

# EQUITABLE REMEDIES: PROTECTING “WHAT WE HAVE COMING TO US”

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*This paper develops a new, doctrinally informed, theoretical account of equitable remedies in terms of our interest in “what we have coming to us”—an interest beyond private law’s commitment to protecting what is already ours, viz., our property rights and our rights to another’s performance of a contract. Through distinctive equitable remedies like specific performance, injunctions and the remedial constructive trust, equity intervenes to prevent others from obstructing or diverting what a person has coming to her. The need for equity to recognize and to protect an interest in “what we have coming to us” arises, I argue, out of the limits of private law: private law allows that ordinary people have powers to change their normative situation to bring about a planned-for state-of-affairs and goes so far as to obligate us to exercise those powers where we have agreed to do so. But private law, in leaving it to us actually to exercise those powers, allows for a gap between what we already have and what we have coming to us, a gap private law lacks the resources to close. For example, an agreement to sell land still requires the owner’s exercise of the independent power to convey in order to bring about that planned-for state of affairs in which the purchaser is the new owner of Blackacre. This account offers a unified explanation of equity’s response to this gap in a wide range of legal areas, from contracts (specific performance, the remedial constructive trust), unfair competition (accounting and injunctions), property (injunctive relief in a nuisance action) to court actions (interlocutory injunctions, asset protection).*

## INTRODUCTION

The core claim in this paper is that equitable remedies<sup>1</sup> of specific performance (and relatedly, injunctions and constructive trusts) are best understood as setting out and protecting distinct equitable rights through

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<sup>1</sup> On the significance of the equitable nature of these remedies, I follow Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530 (2016); Samuel L. Bray, *Fiduciary Remedies*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW 449 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2019); Samuel L. Bray, *Remedies*, in THE OXFORD HANDBOOK OF NEW PRIVATE LAW (Andrew Gold, John C.P. Goldberg, Daniel B. Kelly, Emily L. Sherwin & Henry E. Smith eds., 2020).

what we might call “negotiable duties.” I will argue that these equitable remedies cannot be understood in the same way as legal remedies, as reparations for wrongs or continuations in remedial form of a pre-existing legal right. On my account, these equitable remedies enforce a distinct equitable right against the obstruction, diversion, or expropriation of what we have coming to us—as parties to an agreement, as neighbors, as competitors—by anyone with notice of the equitable interest and the power to compromise it.<sup>2</sup> A distinctive feature of this kind of right, I will argue, is that, unlike private law rights, it is protected through negotiable duties—duties that travel from one person to the next, sometimes to third parties who stand in no pre-existing legal relationship to the complainant and who have not themselves committed any private law rights violation.

A specifically performable contract is thus a composite of two distinct rights: the contractual right and an equitable right that extends beyond the contractual right, both in terms of its content and in terms of its enforceability. An equitable right is free of the confines of contractual privity: it is enforceable against third parties to the contract who bear the power to compromise the protected interest, with notice of it. One important implication of this account is that the equitable interests and duties that arise in conjunction with specific performance need not and often do not track what the parties actually agreed. Consider specifically enforceable contracts for the purchase and sale of land, a standard context in which equity intervenes with a decree of specific performance.<sup>3</sup> Where a vendor in an

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2 Cf. SARAH WORTHINGTON, EQUITY 142–43 (2d ed. 2006) (formulating the general function of equity as “proscriptive rules” that “operate” so as “to regulate the exercise of all powers where the claimant’s interests may be compromised by the defendant’s decision” (emphasis omitted)).

3 This idea is, however, not limited to land. See e.g., *Oughtred v. Inland Revenue Comm’rs* [1959] UKHL 3, [1960] AC 206 (appeal taken from Eng.). In this case, the House of Lords found that a contract to transfer the beneficial reversionary interest in shares that otherwise belonged wholly to the transferee would be specifically performable. *Id.* at 2, 5. Lord Jenkins (dissenting in the result but not on this point) wrote: “The constructive trust in favour of a purchaser which arises on the conclusion of a contract for sale is founded [on] the purchaser’s right to enforce the contract in proceedings for specific performance.” *Id.* at 10 (Jenkins, L., dissenting). Specific performance unpacked is an equitable right against obstruction or diversion of the flow of what a person has coming to her, the conceptual and normative basis of which is found in equity, not contract. As an equitable remedy, specific performance is inherently a matter of judicial discretion, a feature of the remedy at risk of being overlooked in contexts where courts consistently favor awarding specific performance, such as agreements for the purchase and sale of land. On the inherently discretionary nature of the remedy even so, see, for example, *Maryland Clay Co. v. Simpser*, 53 A. 424, 425–26 (Md. 1902), where the court wrote that “it is as much a matter of course for a court of equity to decree specific performance of it as it is for a court of law to give damages for a breach of it,” all while maintaining that “specific execution is a matter not of absolute right in the party, but of sound discretion in the court.” *Id.* at 425 (quoting *Popplein v. Foley*, 61 Md. 381, 385 (1884)). Even where courts have suggested that specific performance “should generally be granted as a matter of course or right regarding a contract for the sale of real estate,” they have insisted that specific performance may yet be refused, such as “when specific performance

agreement for purchase and sale transfers land before the purchase price is paid, what she has coming to her is the purchase price. Now she has an enforceable contractual right to be paid. But equity gives her something more: a secured debt. She has the right to resort to the land itself to realize the purchase price owing. The vendor's equitable lien is not something she bargained for: she bargained for an *in personam* duty to perform the contract by paying an agreed-upon sum, not a lien attached to the land itself. This equitable right in the form of a lien also gives the vendor priority in a bankruptcy, which no contract can pull off. What the vendor has coming to her—the purchase price—is now protected against obstruction in the form of breach or diversion to other creditors in a bankruptcy through the vendor's lien recognized and enforced in a decree of specific performance. The same two features of this kind of equitable right are evident on the buyer's side, too, in a specifically enforceable agreement for purchase and sale. In a decree of specific performance, equity intervenes to recognize and enforce the buyer's equitable interest in the land itself—again an interest that is binding on anyone who acquires the power to compromise that interest with notice of it.<sup>4</sup> The agreement itself figures in equity's reasoning about what we have coming to us: it is because there was an agreement to buy and sell that equity takes the view it does of what the vendor/purchaser had coming to them.

This account runs against conventional ways of thinking about specific performance in private law theory as either a reparative remedy like damages, representing the next best thing when the first best is unavailable,<sup>5</sup> or the direct enforcement of the primary duty to perform a contract—both

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would be inequitable or unjust due to hardship on the one from whom performance is sought," preserving the discretionary nature of the remedy. *Mohrlang v. Draper*, 365 N.W.2d 443, 446–47 (Neb. 1985); see also John C.P. Goldberg & Benjamin C. Zipursky, *From Riggs v. Palmer to Shelley v. Kraemer: Judicial Power and the Law-Equity Distinction*, in *PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY* 291, 303 (Dennis Klimchuk, Irit Samet & Henry E. Smith eds., 2020) (observing that, although courts often award specific performance for certain classes of contracts, specific performance remains an equitable remedy that is given as of discretion and not as of right).

4 This equitable interest is sometimes treated as a kind of constructive trust. See, e.g., *Payne v. Clark*, 187 A.2d 769, 770 (Pa. 1963) (“[T]he vendor is considered as a trustee of the real estate for the purchaser and the latter becomes a trustee of the balance of the purchase money for the seller.”). This too does not gainsay the bedrock principle that specific performance is a discretionary remedy. The court in *Payne v. Clark* added that “[w]hile the courts of equity have the power to grant specific performance, the exercise of the power is discretionary. In other words, such a decree is of grace and not of right.” *Id.* at 771. As this paper reveals, I think the idea of a constructive trust is in most of the contexts in which it is deployed just a way of describing an equitable interest in *what a person has coming to her*, the flow of which equity protects, against obstruction, diversion, etc. by another.

5 JOHN GARDNER, *FROM PERSONAL LIFE TO PRIVATE LAW* 100–02 (2018). John Gardner points out that specific performance has the same qualities of a “next best” response that characterizes damages and other private law remedies. *Id.* at 100. There is nothing special about it—a “reparative” logic underlies both specific performance and damages. *Id.* at 101.

tracking the logic of an underlying contractual relationship.<sup>6</sup> I will argue, by contrast, that specific performance involves a form of right, different from secondary remedial rights to compensation for breach, that requires its own normative and conceptual footing.<sup>7</sup> This, on my account, is the equitable right to what we have coming to us.

In this paper, I will unpack the distinctive nature and structure of an equitable interest in what we have coming to us and the negotiable duty that protects it. I will discuss this theory of equitable remedies with respect to contracts (specific performance, the remedial constructive trust), unfair competition (accounting and injunctions), property (injunctive relief in a nuisance action), and court actions (interlocutory injunctions, asset protection). In all of these instances, equity enters the scene to protect a party's interests in the realization of a legal state of affairs, a state of affairs that is contingent on factors beyond the scope of the legal interests at play. In each instance, equity intervenes to ensure that others do not obstruct or

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6 See especially STEPHEN A. SMITH, *RIGHTS, WRONGS, AND INJUSTICES: THE STRUCTURE OF REMEDIAL LAW* 146–71 (2019), but compare with Mindy Chen-Wishart, *Specific Performance and Change of Mind*, in *COMMERCIAL REMEDIES* 98, 98 (Graham Virgo & Sarah Worthington eds., 2017), highlighting that while specific performance can aim at enforcing a contractual duty, it does so only as a result of a court having weighed all factors relevant to assessing the appropriate remedy, including respect for the promisor's autonomy to change her mind and to not perform. The extent to which specific performance is viewed as flowing directly from the parties' contractual duties is intimately connected to what one considers to be the justification for the binding nature of contracts. See E. Allan Farnsworth, *Damages and Specific Relief*, 27 *AM. J. COMPAR. L.* 247, 247 (1979) ("No aspect of a system of contract law is more revealing of its underlying assumptions than is the law that prescribes the relief available for breach."); see also STEPHEN WADDAMS, *PRINCIPLE AND POLICY IN CONTRACT LAW* 175 (2011) (observing the connection between specific performance and the notion of "principle": "Everything depends on what is taken by a writer to be 'the principle,' or the conceptual starting point."). For example, Jonathan Morgan suggests that, were the promissory stance on the explanation of the binding nature of contracts adopted, specific performance would lose its exceptional status in favor of (more) general applicability. Jonathan Morgan, *On the Nature and Function of Remedies for Breach of Contract*, in *COMMERCIAL REMEDIES*, *supra*, at 23, 35. Randy Barnett puts forward a presumption in favor of specific performance based on a "consent theory of contract." Randy E. Barnett, *Contract Remedies and Inalienable Rights*, 4 *SOC. PHIL. & POL'Y* 179, 179–80 (1986). Barbara Fried highlights that at least for a liberal contract theorist, it would be difficult to argue for prevailing of the promisee by granting specific performance when what the promisee agreed to was "to give the promisor a free option to walk away from the contemplated exchange." Barbara H. Fried, *The Holmesian Bad Man Flubs His Entrance*, 45 *SUFFOLK U. L. REV.* 627, 634 (2012). But see Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 *MICH. L. REV.* 489, 489–90 (1989) (arguing against theories about promising as capable of explaining choices of contractual remedies).

7 See Lionel Smith, *Understanding Specific Performance*, in *COMPARATIVE REMEDIES FOR BREACH OF CONTRACT* 221 (Nili Cohen & Ewan McKendrick eds., 2005). Smith argues that the right to performance is in itself a kind of patrimonial entitlement, a property-like right, which is protected against expropriation by the defendant. *Id.* at 226. For a survey of the interlinked nature of right and remedy, see WADDAMS, *supra* note 6, at 177–79. I take my own argument to be in a similar vein as Smith's although I develop here a very different conceptual and normative footing for that distinctive form of right.

divert what another has coming to her. It does so in respects that are not necessitated by the relationships at the outset (e.g., at the time a contract was entered into) or even at the conclusion (e.g., at the time a contract is performed).<sup>8</sup> In this sense, the equitable rights protected by these remedies are rights to a “flow” of value—inhering in a thing or otherwise—free of interruptions, blockages, or diversions. In the background of this account of equitable remedies is a view of equity as responding to our vulnerability to others’ derailing our plans—legitimately hatched through the only legal mechanisms available to us, i.e. the exercise of our powers to contract, the exercise of ownership authority to set agendas for things, the exercise of our liberty to compete, etc.

## I. WHAT WE HAVE COMING TO US

Equitable remedies like specific performance, injunctions, and constructive trusts go beyond the enforcement of legal rights (our property rights, which relate only to what we already have) and contractual rights (which relate only to another’s duty to perform as agreed).<sup>9</sup> These equitable

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<sup>8</sup> Even if the contract is fully performed or its breach fully compensated, the party may not have received what she had coming to her. That is because equity takes a broader perspective than contract law on what a party had coming to her: the seller of land bought for condo development may have fully discharged her contractual obligations by transferring the land. If the seller transfers without an easement allowing cranes to turn around overhead, she has effectively compromised the interest in what the buyer had coming to her: the acquisition of land for the purposes of development. The equitable standpoint on what a person has coming to her brings the good of the contract into view, when that was the good the parties together had aimed at. Here the seller knew the future state of affairs meant to be realized by means of that contract but retained the power to compromise the buyer’s interest in what she had coming to her. Equity on my account does well to intervene in this kind of case to prevent the seller from exercising her power to compromise that interest so long as she has notice of it. Again, as we will see, equitable principles are generally informed by common sense and community standards: not any expectation to profit from a contract is going to translate into the kind of interest in what you had coming to you that equity will protect. But those *reasonable* expectations do—informed by common sense, industry practice, and particular course of dealings.

<sup>9</sup> Hanoch Dagan and Michael Heller have argued that the “traditional view” in the United States is “a more-or-less bright line rule in which specific performance is granted as a matter of course to the injured party in *all* agreements for the sale of land.” Hanoch Dagan & Michael Heller, *Specific Performance* 37 (Sept. 2, 2020) (unpublished) (available at <http://ssrn.com/abstract=3647336>) (first quoting RESTATEMENT (SECOND) OF CONTRACTS § 360 cmt.e (AM. LAW INST. 1981)). In making this claim, Dagan and Heller imply that the traditional US view eschews any discretion for courts and that specific performance follows automatically, as a matter of right. *See id.* at 37–38. They point to the fact that courts have held damages to be inadequate for land contracts *as a matter of law*, such that no specific proof that the particular parcel of land in question is unique is required. *See, id.* at 37 & nn.88–89, 38 n.90 (citing *SMS Fin., L.L.C. v. CBC Fin. Corp.*, 417 P.3d 70, 75 (Utah 2017); *Keystone Sheep Co. v. Grear*, 263 P.2d 138, 142 (Wyo. 1953); *Kann v. Wausau Abrasives Co.*, 129 A. 374, 378 (N.H. 1925)). However, Dagan and Heller conflate the question of whether damages are invariably inadequate in the case of land contracts with the question of whether specific performance is a discretionary remedy. Though a number of US courts have

remedies stand as the recognition and protection of a distinct equitable right to the free, unobstructed flow of what a person has coming to her, as a party to a contract, as a competitor in a free market, as a neighbor, as a party to a lawsuit, and more.<sup>10</sup>

The *content* of this equitable right—what exactly a person has coming to her from equity’s standpoint—varies across a range of human interactions. Equity looks to a person’s legal relationships in contract or property law—the background rules of fair competition—to construct an (equitable) account of what a person has coming to her as a participant in the private law order.<sup>11</sup> Consider what a person has coming to her as a party to a contract for the purchase and sale of Blackacre or as owner of a holiday property (designed to provide *calme absolu*),<sup>12</sup> or the holder of a contractual right to remain the beneficiary on another’s life insurance policy. In the first case, the buyer does not already have Blackacre (but a contractual right to acquire it), in the second, the owner does not have *calme absolu*, but the power to set an agenda that might lead to it, and, in the last case, she does not already have the proceeds from the policy, but the contractual right to be maintained

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answered the former question in the affirmative, they have not thereby denied that specific performance is a discretionary remedy rather than a remedy as of right. For example, the court in *Kann v. Wausau Abrasives Co.* held that land contracts are irreparable by damages as a matter of law but insisted that “the precise remedy eventually awarded, whether specific performance or an injunction against a breach of the defendant’s negative promise, must of necessity depend upon an equitable consideration of all the evidentiary facts and circumstances.” 129 A. at 379. As this quotation reveals, there is no inconsistency in holding that damages are invariably inadequate as a matter of law and yet that specific performance is a discretionary remedy. Discretionary, contextual considerations may militate against, and ultimately foreclose, an award of specific performance. The Supreme Court of Canada has taken a different view from U.S. courts, requiring evidence that the land in question is unique. *See Semelhago v. Paramadevan* [1996] 2 S.C.R. 415, 429 (Can.). The difference between U.S. and Canadian law on this point is not that specific performance is not a discretionary remedy in the United States, *contra* Dagan & Heller, *supra*, at 39–40, but rather that in Canadian law, plaintiffs have the additional burden of proving that the land in question is unique. U.S. courts will presume as much and move directly to whether any other equitable considerations militate against the award of specific performance. *See also supra* note 3 (discussing the inherently discretionary nature of equitable remedies).

10 Competitors can have an equitable interest in what they have coming to them, where the content of that interest does not reflect the contractual arrangements between the parties but the practice of fair competition. I will explain equity’s willingness to award an injunction in cases like *Int’l News Serv. v. Associated Press*, 248 U.S. 215 (1918), as equity’s recognition of a right to what you have coming to you, translating into a duty not to exercise certain forms of power to divert value or obstruct the channels through which it flows.

11 WADDAMS, *supra* note 6, at 204.

12 Recently in the South of France, I was struck by how many sellers of holiday homes routinely listed *calme absolu* alongside pool, terrace, etc., as an attribute of the property (North Americans emphasize the views), notwithstanding that this is at best a valuable benefit that a person has coming to her so long as the neighbors don’t exercise their powers to compromise it. See discussion below of nuisance and the role of injunctions in protecting *what we have coming to us* (versus repairing damage to *what we already have*). *See infra* notes 61–62 and accompanying text.

as the beneficiary of the policy. Something more has to happen in each case for that person as the holder of the relevant contractual right or the property right finally to emerge as the owner of Blackacre, the enjoyer of *calme absolu*, the recipient of the insurance proceeds: the seller has to exercise her power to grant Blackacre; neighbors must also deal with their land in a manner that is consistent with realization of peace and tranquility in the countryside in July; the holder of the insurance policy has to die with the policy paid up and without having changed the named beneficiary. The underlying right in contract or property points to what one has coming to her (Blackacre, *calme absolu*, insurance proceeds)—but it does not guarantee its flow.

It falls to equity to prevent others from compromising an interest in what one has coming to her. When equity does so, the mechanism it uses is a negotiable duty that constrains whomever now has the power to compromise that interest by obstructing or diverting its flow. This negotiable duty travels to whomever bears the power to compromise the equitable interest. A negotiable duty functions like a negotiable right. Rather than “pay to the person whose name appears here \_\_\_\_ or to the bearer of the note . . .”, we say “demand from the person whose name appears here \_\_\_\_ or the holder of this position . . .”

Now the person in the position to compromise another’s interest in what she has coming to her is usually the person on the other end of the contract, but not always. Third parties may be in a position to interfere with or to obstruct that equitable interest. The equitable duty can travel from the original party to the contract to a third party who has assumed the levers of power to interfere with the interests of the right-holder, by, for instance, acquiring ownership of land on which the fulfilment of the contract depends (something that explains restrictive covenants as I will explain shortly).

The need for equity to recognize and to protect our interest in “what we have coming to us” is at the same time a recognition of a gap between what contracts (or property, legal orders, etc.) aim for—to bring about a planned-for state of affairs—and what these legal rights actually do, which is to obligate ordinary people to exercise other independent powers they have to bring about that state of affairs.<sup>13</sup> This point is perhaps most readily grasped in relation to contracts, although I will argue it obtains in other contexts, too. Contracts always have in view something that is beyond what contracts as such are able to deliver because an agreement to do something is not in itself the doing of it. A contract undeniably obligates a person to do something. But when she simply does not do it, contract law recognizes that she did not do it: contract law, in other words, allows for the possibility of breach, and

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13 Legislation has made it so that some contracts, bills of lading, and sales of goods are instantly executed and require nothing further. See, for example, real estate lease contracts according to Residential Tenancies Act, S.O. 2006, c 17 § 13(1) (Can.) (“The term or period of a tenancy begins on the day the tenant is entitled to occupy the rental unit under the tenancy agreement.”).

remedies for breach are aimed at repairing the losses that result. Put another way, a contract for the sale of property does not and cannot in itself convey the property in the subject matter of the contract.<sup>14</sup> This is bedrock in the structure of private law, explaining why it is just from a legal standpoint to refuse a person priority in a bankruptcy proceeding with respect to property she had agreed to buy from the bankrupt, and indeed already paid for, but had not yet had delivered to her. I have in mind cases like *Re London Wines*.<sup>15</sup> In *London Wines*, the plaintiffs had arranged to purchase bottles of wine from the bankrupt defendant and had paid for them but had not taken possession of them when the defendant was pressed into bankruptcy and insolvency proceedings. Instead, the plaintiffs had been issued scrips entitling them to delivery of the number of bottles they had paid for, the bottles themselves remaining in the warehouse unallocated to any particular buyer. The court denied the buyers any property interest in any of the bottles because property rights attach only to particular things you already have, not what you have coming to you.<sup>16</sup> From a legal standpoint, the buyers, not yet having acquired property rights in any particular bottles of wine, suffered no injustice in being treated as mere unsecured creditors, in line with others. Mere contractual rights do not in themselves generate rights to what you have coming to you through the contract.

Here then lies the potential for injustice: law cannot do any better than to empower us to commit to bringing about a state of affairs and then to hold us accountable for letting others down, by paying for the loss, if we fail to follow through. The possibility of breach is entirely consistent with the logic of private law:<sup>17</sup> people make agreements and they break them, which is precisely why the starting point for contractual remedies is that one person has defected and so the focus is on working out how much of the resulting loss falls to the defecting party.

But from equity's standpoint, the breach of a contractual duty does not exhaust the ways that one person might compromise another's interest in what she has coming to her (fulfill what law demands of her but still leave the other disappointed).<sup>18</sup> Nor does a remedy for breach wholly protect that

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14 Peter Benson wants us to see a contractual right to something as a form of property in it. See Peter Benson, *Contract as a Transfer of Ownership*, 48 WM. & MARY L. REV. 1673, 1693–94 (2007); PETER BENSON, *JUSTICE IN TRANSACTIONS: A THEORY OF CONTRACT LAW* 25 (2019). That is perhaps where we end up through equity's intervention, but I do not think that we can construe contract and contract doctrine on its own as producing that result.

15 *Re London Wine Co (Shippers) Ltd.*, [1986] P.C.C. 121 (Eng.); see also *Re Goldcorp Exchange Ltd.* [1994] UKPC 3 (appeal taken from N.Z.).

16 *Re London Wine Co (Shippers) Ltd.*, [1986] P.C.C. 121.

17 For a discussion of the normative foundations, see Chen-Wishart *supra* note 6, at 98.

18 Take, for example, cases where a seller agrees to sell land knowing that the buyer wants to build a condo tower. Seller fulfills the contract, transferring the parcel of land but without an easement to allow buyers' cranes to pass through airspace during construction. Equitable intervention here is called for to protect what the buyer had coming to him (refusing the seller a remedy continuing trespass for instance, etc.). See also *supra* note 8.

interest: remedies for breach of contract—damages—protect the narrower contractual right that correlates to the contractual obligation to perform as agreed. Private law remedies are not meant to protect against the diversion, “expropriation,” or yet other means of interfering with what we had coming to us that do not involve a breach by the party diverting the gain to himself.<sup>19</sup> Any further protection of our interest in what we have coming to us, ought to be and is found in equity, through the imposition of a duty constraining the power to compromise that equitable interest.<sup>20</sup>

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19 See WADDAMS, *supra* note 6, at 97 (discussing *Lumley v. Wagner*, [1852] EWHC (Ch) J96, 42 Eng. Rep. 687).

20 The well-known but controversial case of *Hunter v. Moss* [1993] EWCA (Civ) 11, 1 WLR 452 (Eng.), is an illustration of how equity intervenes to protect what a person had coming to her by constraining another’s power to divert or to obstruct its flow. In *Hunter v. Moss*, an employer let an employee know that he intended to transfer 50 out of 1000 shares to him and some months later, in a conversation with that employee, made an oral declaration of trust. *Id.* The background circumstances made clear that this was not just a gift but part of a set of arrangements designed to satisfy a prior understanding between the employer and employee about his position relative to another employee who had earlier received a similar transfer. The employer later sold all 1000 shares and kept the proceeds. In resisting the employee’s claim for five percent of the proceeds of the sale, the employer argued that the trust had never come into existence. *Id.* Express trusts, like outright transfers of property right in law, must satisfy certainty of subject-matter requirements and this the trust clearly failed to do because the employer had not set aside or otherwise specified which 50 out of the 1000 shares were subject to the trust. The court found in favor of the employee, *id.*, but its reasoning has always been controversial. The disagreement for the most part has turned on whether the court loosened certainty of subject-matter requirements for fungible things, like shares—we don’t need to know which 50 of the 1000 were trust assets but only that five percent of the 1000 are—or whether the problem of certainty of subject-matter was avoided by finding sufficient certainty of intention to hold the whole 1000 shares on trust for the employer and employee in the agreed-upon proportions 50:950). There would have been no certainty of subject matter on that theory of the case because there would have been no need to separate out trust from non-trust assets: all the shares would have been trust assets. The beneficiaries would have been equitable tenants in common of the whole. A wholly different, and I want to argue better, way of looking at the case is as an equitable intervention to protect the employee’s equitable interest in what he had coming to him (five percent of the shares and their proceeds), by means of a constructive trust. That equitable interest did not arise out of a specifically enforceable contract for the creation of a trust (the court found none on the facts) but on a specifically enforceable promise made in the context of a special relationship between employer and employee, in which presumably employers are in a position to extract over time greater concessions and more value from employees through the making of these promises. Specifically enforceable promises are those promises that from an equitable standpoint generate the kind of interest in what a person has coming to her that warrants protection. This is the kind of interest that from an equitable standpoint is sufficient to justify constraints on another’s power to compromise that interest.

If we treat *Hunter v. Moss* as a case of constructive trust, protecting the employee’s interest in what he had coming to him from diversion or obstruction by the employer (who as owner of the shares retained the power to compromise his interest), the decision rests on a different and more stable footing. The content of that equitable interest is shaped by the content of the employer’s non-contractually binding promise to hold five percent of the shares on trust. What that equitable right requires of the employer is not the performance of his promise to constitute the trust of the shares: that is no longer possible because the shares have

The separate but related spheres of private law and equity come into focus by recognizing the very different function and operation of this kind of equitable interest and the duties that protect them. Whereas private law operates by setting out the framework within which private actors interact as of right, equity operates much more directly on people, through its coercive mechanisms. Thus, private law may obligate people to exercise personal powers in a certain way (to transfer land by grant to another, to name them beneficiary, etc.), but leaves it to the obligor to follow through by actually exercising those powers. Equity by contrast is the most directly coercive branch of law, commanding personal obedience to bring about the very outcomes that the integrity of the legal system as a whole requires from an equitable standpoint.<sup>21</sup> Equity thus conscripts citizens to complete what private law anticipates but does not in itself achieve through the enforcement of contract and protection of property.

I have been talking a lot about this kind of equitable interest in connection to contract. But it will become clear that the equitable interest in what we have coming to us should not be seen just as an appendage to contract. A court order requiring the transfer of property, for instance, generates the same form of equitable interest as the specifically performable contract. In *Mountney v. Treharne*,<sup>22</sup> which has since been endorsed by the Ontario Court of Appeal,<sup>23</sup> a husband was ordered in divorce proceedings to transfer to his wife certain property that his wife and their children occupied.<sup>24</sup> Before making the transfer, the husband became bankrupt.<sup>25</sup> The English Court of Appeal held that the court order was effective to create

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since been sold. Rather what it requires is that the employer not obstruct the employee's receipt of what he had coming to him by diverting the proceeds of the sale of the shares to himself. The constructive trust in *Hunter v. Moss* protects the kind of equitable interest in what a person has coming to him also found in the context of a specifically enforceable contract or a legal order.

21 Nowhere is equity's coercive standpoint clearer than in the context of its characteristic procedure, the writ of subpoena, that did not name the plaintiff at all, but, resting on the authority of the state, commanded appearance on pain of arrest and imprisonment. If ignored, the chancellor would issue a commission of rebellion, authorizing certain others to hunt down and arrest the defendant. See W. M. Ormrod, *The Origins of the Sub Pena Writ*, 61 HIST. RSCH. 11, 11 (1988). Oliver Wendell Holmes recognized the special force of equitable decrees and the personal obedience they demand. See OLIVER WENDELL HOLMES, *Early English Equity*, in COLLECTED LEGAL PAPERS 1 (1921) (citing *Audeley v. Audeley*, 40 Edw. III) ("[Equity] had a form of decree requiring personal obedience."). Holmes goes further in *The Path of the Law*, in COLLECTED LEGAL PAPERS, [supra](#), at 167, 175–76 (describing this personal command of obedience as the only real duty, other private law duties being just a set of options, with prices attached). Holmes' mistake is to see duty as just the product of coercion. His point about equity as a coercive mechanism is well-taken, however.

22 *Mountney v. Treharne*, [2002] EWCA (Civ) 1174, 3 WLR 1760 (Eng.).

23 *Thibodeau v. Thibodeau*, 2011 ONCA 110, (2011) 104 O.R. 3d 161, para. 26 (Can. Ont. C.A.).

24 *Mountney v. Treharne*, [2002] EWCA (Civ) 1174, para. 2.

25 *Id.*

an equitable interest in the property that bound the trustee in bankruptcy.<sup>26</sup> I will turn later to contexts where equity recognizes and protects an interest in what we have coming to us independently of contract, where the essence of the equitable right is constant even as the nature of the legal rights and privileges that accompany it vary.

## II. MULTI-PARTY UNJUST ENRICHMENT

The account I develop of an equitable right against obstruction or diversion of what we have coming to us makes sense of an otherwise bizarre form of unjust enrichment outlined in a recent Supreme Court of Canada (SCC) decision, *Moore v. Sweet*<sup>27</sup>. This form of unjust enrichment is difficult to reconcile with conventional thinking about what makes an enrichment just or unjust. On the conventional view, a person is justly enriched where there is a juridical basis for the enrichment in contract, gift, debt, trust, statute, etc., that accounts for the transfer of value from one person to another. A person is unjustly enriched where she has received value from another, and there is no juridical reason for that enrichment. Let's call this the typical case of unjust enrichment, involving a direct, bilateral relationship between the recipient of value and the person at whose expense it is received. To be enriched at another's expense in this sense involves receiving value that the other person originally had. If they did not have that value in the first place (in the form of a property right or a right to their person), they had nothing that they could be said to have been deprived of, on the occasion of another's enrichment.

In *Moore v. Sweet*, the SCC pointed to another form of unjust enrichment that muddies the clear distinction between just and unjust enrichments: a form of unjust enrichment in which a person may have a juridical basis for the enrichment (in gift, debt, etc.) but still can be said to have been unjustly enriched at another's expense.<sup>28</sup> This form of unjust enrichment involves a transfer from *A* to *B* at the expense of *C*, where *A* (not *C*) is the originator of the value and *B* can point to gift, debt, or some other juridical basis vis-à-vis *A* for *A*'s transfer to her.<sup>29</sup>

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<sup>26</sup> *Id.* at para. 76.

<sup>27</sup> *Moore v. Sweet*, 2018 SCC 52, [2018] 3 S.C.R. 303 (Can.).

<sup>28</sup> *Id.* at para. 69.

<sup>29</sup> I do not develop the idea here but *Moore v. Sweet* also suggests why we should think of the improvements in a person's position as *just* enrichments where there is a decision to be made to award either specific performance or damages: what you get through specific performance is the enforcement of the equitable right, shaped by an equitable construction of what you had coming to you. This is informed by the contractual relationship between the parties but is not the exact equivalent of the right to performance agreed to. (The parallel is the remedy of account, where what the beneficiary is in the end entitled to is the result of an equitable reconstruction of the books as they ought to be, rather than as they are. When equity surcharges the account to reflect what ought to have been received but wasn't, the beneficiary is not unjustly enriched by the trustee's payment to the beneficiary out of pocket in the amount of the surcharge.)

In *Moore v. Sweet*, the petitioner (*C*) and the deceased (*A*) were married with three children.<sup>30</sup> During their marriage, *A* bought a term life insurance policy, naming *C* the revocable beneficiary.<sup>31</sup> *A* was improvident and insolvent.<sup>32</sup> This policy was meant to enable *C* to provide for the children when *A* died, the only contribution to their care that *A* was then in a position to make.<sup>33</sup> After the marriage broke down, *A* and *C* orally agreed that she would remain the beneficiary if she paid the premiums.<sup>34</sup> She paid.<sup>35</sup> He then turned around and designated his new wife *B* the irrevocable beneficiary pursuant to a provision in the Insurance Act.<sup>36</sup> *B* cared for the deceased, who was disabled, for 13 years.<sup>37</sup> *B* had notice of the arrangement between *A* and *C*.<sup>38</sup> At the same time, *B*'s sacrifices and contributions, as a caregiver with health issues of her own and very limited economic means, lead the court to look upon her as a good faith recipient of the insurance proceeds.<sup>39</sup> After *A*'s death, *C* sought a constructive trust over the insurance monies paid out to *B*.<sup>40</sup>

The court of appeal and the dissent at the SCC insisted that all *C* could possibly have in a case like this was a claim for breach of contract against an insolvent estate.<sup>41</sup> On their view, *C*'s contractual right to be maintained the beneficiary is self-evidently not an in rem right in the subject matter of the contract, enforceable against a third party.

The majority at the SCC, however, took a different view and awarded a constructive trust over the insurance monies, imposing a duty on *B*, the second wife, to account to *C* for the proceeds of the insurance policy.<sup>42</sup> Had the court shrouded their decision to award a constructive trust in a general moral principle of "unconscionability," the decision would have been much easier to understand even if, in the end, it remained unsatisfactory.<sup>43</sup> There

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30 *Moore v. Sweet*, 2018 SCC 52, para. 4.

31 *Id.*

32 *Id.* at para. 11.

33 *See id.*

34 *Id.* at para. 5.

35 *Id.* at para. 10.

36 *Id.* at para. 7; Insurance Act, R.S.O. 1990, c I.8, §§ 190, 191 (Can.).

37 *Moore v. Sweet*, 2018 SCC 52, para. 6.

38 *See id.* at para. 7.

39 *Id.* at para. 39.

40 *Id.* at para. 31.

41 *Moore v. Sweet*, 2018 SCC at paras. 51, 102.

42 *Id.* at para. 96.

43 It remains unclear whether a pure "good conscience" constructive trust, unattached to any pre-existing equitable foundation, is available in Canada. These are constructive trusts "to be applied in cases where the defendant cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or a share in it." *Hussey v. Palmer*, [1972] EWCA (Civ) 1, [1972] WLR 1286. *See also* *Moore v. Sweet*, 2017 ONCA 182, para. 147 (Can. Ont. C.A.) (Lauwers, J.A., dissenting) (citing *Hussey*, [1972] EWCA (Civ.) 1); *BNSF Ry. Co. v. Teck Metals*, 2016 BCCA 350, paras. 45–46 (Can. B.C. C.A.) (same).

was unconscionability in the air in this case: *A* had a (judicially recognized<sup>44</sup>) moral obligation to provide for his children that lent further moral force to his contractual obligation to maintain *C* as his beneficiary. It was unconscionable of him to take the benefits of their arrangement (her paying his premiums) stripped of the burdens (forbearing from exercising his statutory power to designate his new wife). Less obvious is how the unconscionability of *A*'s conduct crystallizes into a constructive trust binding innocent *B* who herself had good moral reason to claim support from *A* or his estate, being disabled herself and having sacrificed the last 13 years in the support of *A*. One can imagine some sort of balancing of moral reasons for funneling the money to *C* versus *B*, had the decision rested on the demands of good conscience. In the end, the court insisted that this was a remedial constructive trust requiring an independent equitable foundation.<sup>45</sup> The court took the view that unjust enrichment was the independent equitable foundation of the constructive trust in this case.<sup>46</sup> What I want to suggest is that latent in the court's reasoning is the recognition of an independent equitable right in what *C* had coming to her, the very same kind of equitable right (and the very same kind of equitable duty) that accompanies specifically performable contracts and that grounds an award of constructive trust.

The first thing to notice is that despite the court's insistence that this is a case of unjust enrichment, this is clearly not the typical case of bilateral unjust enrichment. *B* had not received the enrichment directly from *C*. Although *C* paid some of the premiums that maintained the policy, *C* never owned the policy itself.<sup>47</sup> What we get from the SCC, then, is an attempt to articulate a multilateral form of unjust enrichment: a deprivation for the purposes of unjust enrichment is not limited to "out-of-pocket" expenditures typical of "two-party" unjust enrichment scenarios.<sup>48</sup> The concept of deprivation also captures the diversion of benefits that would otherwise have

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44 *Tataryn v. Tataryn*, [1994] 2 S.C.R. 807, 815 (Can.).

45 The SCC found that the constructive trust is "*primarily*" remedial and that a remedial constructive trust *requires* an independent equitable foundation, e.g. resulting from unjust enrichment *or* the breach of a fiduciary obligation. *Moore v. Sweet*, 2018 SCC at para. 32.

46 *See id.*

47 *Moore v. Sweet* 2018 SCC at para. 2. *But see* *Foskett v. McKeown* [2000] UKHL 29, [2000] 1 AC 102. There, the court, for different reasons, held that the use of trust monies to pay three out of five premiums paid before the trustee's death gave the trust a 3/5 share in the payout. *Id.* That case can be distinguished on the basis that the monies used there were taken in breach of trust, subjecting the beneficiaries to an involuntarily assumed risk of a delayed payout (the expected lifespan of the insured) and explaining the willingness there of the court to treat the payment of premiums with trust monies as monies used in the acquisition of the bundles of rights that was the policy rather than as improvements made to a preexisting thing (justifying at best a debt action for their return). Here the contract between husband and wife (*A* and *C*) displaces even the "debt for improvement" analysis that might justify an equitable charge or lien over the policies, and also the equitable reasons favoring a very loose analysis of the "originator" of the thing transferred.

48 *Moore v. Sweet*, 2018 SCC at para. 52.

accrued to a plaintiff from the discharge of a third-party's obligation to her. Where those benefits that would have accrued to a plaintiff are diverted to the defendant, the plaintiff is enriched, and the defendant is correspondingly deprived. Putting this in the language of unjust enrichment, the court found that *B* was unjustly enriched at the expense of *C* because *B* had received a benefit that would have accrued to *C* had *A* fulfilled the obligation to *C*, a deprivation achieved through the very mechanism that enriched *B* (the irrevocable designation of *B* as the new beneficiary).

The award of constructive trust in this case could be understood more straightforwardly as the specific enforcement of an equitable interest in what *C* had coming to her, where a principle against unjust enrichment is not a cause of action to be plead<sup>49</sup> so much as a normative principle that underpins equity's protection of the right of what one person has coming to her against diversion to another. It is particularly instructive here to reflect on the role of the contract between *A* and *C*. The contract drives equity's view of what *C* had coming to her—the interest protected by way of the constructive trust. The contract between *A* and *C* is not itself enforced, nor is the breach of contract remedied through the imposition of a constructive trust. But the contract shapes the content of the equitable interest that is protected in the form of a constructive trust, just as it does in more familiar cases of a specifically performable contract. The SCC recognized the importance of *C*'s contractual right, not as the primary right generating a secondary remedial right but as the basis on which from an equitable standpoint a person could be said to have something coming to her:

In other cases where the plaintiff has some general belief that the insured ought to have named him . . . as the designated beneficiary, but otherwise has no legal or equitable right to be treated as the proper recipient of the insurance money, it will likely be impossible to find either that the right to receive that insurance money was ever held by the plaintiff or that it would have accrued to him or her.<sup>50</sup>

We can see how *Moore v. Sweet* might be distinguished from the “disappointed heir”-type cases: *C*'s contractual right marks the difference. What marks the difference between this contract, standing as the contractual basis for an equitable interest in what a person has coming to her, and other contracts? This of course was the Court of Appeal's worry: that *all* contracts would be in effect specifically performable. We will see in the discussion of

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<sup>49</sup> This brings the role of unjust enrichment in relation to the constructive trust in this context in line with the role of unjust enrichment in relation to resulting trusts generally, i.e. regarding the normative basis for equity's recognition of them. That has implications for pleadings: in *BNSF Ry. Co. v. Teck Metals*, the British Columbia Court of Appeal took the view that a good-conscience, i.e. substantive/non-remedial, constructive trust was still available in Canada after the decision in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (Can.), and that the “availability of constructive trust need not be decided on the basis of pleadings. Being dependent on facts found at trial, the issue can be resolved once the plaintiff is able to make an informed choice prior to final judgment being pronounced.” 2016 BCCA 350, para. 83 (Can. B.C. C.A.).

<sup>50</sup> *Moore v. Sweet*, 2018 SCC at para. 47.

nuisance and fair competition below that the *content* of what a person has coming to her is not just a matter of the terms of the contract itself but requires a larger equitable construction of what a person has coming to her assuming away force, fraud, and otherwise improper tactics (which are unreasonable, violate community standards, etc.) that might get in the way of its flow. In *Moore v. Sweet*, the court calculated what *C* had coming to her by assuming a world in which *A* would not breach his contract because that breach could only be achieved through the violation of a judicially recognized moral obligation to provide for his children. Equity, in short, discounted the possibility of breach getting in the way of *C*'s actually realizing the benefit of that contract—the insurance money—and was left with the view that what she has coming to her is the insurance monies.<sup>51</sup>

In ordinary contracts, equity allows that you have an expectation interest but does not treat that expectation interest as the equivalent of the weightier equitable right to what you have coming to you. Why? Because breach is not in ordinary contract cases always an illicit stratagem to be seen as inequitable interference with the flow of benefits to a person that equity refuses to countenance. Put another way: equity treats contracts as in effect non-breachable only in contexts where breach would be unreasonable, violate community standards, or otherwise represent an illicit move that equity cannot allow to stand in the way of a person and what she had coming to her from equity's standpoint. This of course matches the lawyers' understanding of specifically performable contracts, in which the plaintiff asking for specific performance is meant to assume the posture of a person whose contract has not been terminated through breach, despite the clear failure of the other side to perform, who has suffered no losses that stand to be mitigated, and who is simply renewing a call for performance.

*Moore v. Sweet* makes sense, then, if we understand *C* to have the very same kind of equitable interest that arises in specifically performable contracts generally: that is, a right against the obstruction or diversion of what she has coming to her by anyone with the power to compromise its flow. This is the kind of interest that persists against a third party like *B* who

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51 A person may not receive equity's protection either in cases where the contract allows for the parties to revoke or vary its terms. In such cases, there may be legitimate reasons for the diversion of the subject matter of the contract, with the result that equity should not look at the contract as a reliable channel for the flow of its value to the third party. Contrast, for instance, *In re Garbett* [1963] NZLR (NZSC) 384 (N.Z.), and *Schebsman* (in ALBERT H. OOSTERHOFF, ROBERT CHAMBERS & MITCHELL MCINNES, OOSTERHOFF ON TRUSTS 80 (9th ed., 2019)). Both cases involved contracts between *A* and *B* for the benefit of *C*. In *Schebsman*, the judge wrote: "I have little doubt in the present case both parties (and certainly the debtor) intended to keep alive their common law right to vary consensually the terms of the obligation." *Id.* *C* was unable to establish a right in the nature of trust in the subject matter of the contract although once *B* performed the contract, she could defend her right to retain the value received from *B* against *A*'s claim in unjust enrichment for its return. In *Garbett*, an argument of the same structure succeeded on the basis that the agreement between *A* and *B* for the benefit of *C* was irrevocable, and the benefit to *C* was not subject to forfeiture even on mutual consent of *A* and *B*. *Garbett*, [1963] NZLR at 390.

has notice of it. What was diverted from *C* to *B* was the flow of what *C* had coming to her. The constructive trust is just a way of describing *C*'s equitable right that another not obstruct or divert what she had coming to her. This usage of "constructive trust" to describe what is after all just an equitable right constraining another's power to compromise the flow of benefits is not new: courts have used the term to describe the equitable right arising out of a specifically performable contract for the sale of land, the equitable right of the dominant tenement holder in restrictive covenants cases, and in other contexts that involve the right to what we have coming to us.

### III. RESTRICTIVE COVENANTS

In *Tulk v. Moxhay*,<sup>52</sup> the court enforced a covenant restricting the use of sold land. In that case, the buyer had sold the land free of any restriction to someone who had notice of the covenant. The court addressed the gap between the protection provided by the covenant itself (as against the covenantor only) and what would be required to protect what the covenantee had coming to him in light of the covenant he had arranged for prior to selling the land: the covenantor could fulfill the covenant and still leave the covenantee underprotected, obstructing the flow of benefits to the covenantee/seller simply by selling the land on to another.<sup>53</sup> The value of the covenant would be lost in that case with the result that: "it would be impossible for an owner of land to sell part of it without incurring the risk of rendering what he retains worthless."<sup>54</sup> When a vendor does what the law requires of her to negate that risk by imposing a restrictive covenant, equity helps ensure that the covenant is not empty.

In *Tulk*, the court protected the seller's interest in what he had coming to him: the benefit to his land of the restriction in use of his neighbor's, by preventing its obstruction by whomever had the power to compromise that interest. That included the original covenantor but also any successors in interest, "for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased."<sup>55</sup>

The restrictive covenant, enforced by injunction, involves at its core an equitable interest akin to the interest equity protects in specifically performable contracts and in cases like *Moore v. Sweet*: an equitable interest in what one has coming to her, protected by a duty of non-obstruction or diversion imposed on one who has the power to compromise it. This form of equitable right is protected through a negotiable duty, one that travels to

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52 *Tulk v. Moxhay* [1848] EWHC (Ch) J34 (Eng.).

53 *See id.*

54 *Id.*

55 *Id.*

whoever bears the power to compromise the interest with notice of it.<sup>56</sup> Seen this way, restrictive covenants are best understood as equitable rights, not a fragment of property rights or an addition to the dominant tenement owner's "bundle." Because restrictive covenants are generally studied alongside other legal property rights, and especially easements, we have lost sight of the connection between restrictive covenants and other equitable rights protected by negotiable duties. There remain at least glimmers of this connection in some cases. In *Dominion Coal Co. v. Lord Strathcona Steamship Co.*,<sup>57</sup> a controversial Privy Council case, the logic of *Tulk* was extended beyond covenants over land to the purchase of a ship with notice of an ongoing charter agreement.<sup>58</sup> Lord Shaw concluded that the purchaser was a constructive trustee of the ship with obligations to the charterer:

If a man acquires from another rights in a ship which is already under charter, with notice of rights which required the ship to be used for a particular purpose and not inconsistently with it, then he appears to be plainly in the position of a constructive trustee with obligations which a Court of Equity will not permit him to violate.<sup>59</sup>

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<sup>56</sup> This was Ames's view of restrictive covenants, overtaken by a later tendency to think of restrictive covenants as an equitable form of easement, pushed along by the legal realists who encouraged the view that the use-right was a "stick" in the "bundle of sticks" representing property and that had been moved out from the servient owner's bundle and added to the dominant tenement owner's bundle. See J.B. Ames, *Specific Performance for and Against Strangers to the Contract*, 17 HARV. L. REV. 174, 185 (1904) ("The true analogue of the restrictive agreement is the note payable to the bearer.").

<sup>57</sup> *Lord Strathcona S.S. Co. v. Dominion Coal Co.* [1926] AC 108 (PC) (appeal taken from N.S.).

<sup>58</sup> See DONOVAN W.M. WATERS, *LAW OF TRUSTS IN CANADA* 85, 560 (Donovan W.M. Waters, Mark Gillen & Lionel Smith eds., 4th ed. 2012).

<sup>59</sup> *Lord Strathcona S.S. Co.*, [1926] AC 108, at para. 34. See also *Binions v. Evans*, [1972] 2 All ER 70 (Eng.), which concerned an agreement between a seller and purchasers to allow the seller's widow to live in the house after her husband's death. The seller sold the land to the purchasers with notice of agreement and a promise to respect it, and at a lower price to reflect the restriction. After purchase, the new occupants sought to evict the widow. The court found a "constructive trust" in the widow's favor. See *id.* at 70, 72–73, 77. But see BEN MCFARLANE, *THE STRUCTURE OF PROPERTY LAW* 508–09 (2008) (criticizing the "Constructive Trust" approach). That line of criticism takes aim at the lack of a comprehensive duty to account to the equitable right-holder for dealings with the property. See also William Swadling, *Property: General Principles*, in *ENGLISH PRIVATE LAW* ¶ 4.01, ¶ 4.307 (Andrew Burrows ed., 3d ed. 2013). I agree that the language of "trust" is unhelpful here when all that is really invoked is the idea of an equitable right constraining O2 from exercising her ownership powers so as to obstruct or divert or destroy what the widow had coming to her: the use and enjoyment of the cottage as per the agreement with O1. Equitable rights like this operate more like targeted constraints, something we see most clearly in the context of restrictive covenants. Courts frequently use the term "constructive trust" to refer to equitable rights to what we have coming to us, including those arising out of specifically enforceable promises. No, these are not real trusts because they do not impose a blanket duty to account for all dealings with the land (as we know well in the context of a vendor of land, subject to a constructive trust for the purchaser). But yes, these are a kind of equitable rights that have a common nature and structure and that courts are quite right to recognize. The

#### IV. NUISANCE AND WHAT OWNERS HAVE COMING TO THEM

Equitable remedies in nuisance cases can also be explained in terms of the protection of an interest that extends beyond the scope of the legal right *strictu sensu*.<sup>60</sup> Equity, in the form of an injunction, protects a future flow of benefits—the owner’s material use and enjoyment of her land—by enjoining another’s<sup>61</sup> exercise of her power to compromise that flow.

The injunction in nuisance cases is not a vindication of ownership authority itself. Ownership puts owners in charge of setting an agenda and protects that position of authority against usurpation or contempt: others do wrong when they deal with the thing without authorization. An owner’s authority to set the agenda for a thing is not defined in terms of protected activities or material outcomes.<sup>62</sup> The success of any particular agenda will always depend on powers and circumstances extraneous to the owner’s office (such as her personal abilities, wealth from other sources, and most importantly for my purposes, decisions by others—neighbors, passers-by, public officials, etc.).

Through injunctive relief in nuisance law, equity moves beyond the protection of the owner’s exclusive authority to set the agenda.<sup>63</sup> Whereas the core property right in law is defined according to a formal principle of

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repeated use of the same idea of constructive trust in these contexts is a fairly important indication that there is something that connects the restrictive covenants, the rights arising from the “receipt after promise” principle, the purchaser’s interest in land after an agreement for sale, etc.

<sup>60</sup> Nuisance belongs to a “class of torts embracing nuisance, repeated trespass, and continuous trespass, which equity will prevent because the legal remedy is inadequate.” 25 Y.L.J. 589 (1917). A continued trespass is *analogous* to nuisance: 4 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 1359 (3d ed. 1905). Once we have sorted out the underlying equitable right and duty that is enforced through an injunction in the nuisance context, we can by analogy work out why an injunction for a continuing trespass (a structure or obstruction that remains on the land) or a repeated trespass (e.g., unauthorized daily boundary crossings) is also appropriate.

<sup>61</sup> Nuisances are usually but not necessarily committed through a neighbor’s exercise of her property rights. Others can commit nuisance, too. See, e.g. *Hubbard v Pitt* [1976] QB 142.

<sup>62</sup> See generally Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275 (2008).

<sup>63</sup> This accounts helps to explain why government-authorized nuisance counts as a taking of property requiring just compensation: it is a taking of an owner’s interest in what she has coming to her—a proprietary interest, of a fundamentally equitable character—even as it does not take or destroy the owner’s capacity to set the agenda for her land. See Carlos A. Ball, *The Curious Intersection of Nuisance and Takings Law*, 86 B.U.L. REV. 820 at 861-867, *Antrim Truck Ctr. Ltd. v. Ontario (Transp.)*, [2013] 1 S.C.R. 594 (Can.), *Gautam v. Canada Line Rapid Transit Inc.* 2015 BCSC 2038, affirmed on the nuisance and takings compensation issue by *Gautam v. South Coast British Columbia Transportation Authority* 2020 BCCA 135.

authority, the right that others not obstruct or divert what the owner has coming to her depends on *material* considerations: what counts as a nuisance, the basis on which equity awards an injunction, is a matter both of the use she is making of the land and the standards in that locale for what would count as unreasonable interference with her use and enjoyment. Here as in competition cases, equity invokes material principles of common sense and community standards-- external to the property right itself— to figure out what an owner has coming to her. This interest goes beyond what the legal property right itself guarantees. The good that is meant to follow from the owner's decisions—e.g., peace and quiet, a flow of customers, clean air— is not something the owner already has in virtue of having ownership rights, nor can these material benefits be secured through a more thoroughgoing protection of the formal authority to set the agenda. A person can have full authority to set the agenda for her land, not usurped by anyone else, and yet still suffer the diversion or obstruction of benefits that might reasonably be expected to flow to her in virtue of being the owner. What Equity adds is the protection against obstructions or diversions of the flow of the benefit of an agenda, whether that benefit is enjoying privacy at home, quiet in a doctor's consulting room,<sup>64</sup> or custom at a truck stop.<sup>65</sup>

Equity's intervention in these cases takes the form of a negotiable duty that falls to anyone who assumes the power to compromise another's equitable interest in what she has coming to her (a new owner of the neighboring property, but also tenants and third parties with the power to obstruct or divert the benefits of an agenda another owner has set).<sup>66</sup>

## V. WHAT COMPETITORS HAVE COMING TO THEM (AND WHY)

Equity also intervenes to protect what a person has coming to her outside of any contractual or property relationship. I have in mind here cases, like *INS v. AP*,<sup>67</sup> where equity's view of what a person has coming to her is shaped by an equitably constructed account of fair competition. The equitable account of fair competition is constructed (as equitable accounts generally are) *ex post facto*, using equitable principles and standards to work out how competitors ought to interact. Equity's framework for evaluating what a competitor has coming to her rules out force, fraud, and unreasonable

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64 *Sturges v. Bridgman* [1879] 11 Ch. D. 852 (Eng.).

65 *Antrim Truck Ctr. Ltd. v. Ontario (Transp.)*, [2013] 1 S.C.R. 594 (Can.).

66 *See, e.g., Seymour v. McDonald*, 4 Sand. Ch. 502 (N.Y. Ch. 1847). The claimant sold a lot bordering another he owned to the defendant. *Id.* at 502. The deed indicated that the purchaser could not use the lot as a stone quarry, or for any purpose that would be "offensive" to the adjoining property or reduce the adjoining property's value. *Id.* at 504. The defendant sought to allow a third party to build a wharf and railway on his newly acquired land in order to transport stone from the third party's quarry. *Id.* at 505. The court upheld an injunction prohibiting the erection of a wharf and railway on the defendant's land, finding that this conduct came within the prohibitions in the conveyance. *Id.* at 507.

67 *Int'l News Serv. v. Associated Press*, 248 U.S. 215 (1918).

strategies by fellow competitors in order to determine what, if the competitors had interacted on equity's terms, one or the other would have had coming to her.<sup>68</sup>

Competition can occur within a procedure for acquiring property rights where more than one person is on an open pathway to property rights, as in cases of first possession. The law of first possession makes competition (the first to capture with *animus possidendi*) the procedure for the acquisition of property rights. Unlike other procedures for the acquisition of property rights (sale, grant, etc.), this procedure is open to all comers. Equity, which protects the pathways to property rights, confronts an additional complexity in cases of first possession: competition as a procedure allows for a certain amount of volatility along the way to the right. It is to be expected, for instance, that a frontrunner will be passed by a competitor at the last minute. How then can equity determine that a person nearing the finish line has suffered a loss when another completes the race ahead of her? An equitable framework for fair competition generates a view of what a person has coming to her *absent* fraud, force, and stratagems that violate community standards. Take the case of *Popov v. Hayashi*.<sup>69</sup> Popov was on the point of catching the ball hit into the stands by Barry Bonds on the occasion of his record-breaking home run. He had done everything he could to put himself into the position he was now in, where the arc of the ball ended in his glove.<sup>70</sup> At that moment, a mob jumped on him, taking him down before he could complete the catch.<sup>71</sup> Hayashi, who was not part of the mob, ended up picking up the ball and so winning the race to capture first (and so to acquire legal right to the ball).<sup>72</sup> Hayashi did no wrong: he personally violated no community standard in this competition to capture the ball. But here is what we can say from an equitable standpoint: assuming a framework of fair competition, free from force, fraud, or unreasonable stratagems, Popov, and Popov alone, had the ball coming to him. Equity specifically enforces what

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68 What is unreasonable is determined by community standards, i.e. the prevailing common sense of the time. *Selangor United Rubber Ests. Ltd. v. Cradock* (No. 3), [1968] 2 All E.R. 1073, 1105 (Ungoed-Thomas, J.) (quoting *Bodenham v. Hoskins* (1852), 21 L. J. Ch. 864, 873) (“They are to be understood ‘according to the plain principles of a court of equity’ to which Sir Richard Kindersley, V.-C., referred [in *Bodenham v. Hoskins*], and these principles, in this context at any rate, are just plain, ordinary commonsense.”); cf. Nicolas Cornell, *Competition Wrongs*, 129 *YALE L.J.* 2030, 2034 (2020) (explaining the wronging in terms of a violation of a community standard but denying that the competitor who has standing to complain has any particularized interest or right). While I agree with Cornell that the violation of a community standard about what counts as acceptable strategy is an important part of the story, I think that this violation of a community standard ends up figuring in an equitable construction of a protected interest. It is not a legal right that is protected, but rather an equitable one, a right that correlates to a specifically performable duty on the part of the defendant.

69 *Popov v. Hayashi*, No. 400545, 2002 WL 31833731 (Ca. Sup. Ct. Dec. 18, 2002).

70 *Id.* at \*1.

71 *Id.* at \*2.

72 *Id.*

a person had coming to him within that framework of fair competition by imposing a duty not to divert or obstruct its flow on whoever now has the power to compromise that interest. In this case, that negotiable duty falls on Hayashi, the person who in fact completed the common-law procedure for acquiring property in the ball by capturing first). Equity is not policing wrongs in cases like this; it does not address itself to the actual wrongdoers in the mob. It is rather protecting a competitor's interest in what she has coming to her from diversion or obstruction or expropriation by others—and in doing so preserves the integrity of competition as a procedure for acquiring property rights.

Equity also protects a competitor's interest in what she has coming to her outside of the context of a procedure for acquiring specific property rights. Something like this interest explains equity's intervention where the competition is for profits or value not yet attached to any particular, identifiable thing. My main interest is this second form of competition, an open competition for profits or value resulting from activity in the marketplace. It is in this context that an equitably constructed framework of fair competition drives equity's view of what a person has coming to her such that another's exercise of a power, diverting those profits to herself, counts as illicit compromising of that interest. In these competition cases, equitable remedies like injunction or constructive trust reflect equity's recognition of an interest in what a person has coming to her, protected through a negotiable duty not to divert or obstruct its flow to her.

## VI. GOODWILL

Goodwill is a good example of a protected channel for the flow of value. Goodwill is not a right with respect to any identifiable thing, or even any fixed value, but rather “the attractive force that brings in custom.”<sup>73</sup> In traditional common law thinking, it was not thought of as property in itself. As one nineteenth century court put the point, “goodwill is not property, but an incident to property; it cannot therefore be dealt with independently of the property, or have any existence apart from it, or unless there is a going business attached to it.”<sup>74</sup> The traditional view that goodwill is not property has softened: for many purposes, courts increasingly treat it as property, notwithstanding the lack of specificity and separate existence that property usually requires.<sup>75</sup> Indeed, goodwill is now regarded as capable of surviving despite the inactivity or demise of the underlying business and its physical

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<sup>73</sup> *Inland Revenue Comm'rs v. Muller & Co.'s Margarine, Ltd.* [1901] AC 217 (HL) 224 (Lord Macnaghten).

<sup>74</sup> *Robertson v. Quiddington* (1860) 54 E.R. 469, 471, (1860) 28 Beav. 529.

<sup>75</sup> *See Rowe v. Toon* (1918) 185 Iowa, 848, 169 N. W. 38, where the sale of a physician's practice was deemed possible despite the fact that no tangible thing accompanied the transfer.

assets.<sup>76</sup> What courts still lack is a vocabulary to describe the nature of this right, whatever its label, so as to distinguish what we already have (property *strictu sensu*) from what we have coming to us. The Supreme Court of Canada case, *Manitoba Fisheries v. R.*,<sup>77</sup> while calling goodwill property, goes some way toward revealing the distinctively equitable nature and structure of goodwill. Manitoba Fisheries, the appellant in the case, operated a freshwater fish import-export business with an established customer base.<sup>78</sup> The government passed legislation creating a Crown Corporation with a monopoly on the sale of freshwater fish.<sup>79</sup> The same customers who before the legislation had bought their fish from the plaintiff after the legislation were rerouted to the Crown Corporation.<sup>80</sup> Although Manitoba Fisheries clearly lacked a property right in the customer themselves, the court recognized that it had something else: a right to the flow of custom through the established channel of its goodwill.<sup>81</sup> The government's taking of goodwill was in effect the diversion of this flow of custom to its own Crown Corporation.<sup>82</sup> The "taking" in this case that required compensation was not the taking of what the appellant already had but what it had coming to it: the flow of custom through protected channels. The equitable underpinnings of the right are made explicit in the decision. Justice Ritchie wrote, "I think it to be only fair and equitable that this loss [of goodwill] should be reflected in the amount of compensation awarded to the appellant [for a taking]."

Private appropriation of goodwill similarly involves a diversion or obstruction of the channel for the flow of value—a distinctively equitable interest—and not the appropriation of a thing or of value already existing in some fixed form.<sup>83</sup> This is the point, I take it, of a case like *Ciba-Geigy Canada Ltd. v. Apotex Inc.*, a Supreme Court of Canada case that linked recovery for the tort of passing off to a demonstration that the name allegedly

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<sup>76</sup> See "Marketable 'Goodwill'—The Assignability in Gross of A Foreign Name" 35 Yale L.J. (1926) 496 at 499-500 and "An Inquiry into the Nature of Goodwill" 53:5 Colum. L. Rev. (1953) 660 at 673.

<sup>77</sup> *Manitoba Fisheries Ltd. v. R.*, [1979] 1 S.C.R. 101.

<sup>78</sup> *Id.* at 103.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 104.

<sup>81</sup> *Id.* at 108.

<sup>82</sup> *Id.* at 118. This decision involved an application of the ancient equitable presumption of just compensation for takings of both legal and equitable rights, which in common-law jurisdictions was applied to ensure proper state-citizen relations in the enactment of legislation. For an account of the role of equity in the context of public, administrative decision making more generally, see Timothy Endicott, *Equity and Administrative Behavior: A Commentary*, in *EQUITY AND ADMINISTRATION* 367 (P.G. Turner ed., 2016).

<sup>83</sup> See, for example, *Law Soc'y of B.C. v. Can. Domain Name Exch. Corp.*, 2005 BCCA 535, where a permanent injunction was granted against a party that had registered "lsbc.ca" and "lawsocietybc.ca," prohibiting its continued uses of those domains. The Law Society of British Columbia successfully argued that the use of websites similar to its own amounted to an appropriation of its goodwill. *Id.* at para. 2.

misappropriated attracted goodwill.<sup>84</sup> Goodwill in that context, as in *Manitoba Fisheries*, was understood as “the reputation and drawing power of a given business in its market.”<sup>85</sup> Thus, what is protected is not a right to a thing, a name, but an interest in a protected channel (and so the name as the anchor of goodwill, the channel through which value flows). In *British Telecommunications Plc v. One In A Million Ltd.*,<sup>86</sup> the English Court of Appeal explained passing off actions in terms of this distinctively equitable form of “property” in goodwill (note in what follows the Court’s hesitation in calling this property at all): “There appears to be considerable diversity of opinion as to the nature of the right, the invasion of which is the subject of what are known as passing-off actions. The more general opinion appears to be that the right is a right of property. This view naturally demands an answer to the question—property in what? Some authorities say property in the mark, name, or get-up improperly used by the defendant. Others say, property in the business or goodwill likely to be injured by the misrepresentation. [...] [I]f the right invaded is a right of property at all, there are, I think, strong reasons for preferring the latter view.”<sup>87</sup> The defendants in that case had registered websites consisting in the plaintiffs’ trading names (e.g. virgin.org., britishtelecom.co.uk). The registration of the domain names amounted to a take-over of a protected channel for the flow of custom, with the threat of diverting that flow to another if the plaintiffs did not pay up. The court recognized that the purpose of the registration was “to extract money from the owners of the goodwill in the name chosen. Its ability to do so was in the main dependent upon the threat, expressed or implied, that the appellants would exploit the goodwill by either trading under the name or equipping another with the name so he could do so.”<sup>88</sup> The injunction in that case protected the plaintiff’s goodwill so as to prevent others from diverting or obstructing what the plaintiff, from an equitable standpoint had coming to her: the flow of custom that tradename attracted.

### VII. Mutual (and Joint) Wills

In a mutual or joint will,<sup>89</sup> each party makes a will on identical terms, leaving his or her estate to the survivor for life, remainder to a designated beneficiary.<sup>90</sup> “For instance, A makes his will giving a life interest to B, should B survive A, remainder to C absolutely. B then makes his will giving

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<sup>84</sup> *Ciba-Geigy Can. Ltd. v. Apotex Inc.*, [1992] 3 S.C.R. 120, 132 (Can.).

<sup>85</sup> *Id.* at 134.

<sup>86</sup> *British Telecomms. Plc v. One In A Million Ltd.* [1999] E.T.M.R. 61.

<sup>87</sup> *Id.* at 76

<sup>88</sup> *Id.* at 68. Appeal to the House of Lords was denied.

<sup>89</sup> In a mutual will, in contrast to a joint will, each party executes separate testamentary document on identical terms.

<sup>90</sup> It should be noted that much of the trouble in these cases is caused by evidentiary uncertainty as to whether a binding agreement was made or not, an issue largely outside the scope of this discussion. *See id.* at 544–47.

a life interest to *A*, should *A* survive *B*, remainder to *C* absolutely.”<sup>91</sup> *C* is intended here to be the ultimate beneficiary of *A* and *B*’s estates; the survivor of *A* and *B* have the other’s estate until the survivor’s own death. Assume that *A* dies before *B*, and *B* then alters the terms of his will, directing the remainder to someone other than *C*. The problem is plain: as one treatise writer put it, “[t]here is now no one who can sue on the contract; the deceased party has suffered no loss, and the third party beneficiary of the agreement is not a party to the contract.”<sup>92</sup> In the mutual wills cases, the agreement presupposes the fact that one party will die before the other and will not be in a position to assert contractual rights to secure the third party’s benefit. To resolve this problem, courts have been willing to impose a constructive trust in favor of *C*.<sup>93</sup> In doing this, equity achieves a result that the law alone cannot achieve: a specifically enforceable duty on the part of survivor to forbear from exercising her legal powers with respect to her own property, for the benefit of *C*. Equity, in doing so, creates an interest on the part of *C* in the subject-matter of *A* and *B*’s agreement. This, too, is an instance of equity protecting what we have coming to us; here, equity is concerned to prevent an inequitable diversion of the subject-matter of the agreement between *A* and *B*, to which *C* had no legal right but which, according to that agreement she had coming to her.

The specifically performable duty of a survivor in *B*’s position is equity’s response to the injustice of diverting what someone in *C*’s position has coming to her. Consider the case of *Dufour v. Pereira*,<sup>94</sup> a prominent case followed by the SCC some 200 years later in *Pratt v. Johnson*.<sup>95</sup> In *Dufour*, a married couple made a joint will and there was evidence that they had agreed not to alter the will. The will gave a life estate to the survivor of the husband and wife, remainder to certain beneficiaries. After the husband’s death, the wife made a new will that was a departure from the joint will that she and her husband had agreed to maintain. The beneficiaries of the joint will sought to impose a trust on her estate in their favor. Lord Camden wrote: “It is a contract between the parties, which cannot be rescinded, but by the consent of both. The first that dies, carries his part of the contract into execution. Will the Court afterwards permit the other to break the contract? Certainly not.”<sup>96</sup>

In *Pratt v. Johnson*, husband and wife made a joint will providing that their respective estates should be held by the survivor “during his or her life

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91 WATERS, *supra* note 58, at 542.

92 *Id.* at 543.

93 *See* *Bee v. Smith*, 6 Cal. App. 3d 521, 96 Cal. Rptr. 115. Other courts have arrived at the same result through slightly different equitable means, finding that the agreement concerning the mutual wills is irrevocable and warrants specific performance: *Portmann v Herard*, 409 P.3d 1199 (Wash. App. Div. 2 2018); *Pyle by Straub v. U.S.* 766 F.2d 1141 (7th Cir. 1985); *In Re Estate of Richardson*, 525 P.2d 816 (Wash. App. Div. 3 1979).

94 1 Dick. 419 (1769); *Pratt v. Johnson*, [1959] S.C.R. 102 (Can.).

95 [1959] S.C.R. 102.

96 *Dufour*, 1 Dick. at 421, *cited in Pratt*, [1959] S.C.R. at 110.

to use as such survivor may see fit,”<sup>97</sup> and upon the death of the survivor the remaining property was to be divided equally among five named beneficiaries. After the husband’s death, the wife made a will by which bequests were made to three beneficiaries in addition to the five beneficiaries named in the joint will. Citing *Dufour*, Justice Locke held for the majority that, due to the agreement between the husband and the wife, a trust was fastened upon the property in favor of the five named beneficiaries at the moment that the husband died.<sup>98</sup> *Snell’s Equity* was cited for the following proposition: “Until the death of the first to die either may withdraw from the arrangement, but thereafter it is irrevocable, at least if the survivor accepts the benefits conferred on him by the other’s will.”<sup>99</sup>

What justifies the trust in these cases?<sup>100</sup> One explanation is that, like in *Moore v. Sweet* and *Tulk*, the agreement to make a mutual will is specifically enforceable, which is just to say (on my account) that equity will protect *C*’s interest in what she has coming to her precisely because contract law on its own is not up to the task.<sup>101</sup> *C* has an equitable interest in the subject matter of the contract between *A* and *B*—the property meant to devolve according to the terms of the joint will—protected in the form of a trust: it is an equitable obligation that constrains the survivor’s power to divert the property by leaving it to someone else under a later will. This is not, of course, an express trust, which would require an intention on the part

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97 *Pratt*, [1959] S.C.R. at 102.

98 *Id.* at 106.

99 *Id.* at 109 (quoting EDMUND HENRY TURNER SNELL, *PRINCIPLES OF EQUITY* 156 (R.V. Megarry & P.V. Baker eds., 24th ed. 1954)). Note that there is some disagreement as to the point in time at which the trust comes into existence, and whether or not the survivor’s acceptance of some benefit is a pre-condition to the existence of the trust. It has since been held that a party to a mutual will agreement need not receive a benefit to be bound by the agreement: *University of Manitoba v. Sanderson Estate*, 1998 Carswell BC 121 [1998], 155 D.L.R. (4<sup>th</sup>) 40, 166.

100 See WATERS, *supra* note 58, at 554–57. The prevention of fraud is a commonly stated justification, and there is an analogy to *Rochefoucauld v. Boustead*, [1897] 1 Ch. 196 (C.A.) (Eng.). See also OOSTERHOFF, CHAMBERS & MCINNES, *supra* note 51, at 857 (explaining the trust as perfecting intentions and preventing detrimental reliance).

101 An important similarity between *Moore v. Sweet* and the mutual wills cases might be that, in both cases, one of the contracting parties has fully performed her end of the bargain. In other words, one party has fully complied with what our system of private law required. On this point, Waters writes:

The doctrine concerning agreements to make joint and mutual wills, the secret trust doctrine, and the *Rochefoucauld v. Boustead* doctrine may have this in common that in each case Equity compels the person, who has given an undertaking, to carry out that undertaking if the other party has performed his part.

WATERS, *supra* note 58, at 555. Performance by the one encourages the view that equity takes of a third-party beneficiary’s right. *But see* *Fraser River Pile & Dredge Ltd. v. Can-Dive Servs. Ltd.*, [1999] 3 S.C.R. 108, 109. The SCC has allowed *C* the benefit conferred by a contract between *A* and *B*, but only where that benefit is asserted as a shield to defend against a claim brought by *A* or *B*, not an independent cause of action.

of *A* and *B* actually to create a trust for *C*, but a remedial (constructive) trust.<sup>102</sup> As the contract scholar Donovan Waters put it:

It is essentially this contract which the courts are enforcing; the constructive trust is employed as a means of securing from the surviving promisor a specific relief for the petitioning third party, a relief which is akin in its result to the specific performance that the promisee might have had against that promisor.<sup>103</sup>

In doing this, equity makes a rare departure from the rule that a will only takes effect upon the death of the testator. *B* would otherwise be free to alter his will until his own death. But *C*'s equitable interest in the contract between *A* and *B* puts fetters on *B*'s exercise of this power. Equity's mandate is to insulate the channel of value from unconscionable intrusion during this period, before *C*'s legal right crystallizes.

## VIII. INTERLOCUTORY INJUNCTION

An account of equitable remedies as protecting what we have coming to us against diversion or obstruction makes sense of injunctions in a wide range of circumstances. There is a consistency to the core nature of the underlying equitable right that is recognized and protected wherever equitable remedies are deployed: injunctions, generally, enforce a specifically performable equitable duty not to obstruct or divert what another has coming to her.

While I have focused up until now on equitable remedies as the outcome of judicial proceedings, equity's intervention *during* the judicial process is also consistent with the approach I have outlined here.<sup>104</sup> As one mid-twentieth century writer put it, "[t]heoretically, justice would be best served if adjudication could take place immediately upon the birth of a controversy."<sup>105</sup> That adjudication is a temporally extended process leads to a gap between what the plaintiff already has, i.e. her cause of action, and what she has coming to her, i.e., the remedy that repairs the wrong complained of. It is true even of the plaintiff almost certain to win her case that the ultimate outcome of the legal proceeding (the final remedy) is not *yet* hers until adjudication is complete. In this temporal gap, there is an

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<sup>102</sup> Re Schebsman, [1944] Ch. 83 (in OOSTERHOFF, CHAMBERS & MCINNES, *supra* note 51, at \_\_\_). In *Lloyd's v. Harper*, 16 Ch. D. 290 (1880), the court was willing to find that a contract between *A* and *B* for the benefit of *C* made *A* a trustee of *B*'s promise to perform, allowing the third party to sue in equity for performance.

<sup>103</sup> WATERS, *supra* note 58, at 555. Later, it is suggested that, given that the "flexible and multi-causal nature of the constructive trust is now established in common law Canada," it can "forthrightly be said that the remedy takes the form of bringing about performance of the agreement that was entered into by the parties." *Id.* at 557. I agree on the idea of specific performance grounding the constructive trust but disagree on the nature of specific performance.

<sup>104</sup>

<sup>105</sup> Note, 73 Harv L Rev 331, 336 (1959).

opportunity for a defendant to obstruct or divert the remedy that the cause of action attracts. Interlocutory injunctions are distinctively equitable “anticipatory remedies”: they protect what a plaintiff has coming to her through a legal proceeding, begun<sup>106</sup> but as yet incomplete, by imposing specifically performable, temporary duties on the defendant.<sup>107</sup> These equitable duties have the effect of maintaining the position the plaintiff would be in if adjudication were instantaneous (such that the remedy coming to her is already hers). In some contexts this means preventing a defendant from doing something that would change the status quo (a prohibitive injunction); in other contexts this means requiring a defendant to do something to maintain the status quo at the outset of the process (the less common mandatory injunction).<sup>108</sup> Equitable intervention in the form of an interlocutory injunction reflects equity’s view that a plaintiff has an interest in the future remedy—the plaintiff’s case is such that equity can see that remedy as coming to her. In a typical common law jurisdiction, therefore, a party seeking the injunction must prove that she has a strong *prima facie* case.<sup>109</sup> At minimum, this requires showing that there is a “serious question to be tried”<sup>110</sup> and that there is a “real prospect of succeeding.”<sup>111</sup> U.S. courts

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106 Intriguingly, the process need not be before the court issuing the injunction; in *Canadian Pac. Ltd. v. Brotherhood of Maint. of Way Emps. Canadian Pac. Sys. Fed’n*, the Court held that an injunction is available “where there is a justiciable right, wherever that right may fall to be determined.” [1996] 2 S.C.R. 495, para. 16. In other words, a court is free to issue an injunction so long as there is a legal right to be ascertained through a legal process, *regardless* of the forum in which that process takes place.

107 SMITH, *supra* note 6, at 20.

108 The principal difference, for the purposes of a tribunal determining whether to grant an injunction, is the strength of the underlying claim. The first stage of the test for a mandatory injunction is that there is “a strong *prima facie* case,” amounting to a demonstration that there is a “strong likelihood on the law and the evidence presented” that the application will “be ultimately successful” at trial. *See Canadian Broad. Corp.*, 1 S.C.R. at paras. 15, 17; *see also* *Pashby v. Delia*, 709 F.3d 307, 319 (4th Cir. 2013) (quoting *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 525 (4th Cir. 2003), *abrogated on other grounds by* *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006)) (holding that “when the preliminary injunction is ‘mandatory rather than prohibitory in nature,’ this Court’s ‘application of this exacting standard of review is even more searching.”); *Mastrovincenzo v. City of New York*, 435 F.3d 78, 89 (2d Cir. 2006) (quoting *Tom Doherty Assocs., Inc. v. Saban Ent., Inc.*, 60 F.3d 27, 34 (2d Cir. 1995)) (“In distinguishing between prohibitory and mandatory injunctions, we have noted that ‘[t]he typical preliminary injunction is prohibitory and generally seeks only to maintain the status quo pending a trial on the merits. A mandatory injunction, in contrast, is said to alter the status quo *by commanding some positive act* . . . [and] thus alters the traditional formula by requiring that the movant demonstrate a greater likelihood of success.”) (alteration in original).

109 *See* JEFFREY BERRYMAN, *THE LAW OF EQUITABLE REMEDIES* 32 (2d ed. 2013).

110 *Id.* at 33 (quoting *Am. Cyanamid Co. v. Ethicon Ltd.*, [1975] AC 396 (HL) 407 (appeal taken from Eng.)).

111 *Id.* (quoting *Am. Cyanamid*, [1975] AC 396 at 408). This is true across common-law jurisdictions. The test for injunctive relief in Canada, for instance, was most recently articulated by the Supreme Court in *R v. Canadian Broad. Corp.*, 2018 SCC 5, [2018] 1 S.C.R. 196, where the Court affirmed the test developed in *RJR-MacDonald Inc. v. Canada (Att’y*

have required that the plaintiff seeking a preliminary injunction establish that “he is likely to succeed on the merits.”<sup>112</sup> The appropriateness of an interlocutory injunction is tightly bound to the view that a plaintiff’s cause of action *actually* stands to attract a remedy.<sup>113</sup>

The relationship between the equitable interest underlying injunctions and the legal right that grounded equity’s view of what a person had coming to her is evident in the Supreme Court of Canada case, *R v. Canadian Broadcast Corporation (CBC)*.<sup>114</sup> In that case, the defendant had reported on a first-degree murder case, naming the victim. The Crown subsequently sought a criminal contempt conviction for the broadcaster’s breach of a publication ban placed on it, as well as an injunction calling for the identifying information in question to be removed until the contempt action was resolved.<sup>115</sup> The SCC viewed the Crown’s request for an injunction as improper insofar as it treated the criminal contempt citation and the injunction as separate matters.<sup>116</sup> The Alberta Court of Appeal had cast the availability of an injunction as a matter of “whether the Crown has demonstrated a strong *prima facie* case entitling it to a mandatory order directing removal of the identifying material from the website.”<sup>117</sup> In articulating the test for interlocutory injunctions in this way, the Court of Appeal sought to understand the plaintiff’s claim to an injunction apart from the legal outcome that (the Crown claimed) was on the horizon.

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*Gen.*) [1995] 3 S.C.R. 199. An interlocutory injunction requires the party applying for the injunction (i) to prove there is a serious question to be tried in the sense that the application is neither frivolous or vexatious; (ii) to demonstrate that there will be ‘irreparable harm’ if the application is refused; and (iii) to show that the balance of convenience, taking into account the effect of the injunction on the parties, favors a grant of the injunction. *Canadian Broad. Corp.*, 1 S.C.R. at para. 12.

<sup>112</sup> *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also* *Glossip v. Gross*, 576 U.S. 863, 876 (2015); *BOKF, NA v. Estes*, 923 F.3d 558, 561–62 (9th Cir. 2019). Other requirements are: he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest

<sup>113</sup> Equity’s intervention in anticipation of the plaintiff’s success depends on the mitigation of harm to a defendant should it turn out that the court awarded the injunction erroneously. In addition to assessing the strength of the plaintiff’s case upfront, there are mechanisms that equity can deploy to avoid harm to a defendant in cases where the court misjudged the strength of the plaintiff’s case *ex ante*. Plaintiffs may, for instance, be required to post injunction bonds, to secure indemnification of the defendant if it turns out that the injunction was erroneously granted.

<sup>114</sup> 1 S.C.R. 196.

<sup>116</sup> *Id.* at para. 23.

<sup>116</sup> *Id.* at para. 23.

<sup>117</sup> *Id.* at para 9.

The SCC emphasized that a mandatory interlocutory injunction is “a remedy ancillary to a cause of action,”<sup>118</sup> and so its availability is contingent on the strength of the associated claim in law.<sup>119</sup> The mandatory injunction just is the way to ensure that a contempt case with a high degree of success would not be gutted of efficacy *a priori* because the victim’s identity had already become widely known. The injunction would only be available had the Crown made out a strong *prima facie* case of criminal contempt,<sup>120</sup> which the Crown had not in that case.<sup>121</sup>

This case helpfully illustrates two points. First, the equitable interlocutory remedy exists to protect the party’s interest in what she has coming to her following the adjudication of her cause of action: an effective remedy. Assuming the Crown’s case, an injunction would prevent the dissemination of the inappropriate information prior to trial; absent such an injunction, the delay caused by the legal process would make an ultimate suppression of the identifying information at the time of trial ineffective. Secondly, *R v. CBC* shows that the availability of the injunctive interlocutory remedy is necessarily tied to the strength of the legal claim at the outset.

A *Mareva* injunction is a well-known<sup>122</sup> form of interlocutory injunction in common law jurisdictions.<sup>123</sup> A *Mareva* injunction is an *in personam* order, generally granted *ex parte*, requiring that a party neither deal with nor remove assets (equivalent to the value of the applicant’s claim) from the jurisdiction. As assets have become increasingly mobile and thus more readily removed from the courts’ jurisdiction, *Mareva* injunctions, initially developed in the context of the English shipping industry, have been used across a wide range of disputes.<sup>124</sup>

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118 *Id.* at para. 24 (quoting *Amchem Prods., Inc. v. British Columbia (Workers’ Comp. Bd.)*, [1993] 1 S.C.R. 897, 930).

119 *Id.* at para. 25.

120 The Court also suggested that this may not have been sufficient. *See id.* at para. 26 (“It is implicit in the foregoing analysis that, in some circumstances, an interlocutory injunction may be sought and issued to enjoin allegedly criminal conduct. The delineation of those circumstances, however, I would not decide here. To be clear, the disposition of this appeal should not be taken as standing for the proposition that injunctive relief is ordinarily or readily available in criminal matters, or that—even had the Crown been able to show in this case a strong *prima facie* case of criminal contempt—an injunction would have been available.”).

<sup>121</sup> *Id.* at para. 31.

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123 *Mareva Compania Naviera SA v. Int’l Bulkcarriers SA* [1980] All E.R. 213 (Eng.); SHARPE, *supra* note 53, ¶ 2.700.

124 In Canada, the Supreme Court first recognized *Mareva* injunctions in *Aetna Fin. Servs. Ltd. v. Feigelman*, [1985] 1 S.C.R. 2, a bankruptcy dispute. However, lower courts had made use of *Mareva* injunctions for years prior to this. *See, e.g., Liberty Nat’l Bank & Trust Co. v. Atkin*, 31 O.R. 2d 715 (Can. Ont.); *Parmar Fisheries Ltd. v. Parceria Maritima Esperanca L. DA.*, 53 N.S.R. 2d 338 (Can. Nov. Scot.). In the United States, *Mareva* injunctions have not flourished as they have in Canada and elsewhere. A narrow five-four decision of the U.S. Supreme Court in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond*

The prejudgment restraint on the disposition of assets pending trial is an extraordinary form of equitable relief, imposing potentially significant costs on the defendant. Accordingly, an application for a *Mareva* injunction is demanding; it requires (i) a full and frank disclosure of all matters in the applicant’s knowledge which are material, (ii) a statement of the particulars of the claim against the defendant, including the amount of the claim, fairly stating the points against the defendant, (iii) the grounds for believing that there is a risk of assets being removed from the court’s jurisdiction prior to the judgement or award being satisfied, (iv) an undertaking in damages, in the event the claim fails or the injunction is unjustified, and (v) grounds for believing that the defendant has assets in the jurisdiction at the time of the application.<sup>125</sup> Although a *Mareva* injunction is itself prohibitive, not mandatory, the applicant nevertheless has to prove that there is a “strong prima facie case” for the underlying claim.<sup>126</sup>

In the context of *Mareva* injunctions, as with interlocutory injunctions generally, equity conceives of the value of the ultimate legal remedy as something a person has coming to her—given its view of the strength of her legal claim. Equity intervenes to protect the potential value that adheres in a claim, value that ought to flow through the established channel of the judicial process, by imposing specifically performable duties on the defendant. A defendant is prevented from removing her assets so as to divert or destroy the value of a future judgement in her favor.<sup>127</sup>

Equity has a related role to play after judicial proceedings are complete, but before judgments are enforced. In the nineteenth century, courts in common-law jurisdictions used equitable powers to “fill the gap” between the issuance of a judgement and the judgement-creditor’s enforcement of that judgement through other injunctions to protect assets, pending enforcement. In *Cummins v. Perkins*, a plaintiff was directed to pay the defendants’ costs after a failed negligence action; the plaintiff, a married woman, was ordered to pay out of her separate estate—which consisted of just one share to which she was entitled under a will. The defendants, fearing they would lose the benefit of the judgement, applied for a receiver to be appointed for the share. At the Chancery Court, the plaintiffs’ counsel argued that such an order should not be granted; it would amount to “equitable execution, but,

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*Fund, Inc.*, 527 U.S. 308, 332–33 (1999), held that federal courts do not have equitable jurisdiction to issue *Mareva* injunctions because such injunctions were not available at the time the 1789 Judiciary Act was enacted. See also *SEC v Cavanagh*, 445 F.3d 105, 117 n.27, 118 n.28 (2d Cir. 2006); *Velasquez v. Metro Fuel Oil Corp.*, No. 12 CV1548(NGG)(LB), 2012 WL 5879446, at \*1 (E.D.N.Y. Oct. 25, 2012); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 117 n.8 (2d Cir. 2007). For criticism of the majority approach in *Grupo Mexicano*, see Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1009–14 (2015), and David Capper, *The Need for Mareva Injunctions Reconsidered*, 73 FORDHAM L. REV. 2161, 2174 (2005).

<sup>125</sup> See SHARPE, *supra* note 53, ¶¶ 2.850–2.950.

<sup>126</sup> *Aetna*, [1985] 1 S.C.R. at 10 (quoting *Chitel v. Rothbart* (1982), 39 O.R. 2d 513, 522 (Can. Ont. C.A.)) (emphasis omitted).

according to established practice, to entitle [the defendants] to equitable execution they must be in a position to get legal execution. execution they must be in a position to get legal execution.” Kekewich J. rejected this position, notwithstanding that “equitable enforcement” was apparently “entirely without precedent and the established rules of the Court.” Lindley MR, at the Court of Appeal, affirmed. The equitable powers of the court allowed it to intervene to protect the value that would flow to the defendants, notwithstanding that their right to a particular source of that value had not yet crystalized. Equitable “enforcement” of this sort can be seen in other actions aimed at the preservation of assets, such as a postjudgment injunction to restrain assets while quantum is assessed<sup>128</sup> or pending appeal,<sup>129</sup> or where a party seeks to have a foreign judgement recognized in Canada.<sup>130</sup>

### CONCLUSION

This paper has argued that there is a class of remedies—equitable remedies—that go beyond the enforcement of our property rights, which concern only what we already have, and our contractual rights, which concern only a person’s right to another’s performance as agreed. These equitable remedies, on this account, stand as the recognition and protection of a distinct equitable right to the unobstructed flow of what a person has coming to her, as a party to a contract, as a competitor in a free market, as a neighbor, as a party to a lawsuit, and more. Equity intervenes in the form of “a negotiable duty” that constrains whoever now has the power to compromise that interest through obstructing or diverting its flow. This negotiable duty travels to whoever bears the power to compromise the equitable interest. A specifically performable contract, on this approach, is thus a composite of two distinct rights: the contractual right to performance and an equitable right that extends beyond the contractual right. Breaking out of the confines of privity, the equitable right is enforceable against whoever bears the power to compromise the protected interest with notice of it. One important implication of this account is that the equitable interests and duties that arise in conjunction with specific performance need not and often do not track what the parties actually agreed.

The need for equity to recognize and to protect our interest in “what we have coming to us” is at the same time a recognition of a gap between what contract law in particular, and private law generally, aims at—viz. to bring about a planned-for state of affairs—and what contract law in particular, and private law generally actually does, viz. merely to *obligate* private actors to exercise other independent powers they have to bring about that state of

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128 See, e.g., **Lamont v. Kent**, (1999) 30 CPC 4th 168 (Ont. Gen. Div.); *Orwell Steel (Erection and Fabrication) Ltd. v. Asphalt & Tarmac (U.K.) Ltd.*, [1984] 1 WLR 1097 (QB) at 1097.

129 *Walter E. Heller Fin. Corp. v. Am. Gen. Supply of Can. (1969) Ltd.*, [1986] 30 D.L.R. 4th 600, 609 (Can. Ont. C.A.).

130 See, e.g., *Hunt v. BP Expl. Co. (Libya)*, [1980] 1 NZLR 104, (SC) at 118 (N.Z.).

affairs. While an agreement to sell property obligates a vendor to exercise her power to convey property, the agreement is not in itself an exercise of that power to convey. It falls to equity to perfect private law, by preventing others from compromising our interest in what we have coming to us, while it is en route.