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Impossibility and Frustration

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I INTRODUCTION

A doctrine that discharges contractual obligations due to changes in the world that occur after contract formation presents a theoretical puzzle. As a present commitment to do something in the future,[1] a contract necessarily involves the risk that circumstances will change, making performance more difficult or more expensive and the bargain consequently less profitable than anticipated at the time of contract formation. If the contract is discharged because that risk materializes, there is nothing left of contract law as a law of obligation. Consider, however, the following two situations.

1. A agrees to rent a music hall to B. After the agreement, but before the rental is supposed to commence, the music hall burns down. B sues A for breach.[2]

2. A agrees to rent an apartment to B for the day of the King's Coronation procession. The King falls ill and the Coronation procession is postponed. B refuses to pay the rent and A sues B for breach.[3]

It is generally agreed that the defendants are excused from liability in both cases, on the basis of the doctrine known as contractual frustration. But there is deep controversy about the juridical basis of this doctrine. One theory of frustration is rooted in the parties' agreement; it says that the question in cases of frustration is whether the contract extends to the situation in which the parties now find themselves. Another theory of frustration is rooted in a conception of fairness that is external to the parties' agreement; it says that the question in cases of frustration is whether it would be just and reasonable to hold the parties to their obligations in these circumstances.[4]

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[1] Of course, the immediate exchange of material goods is an exception.

[2] *Taylor* v *Caldwell* 122 ER 309.

[3] *Krell* v *Henry* 1 [1903] 2 KB 740.

[4] For this division between agreement theories and fairness theories of impossibility and frustration, see also Smith, *Contract Theory* (OUP, 2004, 2007), 282. There is also an economic theory of impossibility and frustration, which I do not discuss in this chapter because it has not been taken up by English or Canadian courts. See, for example,

In this essay, I set out these two theories of frustration and discuss the inadequacies of each. I then show that we can overcome the inadequacies of each theory if we recognize that although impossibility of performance (situation 1) and frustration of purpose (situation 2) are frequently treated as a single excuse from liability known as "frustration,"[5] they are really two distinct excuses with two distinct normative justifications. The theory of contractual agreement, suitably refined, is appropriate to the doctrine of impossibility, while the theory of contractual fairness, suitably refined, is appropriate to the doctrine of frustration. Moreover, I argue that, when properly understood, both doctrines can be reconciled with the idea that contract law holds individuals responsible for the obligations they have voluntarily assumed.

II THE THEORY OF IMPLIED CONDITIONS

Events that take place after contract formation might make contractual performance impossible. This raises a question about the effect of supervening impossibility on the contractual obligation. The common law's answer to this question is usually described in the following way. In the seventeenth century, the obligation to perform or else face liability for damages was absolute; even impossibility of performance did not discharge the contractual obligation. But in *Taylor* v *Caldwell*, it is often said, the court rejected the rule of absolute liability and set out a doctrine whereby the contractual obligation may be discharged when supervening events make performance impossible.[6] As I will explain below, this story of the common law's development is misleading.

In *Taylor* v *Caldwell*, Caldwell agreed to rent the Surrey Gardens and Music Hall to Taylor for four music concerts. After the agreement was concluded but before the date of the first concert, the hall burned down. Taylor brought an action for breach of contract against Caldwell and Caldwell claimed that the destruction of the music hall brought his obligation to an end. In his judgment, Justice Blackburn (as he then was) was clear that impossibility of performance is not by itself a reason for discharge:

> There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burthensome or even impossible.[7]

Implicit in Justice Blackburn's language is the justification for this position. No one would suggest that the contractual obligation is, in general, merely an obligation to make best efforts to perform the contract. If A promises to deliver to B a brand new Toyota Camry by 9am on Monday, the obligation is not merely to deliver the car if one can be found, or to deliver it by 9am so long as

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Posner and Rosenfield, 'Impossibility and Related Doctrines in Contract Law: An Economic Analysis' (1977) 6 J Leg Stud 83.

[5] This is true in Canada and the United Kingdom, but in the United States, the two doctrines are distinguished from one another. The conflation of impossibility and frustration seems to have first occurred in *Krell* v *Henry* (n 3). See MacMillan, 'English Contract Law and the Great War: The Development of a Doctrine of Frustration' (2014) 2 Comp Legal Hist 278.

[6] See, for example, Williston, *Law of Contracts* (Baker, Voorhis & Co, 1920), s 1931; McNair, 'War-time Impossibility of Performance of Contract' (1919) 35 LQR 84; Fridman, 'The Theory and Practice of Frustration'. (1977) 25 Chitty's LJ 37; Benson, *Justice in Transactions: A Theory of Contract Law* (Harvard U Press, 2019), 144-146. See also *Opera Co of Boston, Inc* v *Wolf Trap Foundation*, 817 F (2d) 1094, 1097-101 (4th Cir 1987).

[7] *Taylor* (n 2), 312.

there isn't an unexpected traffic jam. The contractual obligation is an absolute obligation—not, of course, in the sense that contract law demands the impossible—but in the sense that the risk of non-performance is borne by the one who promised and who was paid to perform. Thus, as Justice Blackburn said, the promisor must perform the contract or face liability in damages for the failure to do so.

Justice Blackburn went on to argue, however, that even at the time of *Paradine* v *Jane*[8], the case that announced the rule of absolute liability in the seventeenth century, there was a recognized exception to the rule where there was a personal service contract and the person who was to perform the service died.[9] Justice Blackburn took this to be, not an *ad hoc* exception, but an instantiation of a general principle:

> [W]here, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.[10]

Justice Blackburn thus articulated a principle of implication: if the fulfillment of the contract depends upon a particular and specified person's or thing's existence, the contractual obligation is implicitly conditional on the specified person or thing continuing to exist. Caldwell was discharged from his obligation to provide the hall because the contract provided for the use of a particular, specified music hall and was thus implicitly conditional on the hall's continued existence.[11]

It is therefore a mistake to say, as is often said, that *Taylor* articulates a doctrine of discharge for impossibility. The opposite is true. *Taylor* makes clear that there is no doctrine of discharge for impossibility. The default presumption is, as Justice Blackburn argued, that the contractual obligation is absolute. A contract, in other words, allocates the risk of non-performance to the one who promised to perform. However, the parties might agree, explicitly or implicitly, that performance is conditional on the thing promised continuing to exist and when they have done so, the agreement will rule.

III THE THEORY OF THE JUST SOLUTION

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[8] Aleyn 27.

[9] *Hyde* v *Dean of Windsor*, Cro Eliz 5.2.

[10] *Taylor* (n 2), 312, 314.

[11] For other illustrations of this approach, see *Appleby* v *Meyers* (1867), LR 2 CP 651 (an agreement to install machinery on the defendant's premises was implicitly conditional on the premises continuing to exist) and *Howell* v *Coupland* (1876), 1 QBD 258 (a contract for 200 tons of potatoes grown on the defendant's land was implicitly conditional on the existence of "potatoes grown on the defendant's land"). The principle of implication articulated in *Taylor* might be criticized. One might think, for example, that when the destruction of the specified thing that is promised is a foreseeable risk—like the destruction of a music hall by fire—the contractual obligation is absolute unless the contract expressly says otherwise. See, for example, Mayers, 'The Need for Law Reform – Foreword' (1918) 38 Can L Times 86. The key point for my purposes is that *Taylor* articulates a doctrine of implied conditions, not a doctrine that says that contractual obligations are discharged when performance becomes impossible.

The difficulty with Justice Blackburn's judgment in *Taylor*, however, is that the references to what "the parties must from the beginning have known" and what "they must have contemplated" suggests an effort to determine what was in the parties' minds. Many criticized this approach, not only because of the impossibility of determining what was in the parties' minds, but also because cases involving unexpected events are cases where the parties did not turn their minds to the issue at all. As Lord Sands put this point: "A tiger has escaped from a travelling menagerie. The milk girl fails to deliver the milk. Possibly the milkman may be exonerated from any breach of contract; but, even so, it would seem hardly reasonable to base that exoneration on the ground that 'tiger days excepted' must be held as if written into the milk contract."[12] The implied terms approach to impossibility was thus regarded as a fictitious exercise that paid lip service to freedom of contract—by suggesting that the courts were simply giving effect to the contract's terms—while concealing the judicial imposition of an external conception of fairness.[13] These criticisms led to the view that judges should abandon the fiction and be open about what they were doing. Cases dealing with supervening events, it was said, are cases where the agreement between the parties has run out, and should be openly settled on the basis of what seems just and reasonable under the circumstances.[14] This was the position taken by Lord Denning. At the Court of Appeal in *British Movietonenews*, he argued that in cases of unexpected events arising after contract formation, "the court really exercises a qualifying power—a power to qualify the absolute, literal or wide terms of the contract in order to do what is just and reasonable in the new situation."[15] And in a decision from 1975, the Ontario Court of Appeal declared that "[t]he theory of the implied term has been replaced by the more realistic view that the court imposes upon the parties the just and reasonable solutions that the new situation demands."[16]

However, the House of Lords in *British Movietonenews* recognized the difficulties with this approach.[17] Lord Denning seemed to suggest that in the absence of express provision for the happening of a certain event, a judge was free to write a contractual term for the parties based on the judge's own sense of what was a fair allocation of risk under the circumstances. Since what was fair was left vague and open-ended, this approach to supervening events was a license for unbounded judicial discretion that threatened the idea of contract law as the law of *voluntary* obligations.

IV THE INTERPRETIVE THEORY OF IMPLIED CONDITIONS

[12] *James Scott & Sons Ltd* v *Del Sel* 1922 SC 592, 597.
[13] See, for example, Trakman, 'Frustrated Contracts and Legal Fictions' (1983) 46 Modern L Rev 39; Page, 'The Development of the Doctrine of Impossibility of Performance' (1920) 18 Michigan L Rev 589, 600; Gow, 'Some Observations on Frustration' (1954) 3 International & Comparative L Quarterly 29.
[14] See, for example, Williston (n 6), s 1937; Waddams, *Sanctity of Contracts in a Secular Age* (Cambridge U Press, 2019), 2, 170 and Waddams, 'Mistake and Unfairness in Contract Law' in Goldberg, Smith, and Turner (eds), *Equity and Law: Fusion and Fission* (Cambridge U Press, 2019) 229; Schlegel, 'Of Nuts and Ships, and Sealing Wax, Suez and Frustrating Things—The Doctrine of Impossibility of Performance' (1969) 23 Rutgers L Rev 419; Farnsworth, 'Disputes Over Omission in Contracts' (1968) 68 Columbia L Rev 860, 879; Grunfeld, 'Traditionalism Ascendant' (1952) 15 Modern L Rev 85.
[15] *British Movietonenews* v *London and District Cinemas Ltd* [1951] 1 KB 190.
[16] *Capital Quality Homes Ltd* v *Colywyn Construction Ltd* (1975) 9 OR (2d) 617, 623.
[17] *British Movietonenews Ltd* v *London and District Cinemas Ltd* [1951] 2 All ER 617, 623. See also Langille and Ripstein, 'Strictly Speaking—It Went Without Saying' (1996) 2 Legal Theory 63, 67-68; McCamus, *The Law of Contracts*, 3rd ed (Irwin Law, 2020) 660.

In recent work, scholars have shown that we can respond to the problem of artificiality in Justice Blackburn's judgment without fundamentally changing the nature of the principle he articulated. Rather than asking what the parties must have had in mind when they entered the contract, we can ask whether a reasonable interpretation of the contract is that the obligation was conditional on the persistence of a particular state of affairs.[18] For example, in *Taylor*, we can ask, not whether the parties *thought* their contract was conditional on the existence of the music hall, but whether a reasonable interpretation of the contract is that it was, from an objective point of view, conditional on the continued existence of the music hall. We can call this the interpretative approach to implied terms—since it asks for an objective interpretation of the agreement—and contrast it with the mental state approach—which asks what the parties had in their minds.

In *Davis Contractors Ltd.* v *Fareham Urban District Council*,[19] the House of Lords switched from speaking about implied terms to speaking about the scope of the contractual obligation and whether the obligation had radically changed as a result of supervening events. In that case, the builders of a large housing development sought a discharge of their obligation when an unanticipated shortage of labour and materials made it impossible for the builders to complete the work on time. Lord Reid argued that "there is no need to consider what the parties thought or how they…would have dealt with the new situation if they had foreseen it. The question is whether the contract…is, on its true construction, wide enough to apply to the new situation: if it is not, then it is at an end."[20] Lord Radcliffe held that the contractual obligation is discharged only when "the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract."[21]

The approach taken by the House of Lords in *Davis Contractors* is usually referred to as "the construction theory," and it is contrasted with the implied terms theory. There is, however, no important difference between construing the scope of the contractual obligation and asking whether the obligation is implicitly conditional from an objective point of view.[22] In *Taylor*, we could ask whether the contract extended to the situation of the music hall burning down or we could ask whether the contract was implicitly conditional on the continued existence of the music hall. In *Davis Contractors*, we could ask whether the contract extended to the situation of a shortage of materials and skilled labour or whether the contract was implicitly conditional on their availability. The importance of *Davis Contractors* is that it rejects the approach that asks what the parties must have had in their minds and makes clear that we are seeking an objective interpretation of the contract and its scope. The doctrine of impossibility is thus, as Justice Blackburn argued in *Taylor*, a question of what the parties agreed to; but what they agreed to emerges from an objective interpretation of their agreement, not from an effort to discover the parties' subconscious thoughts.

This, I think, is a satisfactory theory of supervening impossibility as a doctrine requiring nothing more than an interpretation of the contract. It is rooted in the recognition that a contract places the risk of non-performance on the one who promised and was paid to perform, and that, consequently, impossibility of performance cannot by itself excuse liability. However, the contracting parties may explicitly or implicitly make their obligations conditional on the possibility

[18] Langille and Ripstein (n 18), 79-81; Benson (n 6), 146-148; Bridgeman, 'Reconciling Strict Liability with Corrective Justice in Contract Law' (2007) 75 Fordham L Rev 3013, 3037-3038.
[19] *Davis Contractors Ltd.* v *Fareham Urban DC* [1956] AC 696
[20] Ibid, 721.
[21] Ibid, 160.
[22] McCamus makes this point as well (n 18), 661. For others who regard the implication of terms as an aspect of contractual interpretation, see Kramer, 'Implication in Fact as an Instance of Contractual Interpretation' (2004) 63 Cambridge LJ 384 and Smith (n 4), ch 8.

of performance and whether they have done so depends on an objective interpretation of their agreement. But although others have thought that this agreement-centred analysis can also be applied to the Coronation cases,[23] I will argue that it cannot.

V FRUSTRATION AND IMPLIED CONDITIONS

The Coronation cases arose from the postponement of Edward VII's coronation procession when the King fell ill with appendicitis. Many arrangements had been made in anticipation of the procession. In *Krell* v *Henry*, six days before the coronation was scheduled to take place, Henry agreed to rent from Krell a flat along the procession route for the days of the procession. When the procession was postponed, Henry refused to pay the rent and Krell sued. The Court of Appeal held that the postponement of the procession discharged Henry's obligation to pay.

Taylor and *Krell* are frequently treated as articulating one doctrine, the doctrine that is now referred to as contractual frustration. But while these two cases may seem parallel, they are not.[24] In *Taylor*, the lessee sued the lessor for breach of contract. The lessor sought a discharge of his contractual obligation on the ground that, the promised music hall having burned down, his obligation had become impossible to perform. But in *Krell*, the lessee refused to pay for the room and the lessor sued. The lessee could not seek a discharge of his contractual obligation on the ground that his obligation had become impossible to perform, because his obligation was to pay the rent and that remained perfectly possible. His claim was therefore that the postponement of the procession frustrated his purpose in agreeing to rent the rooms on those particular days. There is a fundamental difference between claims of impossibility and claims of frustration. In the former, the party seeks discharge on the ground that his obligation is impossible to perform. In the latter, the party seeks discharge on the ground that, although performance is possible, his purpose in entering the contract has been frustrated.

However, one might think that *Taylor* and *Krell* are analogous after all, for the following reason. Above I argued that *Taylor* does not articulate a doctrine of impossibility, but rather articulates a doctrine of implied conditions. If this is correct, then there is nothing significant about the fact that performance in *Taylor* became impossible. A contract may be implicitly conditional, not on the possibility of performance, but on the persistence of a certain state of affairs. If that state of affairs does not persist, the contractual obligation does not arise. So, one might think that just as the contract in *Taylor* was implicitly conditional on the continued existence of the music hall, the contract in *Krell* was implicitly conditional on the coronation procession going ahead as planned. Thus, it might be thought that although *Krell* is not a case of impossibility, it can, like *Taylor*, be resolved through an objective interpretation of the parties' agreement.[25] I'll now argue that this is a mistake.

In *Krell*, there was a contract for the rental of a flat but no term that referred to the coronation procession or anything connected to the coronation procession. There is no sensible principle that would allow us to infer from an agreement to rent a flat a condition that a coronation take place as scheduled. Clearly, the condition cannot be inferred from the contract's express terms as it was in *Taylor*. Moreover, a condition that the procession take place as scheduled is not

[23] See, for example, Benson (n 6), 150; Weiskopf, 'Frustration of Contractual Purpose-Doctrine or Myth' (1996) 70 St John's L Rev 239; Langille and Ripstein (n 18), 80.
[24] This has been noticed by others. See, for example, McElroy & Williams, 'The Coronation Cases-I' (1941) Modern L Rev 241, 246; Anderson, "Frustration of Contract—A Rejected Doctrine" (1953) 3 DePaul L Rev 1.
[25] See Benson (n 6), 150-151.

necessary for the contract's business efficacy[26], since an absolute obligation simply allocates the risk of the procession's cancellation to the renter of the flat rather than the owner. And since there is nothing absurd in that risk allocation, the condition cannot be implied on the basis that it is so obvious that it goes without saying.[27] Further, nothing changes if we move from the stringent tests for implying terms to focus on construing the scope of the contractual obligation. If, following *Davis Contractors*, we ask whether the obligation in *Krell* became radically different because there was no procession, the answer is no. Henry's obligation was to pay the rent and that obligation did not change. Of course, one may want to say that the obligation was to pay rent for rooms to view the procession. But this simply puts us back to the problem we have just seen. The contract gives us no basis for inferring this limitation on the scope of the express obligation to pay rent.[28]

In his judgment in *Krell*, Lord Justice Vaughan Williams acknowledged that the contract was silent about the procession. But he took account of the following circumstances that preceded the signing of the contract. Henry saw Krell's advertisement posted in the window, which specifically mentioned that rooms to view the coronation procession were available for rent. He then spoke to Krell's housekeeper, who said that Krell was willing to rent the rooms for the purpose of seeing the procession on the days of June 26 and 27, but not the nights. On the basis of this evidence, Vaughan Williams L.J. concluded that this contract was implicitly conditional on the procession taking place as planned.[29]

We should note that the use of evidence relating to advertising and prior conversations to determine that a contract that is, on its face, unconditional is implicitly conditional is a violation of the parol evidence rule, since it allows evidence of what was said and done before the contract was signed to vary the terms recorded in the written agreement.[30] But we can criticize the reasoning in *Krell* without relying on a doctrine that some will find overly formalistic. Vaughan Williams L.J. argued that the advertisement and conversation show that the contract was implicitly conditional on the occurrence of the procession. But why not think that the final contract's exclusion of any language relating to the procession—despite the advertisement and conversation—shows that although Krell wanted to attract customers who were willing to pay a high price to see the procession, he did not assume the risk of it taking place as planned? Why not think that Krell, by his silence about the procession, transferred to Henry the right to a view of whatever might happen along the Pall Mall on the agreed upon days as well as the risk that the happening might not be the one anticipated?[31] Krell was, after all, in possession of a commodity that was in high demand, and therefore in a position to dictate terms that were favourable to him.[32] I do not suggest that this is the objectively correct interpretation of the agreement. Rather, my

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[26] *The Moorcock* (1889) LR 14 PD 64, 68.

[27] *Shirlaw* v *Southern Foundries (1926) Ltd* [1939] 2 KB 206, 227.

[28] McElroy and Williams (n 25), 248, suggest that the question to be asked in *Krell* is "what did the defendant buy?" and the answer, they say, is "rooms to view the procession." This approach suffers from the same problems. Since the contract says nothing about rooms to view the procession, what reason have we for saying that that is what was bought?

[29] Benson (n 6), 150-151, does the same in his analysis of *Krell*.

[30] Others have made this point as well. See McElroy & Williams (n 25), 248-249; Farnsworth, 'Disputes Over Omission in Contracts' (1968) 68 Columbia L Rev 860, 888.

[31] The judgment in *Krell* was questioned by Lord Finlay LC in *Larrinaga & Co* v *Société Frainco-Americaine des Phosphates* (1923), 39 TLR 316, 318: "It may be that the parties contracted in the expectation that a particular event would happen, each taking his chance, but that the actual happening of the event was not made the basis of the contract."

[32] For this point see Hiller, 'Frustration of Contract: Davis Contractors Ltd v Fareham' (1958) 2 Sydney L Rev 571, 572.

argument is that, even taking into account the background context, the contract's silence about the procession makes it *indeterminate* with respect to the question of who was to bear the burden of its cancellation. In the face of this indeterminacy, the claim that this contract was implicitly conditional on the procession taking place as planned is entirely arbitrary.

Notice, then, that the only way to find an implicit condition in *Krell* is to revert to the rejected mental state understanding of implied conditions, that is, to make an argument based on what the parties must have had in their minds. For example, Eisenberg argues that tacit assumptions "are so deeply embedded in the minds of the parties that it simply doesn't occur to them to make these assumptions explicit."[33] In *Krell*, he goes on, "we can be pretty confident that: (i) actors in the positions of the contracting parties would have shared the tacit assumption that the coronation would take place in six days as scheduled; [and] (ii) the contract was made on the basis of that assumption." [34] All this seems quite plausible,[35] but from contract law's perspective, it is beside the point. The objective theory of contract formation requires us to interpret the contract, not to probe the parties' subconscious thoughts. And in *Krell*, the contract tells us nothing about what was to happen if the procession did not take place.

Of course, not every case will be like *Krell*. A contract might explicitly or implicitly allocate the risk of a purpose's frustration by events that take place after contract formation. For example, in *Holtzapffel* v *Baker*[36], a tenant agreed to a nine year lease of a property with a house. The tenant also agreed to repair the premises and keep them in repair, "damage by fire excepted." The Lord Chancellor interpreted this as a contract that implicitly allocated the risk of fire between the parties. "Damage by fire excepted" meant that, if the house burned down, the landlord would be content to take the land without the house at the end of the lease; it also meant that during the lease, the tenant would have to be content to do the same. If the contract allocates the risk of frustration to one of the parties, then respect for their voluntary agreement means that there is no room for the operation of an independent doctrine of frustration.

However, as I have tried to show, there will be cases, like *Krell*, where the contract does not, either explicitly or implicitly, allocate the risk of frustration. In these cases, a judgment must be made on the basis of a conception of justice that is independent of the parties' agreement. We might say that these are the true cases of frustration, since their resolution requires a theory of the normative significance of frustration and not merely a theory of contractual interpretation. The question now is whether we can articulate a conception of what justice requires under circumstances of frustration that does not threaten the basic idea that contract law does not make agreements for the parties, but rather holds them to the agreements they have voluntarily made. I will argue that we can.

VI FRUSTRATION AND SELF-DETERMINATION

[33] Eisenberg, 'Impossibility, Impracticability, and Frustration' (2009) 1 Journal of Legal Analysis 207, 212.
[34] *Ibid*, 214.
[35] Although Victor Goldberg questions this: "The likelihood that a sixty-year-old, grossly overweight, heavy smoker, who had been the target of at least one assassination attempt might be unavailable was not trivial. Moreover, the procession was to be in a city renowned for its miserable weather. That someone might have thought about a possible postponement or cancellation no longer seems so far-fetched." Goldberg, 'Excuse Doctrine: The Eisenberg Uncertainty Principle' (2010) 2 Journal of Legal Analysis 359, 363.
[36] 18 Ves Jun 115, 22 Eng Rep 261 (Ch 1811).

I have argued that, absent a contract's allocating the risk, a case of frustration must be resolved by inquiring into the normative significance of a party's purpose in contracting having become frustrated by events subsequent to contract formation. Equity, I will now show, has a cluster of doctrines that attend to situations where an agent has acted voluntarily but where her purpose in acting has been thwarted. I thus want to suggest that the true precedent for *Krell* lies in equity, and not in a common law doctrine of implied conditions.

The case most often cited for the traditional common law position on impossibility is *Paradine* v *Jane*.[37] The issue in that case was whether a lessee of land was required to pay rent despite being ousted from possession by an enemy of the King. The court held that being ousted from possession was no excuse for the failure to pay rent, for if the parties had intended eviction by a third party to discharge the duty to pay, they might have provided for that in their contract. Although this case is often cited for the proposition that the early common law failed to recognize a doctrine of impossibility, it does not show that at all.[38] Rather, it shows that the early common law failed to recognize a doctrine of frustration. In *Paradine*, the lessor was suing the lessee for the payment of rent, and it was perfectly possible for the lessee to pay the rent. The gist of the lessee's defense to the suit was that it was unfair to require him to pay rent since he did not have the use of the land.[39] In modern terms, the claim was that the contractual purpose was frustrated, and the court held that this was no reason to deny liability.

We should not be surprised that the common law historically recognized no doctrine of frustration. Such a doctrine would inquire into a contracting party's purpose and into whether that purpose has been thwarted by unexpected events. However, the common law, it has been argued, systematically ignores purposes. It conceives of freedom simply as the freedom to *choose* ends, and it regards private law as a system of norms ordered to respect for freedom understood in this formal way.[40] Its primary doctrines therefore articulate the requirements of respect for free agency and for its external manifestations in property and contract. These doctrines ensure that no free agent is coerced for the sake of another's ends or needs, and they make liability dependent on action that is voluntary, since only voluntary action is an expression of free agency. However, an agent's concrete purposes—which are to be distinguished from her formal capacity for purposive action—are regarded as her subjective preferences, which no free agent may be coerced to serve or accommodate. The common law's doctrines are therefore indifferent to the purpose an action is intended to serve and to whether or not that purpose has been realized, since action that misfires as an expression of the agent's purposes may still have been freely chosen.

For example, at common law, an alienation of property must be voluntary in order to be valid. But the validity of an alienation does not depend on the agent's accomplishing her purpose in alienating. Suppose A deposits $500 in B's bank account in the mistaken belief that she owes

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[37] See, for example, Williston (n 6), s 1930. Pollock described *Paradine* as the "leading case" on impossibility, though he recognized that it was not actually a case of impossibility in *Principles of Contract at Law and in Equity* (Baker, Voorhis, 1906) s 411.

[38] Others have recognized this as well. Pollock (n 38); Aigler, 'Subsequent Impossibility as Affecting Contractual Obligations' (1919) 17 Mich L Rev 689; Wladis, 'Common Law and Uncommon Events: The Development of the Doctrine of Impossibility of Performance in English Contract Law' (1987) 75 Geo L J 1575, 1584; Gordley, 'Impossibility and Changed and Unforeseen Circumstances' (2004) 52 Am J Comp L 513, 522. Kelly and Page trace the tendency to treat *Paradine* as a case of impossibility to the influence of Serjeant Williams' note to *Walton* v *Waterhouse*, 2 Wms Saund 420, 85 Eng Rep 1233 (KB 1684). Kelly, 'Paradine v. Jane: A Doctrine of Absolute Contractual Liability' (2004) 12 Irish Student L Rev 64, 81; Page (n 14), 595.

[39] Aleyn 27.

[40] Brudner, *The Unity of the Common Law* (2nd edn, OUP 2013).

that amount to B. The alienation of $500 is valid as a matter of the common law of property—the money now belongs to B—though it fails to express A's purpose since A did not intend to make a gift to B. Similarly, a valid contract requires voluntary manifestations of assent from both parties. But a contract's validity does not depend on the contract's fulfilling the purpose intended by either party. If A agrees to pay B millions of dollars for a painting in the mistaken belief that it is the work of an old master and it turns out to be a copy, the contract is valid as a matter of the common law of contract although A's purpose has been thwarted by error.[41]

The situation in *Paradine* is parallel. Jane agreed to pay Paradine rent for the lease of the land in the belief that he would have the benefit of the property. When Jane was expelled by the King's enemy, he still held the leasehold estate; the estate simply failed to fulfill its intended purpose. The common law, indifferent to purposes, saw no reason why the rent should not be paid.

It has been argued that equity, in contrast to the common law, conceives of freedom, not merely as free choice, but as self-determination, as action directed to purposes chosen upon reflection and deliberation.[42] Equity is therefore attentive precisely where the common law is indifferent—to cases where action, though voluntary, misfires as an expression of the agent's purposes and where the common law's enforcement therefore requires the agent to serve purposes that are not her own. In cases of mistaken payment, unjust enrichment, which has its roots in equity,[43] recognizes that the alienation of property, though voluntary, fails to reflect the agent's purpose.[44] The validity of the alienation at common law means that the one who parted with her property will be forced to unilaterally serve the beneficiary of her mistake. Unjust enrichment therefore requires restitution of the unintended benefit. In cases of mistaken assumptions in contract, the common law is indifferent to defeated purposes, but equity asks whether the mistake is such that the complaining party would not have entered the contract had she known the truth. If it is, equity sets the contract aside.[45]

There is an exact parallel for frustration.[46] In *Harrison* v *Lord North*, a tenant refused to pay rent when the house he was leasing was converted by Parliament into a hospital for soldiers. The owner sued the tenant in debt at common law and the tenant responded by seeking relief in equity. No final decision was reported, but the case reporter wrote: "The Lord Chancellor took time to advise; but declared if he could he would relieve the Plaintiff." *Harrison* fails to give us the reason behind the Chancellor's view that relief should be granted, but a later case hints at the justification. In *Brown* v *Quilter*, the lessee rented a house that burned down. The lessor collected the insurance money, refused to rebuild the house, and continued to demand the rent. The lessee sought relief in equity and the Lord Chancellor said: "The justice of the case is so clear, that a man should not pay rent for what he cannot enjoy…when an action is brought for rent after the house is burnt down, there is a good ground of Equity for an injunction, till the house is rebuilt."

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[41] *Bell* v *Lever Brothers* [1932] AC 161 (HL).

[42] Brudner (n 41).

[43] *Moses* v *Macferlan* (1760) 2 Burr 1008, 1009.

[44] For a full account of this understanding of unjust enrichment, see Nadler, 'What Right Does Unjust Enrichment Law Protect?' (2008) 28 OJLS 245.

[45] *Solle* v *Butcher* [1950] 1 KB 67 (CA). In *Great Peace Shipping* v *Tsavirilus Salvage*, [2002] EWCA Civ 1407, [2003] QB 679, the English Court of Appeal overruled *Solle*, denying that there is a distinct equitable doctrine of mistake. In Canada, *Solle* remains authoritative: *Miller Paving Ltd* v *B Gottardo Construction Ltd*, 2007 ONCA 422, 86 OR (3d) 161, [26]. For a defense of a separate equitable doctrine of mistaken assumptions see Nadler, 'A Theory of Mistaken Assumptions in Contract Law' (2021) 71 UTLJ 32.

[46] The cases discussed in this paragraph are also noted in Wladis (n 39). Kelly (n 39), 78 also notes that equity recognized the potential injustice of *Paradine*.

Implicit in the statement that a man should not pay rent for what he cannot enjoy is, I believe, the following idea. The lessee's purpose in renting the house was, of course, to use and enjoy the house, and that purpose was frustrated by the house's destruction. An enforcement of the obligation to pay rent thus requires the lessee to unilaterally serve another—to pay although he cannot enjoy—contrary to the equality of self-determining agents. Equity would therefore provide relief in these circumstances, discharging the tenant from the obligation to pay rent until the house was rebuilt.[47] The same reasoning can justify the result in *Krell*. The promisee's purpose in entering the contract was to rent rooms to view the procession. When the procession was postponed, his purpose was defeated, and the court's enforcement of the contract would require the promisee to one-sidedly act for the benefit of the promisor—to pay for what he cannot enjoy. This the court would not do. The precedent for *Krell* thus lies in equity's doctrines showing concern for purposes and their frustration in action, and not in *Taylor*'s doctrine of implied conditions.[48]

It might be objected that the foregoing account of frustration wrongly subordinates the promisor to the private purposes of the disappointed promisee. In the language of the lawyers for Krell, one might object that this theory of frustration makes the promisor the unremunerated insurer of the promisee's hopes and expectations.[49] This is an important objection, and it explains why the frustration of the promisee's purpose by supervening events is not sufficient for a discharge of the contractual obligation. There is a further requirement.

Courts sometimes say that there will be discharge for frustration only if the frustrated purpose is "common" to both parties.[50] It is natural to think that common purpose means "shared purpose," but how is this sharing to be determined? We might try to probe into what each party had in her mind to see if their purposes match, but this is inconsistent with the objective theory of contract formation and, in any case, it is necessarily speculative. We might also try to ascertain the purpose objectively implicit in the contractual agreement. But, as I have argued, in true cases of frustration, the contract is silent as to purpose. In *Krell*, recall, the contract said nothing about the reason for renting the rooms.

"Common," however, may mean "public" or "known" rather than shared. So interpreted, it is a requirement that the purpose in question be known to the promisor at the time of contract formation and be reflected in the contract price. Where this is the case, discharge for frustration does not make the promisor the insurer of all the promisee's hopes and expectations; it merely refuses to force the promisee to confer on the promisor what is, from *both* of their perspectives, a unilateral benefit. This makes the advertisement and the conversation in *Krell* significant after all, though not for the reason suggested by Vaughan Williams L.J. These prior interactions are significant, not because they tell us what was ultimately agreed upon, but because they tell us that Henry's purpose in renting the rooms was both known to Krell and reflected in the price he charged. Thus Krell cannot object to the contract's discharge without implicitly asserting a right to a unilateral benefit, a right inconsistent with the equality of self-determining agents.

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[47] See Wladis (n 39), n 58 for a discussion of possible unreported Chancery cases along similar lines. The equitable roots of the doctrine of frustration were also recognized in *Lloyd* v *Murphy*, *P* (2d) 47 at 50 (Cal Sup Ct 1944).

[48] It might be wondered whether this account of equity as responsive to a form of subordination that the common law does not recognize leads to the conclusion that equity should replace the common law. For an argument for preserving the common law (despite its blind spots) and its equitable supplements, see Nadler, 'What is Distinctive about the Law of Equity?' (2021) 41 OJLS 854.

[49] *Krell* (n 3), 742.

[50] See, for example, *Hirji Mulji* v *Cheong Yue Steamship Co Ltd* [1926] AC 497, 507.

The foregoing theory of frustration is a theory of contractual fairness, of the "just and reasonable solution," in the sense that it is derived, not from the parties' agreement, but from a conception of what interpersonal obligations are consistent with the equality of self-determining agents.[51] But it does not threaten the idea of contract law as the law of voluntary obligations for the following reasons. On this theory, the doctrine of frustration applies only where the contract does not allocate—explicitly or implicitly—the risk of frustration. Where it does, the contract rules. Second, when the doctrine of frustration does apply, it brings to bear an understanding of the specific injustice—unilateral subordination—that arises when contract law gives legal effect to voluntary action that misfires as an expression of the agent's purposes. So, there is no question of the court substituting its own view of a just risk allocation for the one settled upon by the parties themselves, and no question of the court acting upon a vague and intuitive sense of what is fair in the circumstances. There is therefore no threat to contract as a law of *voluntary* obligation. Moreover, since discharge depends on the promisee's purpose being both known to the promisor and reflected in the price, there is no question of discharge for all disappointed hopes or expectations arising from unexpected events or for contracts that simply turn out to be bad deals. There is therefore no threat to contract as a law of voluntary *obligation*.

VII CONCLUSION

Taylor v *Caldwell* and *Krell* v *Henry* have been conflated into a single line of authority that is supposed to elaborate a doctrine referred to as contractual frustration. This has caused much confusion about the theoretical basis of this doctrine, in particular about whether the reason for discharge is grounded in the contract itself or in a conception of justice external to the contract. This confusion can be avoided if we see that *Taylor* and *Krell* address two distinct legal issues, both of which arise due to events that take place after contract formation. *Taylor* deals with the situation in which a party defends against breach by claiming that performance has become impossible. The law's answer is that impossibility of performance does not excuse liability, since the risk of non-performance is borne by the promisor, but that no obligation arises if, from an objective point of view, the agreement was conditional on the possibility of performance. By contrast, *Krell* deals with the situation in which a party defends against breach by claiming that events subsequent to contract formation have turned the contract into one that no longer serves her purposes. The answer here is that, when the purpose is known to both parties and reflected in the contract price, and where the risk of frustration was not allocated by the agreement, a court will not enforce a contract that would require one to unilaterally serve the purposes of the other. In sum, the law's answer to problems of impossibility is nothing more than an exercise in contractual interpretation. However, its answer to problems of frustration must be derived from a conception of justice that is independent of the parties' agreement and rooted in equity's principled concern for self-determination and the ways it can be undermined by a contract law indifferent to purposes.

[51] Dagan and Somech also offer an account of frustration rooted in concern for the parties' self-determination. See 'When Contract's Basic Assumptions Fail' (2021) 34 CJLJ 297.