

Specific Performance

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INTRODUCTION

The standard remedy for breach of contract in the common law is expectation damages.¹ Expectation damages attempt to put the promisee in a position that is financially equivalent to that she would have been in had the promisor performed,² giving her “the benefit of the bargain.”³ They vindicate the promisee’s *expectation interest*.⁴ In practice, expectation damages are typically undercompensatory.⁵ This is a consequence of limiting doctrines, like foreseeability, mitigation, and certainty—as well as of the inevitable evidentiary and epistemic limitations inherent to judicial determinations of monetary losses.

In some cases, though, expectation damages are not simply undercompensatory, but would in fact be unable to vindicate the promisee’s

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¹ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS §§ 347, 357 (1981).

² Lon Fuller and William R Perdue, ‘The Reliance Interest in Contract Damages: 1’ (1936) 46 The Yale Law Journal 52, 54. See also *Robinson v Harman* (1848) 1 Exch 850, 855.

³ E Allan Farnsworth, *Contracts* (4 edition, Aspen Publishers 2004) 730.

⁴ Fuller and Perdue (n 2) 54.

⁵ Daphna Lewinsohn-Zamir, ‘The Questionable Efficiency of the Efficient-Breach Doctrine’ (2012) 168 Journal of Institutional and Theoretical Economics 5; Gregory Klass, ‘Efficient Breach’ in Gregory Klass, George Letsas and Prince Saprai (eds), *Philosophical Foundations of Contract Law* (Oxford University Press 2014) 369; Craig S Warkol, ‘Resolving the Paradox between Legal Theory and Legal Fact: The Judicial Rejection of the Theory of Efficient Breach’ (1998) 20 Cardozo Law Review 321, 351; Tess Wilkinson-Ryan and David A Hoffman, ‘Breach Is For Suckers’ (2010) 63 Vanderbilt Law Review 1003, 1006.

interest and would therefore be “inadequate.”⁶ This is the case, particularly, in situations involving unique goods without a market substitute.⁷ In these situations, common law jurisdictions make the remedy of specific performance available as an equitable—and therefore, exceptional and, at least in theory, discretionary—remedy.⁸

The fact that the standard legal remedy for breach is an order to pay an amount of money raises important theoretical questions. The questions are heightened by expectation damages’ undercompensatory aspects. These aspects are relevant, but in this chapter, I will ignore them. I will assume, in other words, an ideal version of the expectation remedy, according to which the remedy does what it should: it makes the promisee financially indifferent between performance and breach. This assumption does not eliminate the theoretical puzzles. These puzzles include, for instance, the question of why, if the promisee seems to be entitled to performance, the only remedy they can get in the standard case is monetary (Part I); concerns about the divergence between the remedial regime and the morality of promise (Part II); and doubts about parties’ inability to contract for specific performance (Part III). I will analyze some familiar justifications for the common law’s stance on specific performance, which also act as potential rejoinders to the philosophical puzzles raised by it (Part IV). Yet the deeper answer to these puzzles, I will suggest, requires questioning the inference from primary rights to remedies (Part V).⁹

⁶ *Javierre v. Central Altagracia*, 217 U.S. 502, 508 (1910); *Falcke v Gray* (1859) 4 Drew 651.

⁷ See, e.g., UNIFORM COMMERCIAL CODE, § 2-716(1). See also Theodore Eisenberg and Geoffrey P. Miller, ‘Damages Versus Specific Performance: Lessons from Commercial Contracts’ (2015) 12 *Journal of Empirical Legal Studies* 29, 33.

⁸ Anthony T. Kronman, ‘Specific Performance’ (1978) 45 *The University of Chicago Law Review* 351, 355. For a brief historical survey, see Farnsworth (n 3) 739–743.

⁹ These puzzles are aggravated by the fact that not all legal systems are consistent with the common law in this regard. Many civil law jurisdictions grant specific performance as the standard legal remedy. See John P. Dawson, ‘Specific Performance in France and Germany’

I. RIGHTS TO PERFORMANCE AND MONETARY REMEDIES

According to the rules of contract law in most (if not all) Western jurisdictions, the promisor is under a legal duty to perform.¹⁰ If they do not perform, the promisee has a cause of action for breach of contract.¹¹ But the usual remedy under the common law does not replicate or directly enforce this right. Instead, the promisee is only entitled—at least in the typical case—to demand monetary compensation.

There is a long tradition in American law that denies the assertion that promisors have a legal duty to perform—and promisees a correlative legal right to performance. According to that view, since contractual rights are protected by money damages, contractual rights are not really rights to

(1959) 57 Michigan Law Review 495; Solène Rowan, *Remedies for Breach of Contract: A Comparative Analysis of the Protection of Performance* (Oxford University Press 2012) 17–69. However, whether these surface differences reflect real practical differences or not is a contested question. See Leon Yehuda Anidjar, Ori Katz and Eyal Zamir, ‘Enforced Performance in Common Law Versus Civil Law Systems: An Empirical Study of a Legal Transformation’ (2020) 68 The American Journal of Comparative Law 1, 10–12; E Allan Farnsworth, ‘Comparative Contract Law’ in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford Handbooks in Law 2008); James Gordley, *Foundations of Private Law* (Oxford University Press 2007) 390–391; Felipe Jiménez, ‘Against Parochialism in Contract Theory: A Response to Brian Bix’ (2019) 32 Ratio Juris 233, 243–244; Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (3rd edn, Clarendon Press 1998) 484.

¹⁰ See, e.g., Articles 28, 45, and 46 of the United Nations Convention on Contracts for the International Sale of Goods (CISG); Article 1590 of the Civil Code of Quebec; Article 3:296 of the Dutch Civil Code; Article 1452 of the Italian Civil Code; §241 of the German Civil Code. On American contract law, claiming that ‘[m]uch detail in the law of contract is understandable only with reference to this principle that a part’s fair expectation of return performance deserves protection,’ see E Allan Farnsworth and others, *Contracts: Cases and Materials* (7th edn, Foundation Press 2008) 691. On English contract law, see Jack Beatson, *Anson’s Law of Contract* (28th edn, Oxford University Press 2002) 499.

¹¹ Andrew Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, Oxford University Press 2004) 4. Regarding private law in general, see Paul B Miller, ‘Justifying Fiduciary Remedies’ (2013) 63 University of Toronto Law Journal 570, 578.

performance but a right to obtain performance or monetary compensation, as the promisor chooses. In Holmes's words, "the duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, and nothing else."¹²

There are multiple analytical advantages that can be derived from a purely remedial or sanction-based understanding of legal rules and obligations. The broad literature on the economic analysis of contract law is, in part, a reflection of these analytical advantages. Still, I believe that as an account of the content of contractual obligation—and more generally as an account of legal duties—a purely remedial understanding is wrong.¹³ It is, moreover, an implausible interpretation of the rules and doctrines of the common law of contracts. But I will not make that argument here.¹⁴ The reason is that if we believed—like Holmes and his followers—that primary rights ought to be understood by reference to the remedies that enforce them, then the enforcement of contracts through money damages would not raise any significant issue. The remedial regime only becomes an issue if we assume that primary rights have a content that can be, at least to some extent, determined without reference to remedies, and that the correct interpretation of those rights is that they are rights to obtain performance.

Under that assumption, shared by most contracts scholars beyond Holmes's sphere of influence,¹⁵ the legal system does in fact seem to be doing something quite strange when it enforces a legal right to performance through

¹² Oliver Wendell Holmes, 'The Path of the Law' (1997) 10 Harvard Law Review 991, 995.

¹³ For the general argument, see HLA Hart, *The Concept of Law* (Clarendon Press 1994) 26–49.

¹⁴ See Felipe Jiménez, 'Rethinking Contract Remedies' (2021) 53 Ariz. St. LJ 1153.

¹⁵ See, e.g., Peter Benson, *Justice in Transactions: A Theory of Contract Law* (Harvard University Press 2019) 241–274; Daniel Friedmann, 'The Efficient Breach Fallacy' (1998) 18 The Journal of Legal Studies 1; Lionel Smith, 'Understanding Specific Performance' in Nili Cohen and Ewan McKendrick (eds), *Comparative Remedies for Breach of Contract* (Hart Publishing 2005).

a damages award.¹⁶ Note, incidentally, that the common law chooses to give the promisee a monetary remedy even when performance of the primary duty would be possible.¹⁷ As Jennifer Nadler argues, on the prevalent assumption that the primary contractual obligation is an obligation to perform, “courts, in treating damages as the presumptive remedy for breach, must be understood as incoherently choosing a second-best remedy when the best is available.”¹⁸

The fact that remedies diverge in this way from primary rights seems puzzling because, on a very widely held and quite plausible view, remedies are the servants of rights¹⁹—the reason for having a remedy is the infringed right.²⁰ The infringed right demands a response, and it is difficult to understand why, if performance of the duty is still feasible, the law declines to do so as a general matter. Note here that the situation is not just that specific performance is unavailable in certain specific situations (such as personal service contracts). Specific performance is unavailable as a general matter. It is the exception rather than the rule.²¹

¹⁶ Mindy Chen-Wishart, ‘Contractual Remedies: Beyond Enforcing Contractual Duties’ (2017) 85 *George Washington Law Review* 1617, 1617–1618; Dori Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Hart Publishing 2003) 95; Ewan McKendrick, ‘Breach of Contract and the Meaning of Loss’ (1999) 52 *Current Legal Problems* 37, 47.

¹⁷ Rowan (n 9) 25.

¹⁸ Jennifer Nadler, ‘Freedom from Things: A Defense of the Disjunctive Obligation in Contract Law’ (2021) 27 *Legal Theory* 177.

¹⁹ See, e.g., Gregory C Keating, ‘The Priority of Respect over Repair’ (2012) 18 *Legal Theory* 293.

²⁰ Ernest J Weinrib, ‘Punishment and Disgorgement as Contract Remedies’ (2003) 78 *Chicago-Kent Law Review* 55, 57. See also Ernest J Weinrib, ‘Two Conceptions of Remedies’ in Charles Rickett (ed), *Justifying Private Law Remedies* (Hart Publishing 2008) 14.

²¹ At least at the level of traditional legal doctrine—even if in practice specific performance might be more available. See Anidjar, Katz and Zamir (n 9); Yonathan A Arbel, ‘Contract Remedies in Action: Specific Performance’ (2015) 118 *West Virginia Law Review* 369;

One could worry that this is giving too much normative weight to the existence of the contractual right to performance. According to this concern, while legal rights might be legitimate bases for individuals' expectations and might ground at least a defeasible claim to enforcement, we should not forget that many additional considerations come into play in questions of enforcement.²² This is a plausible response, and one I am very sympathetic to. But there is one important problem it faces: contractual rights might not be *mere* legal rights. On a relatively prevalent view, they might be at the most basic level promissory rights or, at least, legal rights that parallel, build upon, or piggyback on promissory rights. If that is the case, the exceptional availability of specific performance seems not just inconsistent with the primary legal right, but also perhaps morally problematic, or at least suspicious. I turn to this issue in the next section.

II. PROMISES AND CONTRACT REMEDIES

Promises impose obligations to perform the promised action(s). There is an endless literature discussing the grounds of promissory obligation.²³ To some extent, though, to make a promise is simply equivalent to assuming an obligation to perform the promised action.²⁴ An explanation of the nature of promising is, in this sense, an explanation of their bindingness.

As we saw in the previous section, contract law coincides, at least superficially, with promissory obligations in this regard. At the level of enforcement, however, the issue is less clear. According to Seana Shiffrin, for instance, if contract law “ran parallel to morality,” it would require

Theresa Arnold and others, “‘Lipstick on a Pig’: Specific Performance Clauses in Action Essays’ (2021) 2021 Wisconsin Law Review 359.

²² Chen-Wishart (n 16) 1621–1622.

²³ Allen Habib, ‘Promises’ in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (2018) <<https://plato.stanford.edu/archives/spr2018/entries/promises/>> accessed 30 March 2021.

²⁴ John Rawls, ‘Two Concepts of Rules’ (1955) 64 *The Philosophical Review* 3; John R Searle, ‘How to Derive “Ought” From “Is”’ (1964) 73 *The Philosophical Review* 43.

performance,²⁵ because performance is what the promisee is owed given the fact that contracts are, or at least involve, promises. Contract law's stance on specific performance as an exceptional remedy, therefore, diverges from the demands of morality.²⁶

There are multiple reasons to be concerned about this divergence,²⁷ but to the extent it exists, it seems to strengthen the argument that there is something odd and perhaps incoherent about a legal regime that enforces contracts through money damages, and that only exceptionally allows for the specific enforcement of contracts. Perhaps this oddity is ultimately justified because of other legal considerations (I return to this point below).²⁸ But it still exists and demands an explanation, according to the promissory critique.

Now one answer to the concern could be that principles of promise-keeping do not say much about enforcement.²⁹ While promissory morality speaks to our primary obligations, it does not address questions of enforcement.³⁰ I am sympathetic to this line of response.³¹ While perhaps promissory duties have an impact on the legitimate structure of contract law, they might not determinatively settle the exact contours of the institution and its enforcement mechanisms. Perhaps morality dictates that promises ought to be kept and that this judgment ought to be reflected in our enforcement practices regarding the promises we have decided to treat as enforceable contracts. Yet this might still leave things relatively open for legal

²⁵ Seana Shiffrin, 'The Divergence of Contract and Promise' (2007) 120 *Harvard Law Review* 708, 722.

²⁶ *ibid* 722–723. *But see* Charles Fried, *Contract as Promise* (Harvard University Press 1981) 17.

²⁷ Shiffrin (n 25).

²⁸ *ibid* 733–740.

²⁹ See (regarding default rules in general) Richard Craswell, 'Contract Law, Default Rules, and the Philosophy of Promising' (1989) 88 *Michigan Law Review* 489.

³⁰ Nathan B Oman, *The Dignity of Commerce: Markets and the Moral Foundations of Contract Law* (University of Chicago Press 2017) 117.

³¹ My analysis here summarizes my argument in Jiménez (n 14).

determination.³² Even if we are under a moral obligation to perform our promises, it is unclear whether this obligation says anything of general significance—or anything relevant for legal design—about the remedies courts ought to impose when such duties are not satisfied.³³

This is a plausible response, but it is relatively abstract. It talks about “promissory obligation” instead of specific promises. The issue here is that specific promises might in fact tell us a lot about enforcement. It could be the case, first, that an accurate interpretation of any given contract leads us to the conclusion that, in fact, *this* promise does demand a specific remedial response.³⁴ In those situations, it seems that promissory morality does demand the specific remedy required by the promise. The familiar claim that promissory morality leaves questions of legal enforcement underdetermined is plausible at a high level of abstraction. But whether a specific promise in fact says nothing about legal enforcement is an open interpretive question. The specific features of specific agreements might actually say a lot about the morally correct enforcement mechanisms. And there is no reason to assume that what is true of a specific promise might not be true of a large segment of the promises that the law of contracts enforces. In these conditions, the argument that promissory morality says *nothing* about enforcement can start to sound less plausible. It could be the case that many specific promises that the law of contracts enforce do demand, as a moral matter, an injunctive

³² See John Finnis, *Natural Law and Natural Rights* (Clarendon Press 1980) 284–289; Tony Honoré, ‘The Dependence of Morality on Law’ (1993) 13 *Oxford Journal of Legal Studies* 1, 2–4.

³³ This is a more moderate version of the arguments made by Craswell (n 29); Liam Murphy, ‘The Practice of Promise and Contract’ in Gregory Klass, Prince Saprai and George Letsas (eds), *Philosophical Foundations of Contract Law* (Oxford University Press 2014) 169. See also Jody Kraus, ‘The Correspondence of Contract and Promise’ (2009) 109 *Columbia Law Review* 1603, 1627–1628.

³⁴ In fact, one could pursue a justification of the complete remedial regime in these terms. See Daniel Markovits and Alan Schwartz, ‘The Myth of Efficient Breach: New Defenses of the Expectation Interest’ (2011) 97 *Virginia Law Review* 1939.

response to their breach.

III. FREEDOM OF CONTRACT AND SPECIFIC PERFORMANCE

There is an easy epistemic answer to the puzzle. Even if some promises might demand specific remedial responses at the “ontological” level, at the epistemic level that response might just be hard to figure out. But this is where things get even trickier. Not only does the law of contract remedies provide that the standard legal remedy for breach is expectation damages, and specific performance the exception. It also refuses to defer to parties’ preferences when they agree on a specific remedy.³⁵ In these cases, even if the parties deliberately agreed that specific performance is the appropriate remedial response to breach of their agreement and expressed it clearly and beyond any doubt—that is, even when there is no epistemic question left about what their promise requires—the legal system still seems to hold on to a preference for money damages.

The penalty doctrine is the clearest instance of this stance,³⁶ but it is not the only one. Under the American common law of contracts, remedial clauses whereby the parties agree to specific performance as the remedy are not binding on courts. Courts retain equitable discretion even in the presence of parties’ explicitly and clearly revealed preferences regarding the remedy.³⁷

This doctrinal reality seems, at least *prima facie*, at odds with freedom of contract and with the notion that contract enforcement is the enforcement

³⁵ See Jody Kraus and Robert E. Scott, ‘The Case against Equity in American Contract Law’ (2020) 93 Southern California Law Review 1323, 1367–1374.

³⁶ Seana Shiffrin, ‘Remedial Clauses: The Over-Privatization of Private Law’ (2016) 67 Hastings Law Journal 407, 414–415.

³⁷ See *ibid* 414; Edward Yorio and Steve Thel, *Contract Enforcement: Specific Performance and Injunctions* (Aspen Publishers 2011) 439–448. This limitation is not impossible to surpass. Strategic contract drafting—including the recitation of the correct phrases, such as “irreparable injury”—together with the willingness of at least certain courts to defer to parties despite traditional doctrine can bypass the limitation. See Arnold and others (n 21).

of voluntary agreements.³⁸ It is also at odds with standard welfare economics: if parties are best positioned to know what maximizes the satisfaction of their preferences, judges should defer to their remedial preferences.³⁹ The law of contract remedies should be a law of default, not mandatory, rules.⁴⁰ From the economic perspective, this becomes particularly pressing given that it is unlikely that any one remedy will be optimal across different parties, relationships, and transactional contexts.⁴¹ Instead of acknowledging this, it seems, the common law of contracts appears fixated on giving judicial institutions the last word about enforcement.

Yet many commentators think this fixation is justified. The moral value and justification of our enforcement practices turn on multiple concerns, and the consistency of legal enforcement mechanisms with parties' revealed preferences is only one of them. More importantly, courts are independent, impartial parties that resolve legal disputes through an exercise of public authority and power. They shouldn't be the mere servants of private parties.⁴²

This still raises questions. Perhaps our public enforcement practices shouldn't be held hostage to private preferences. But it is difficult to see why those enforcement practices shouldn't be governed, or at least heavily influenced, by parties' preferences in at least some situations—for instance, when those preferences are expressed in a lengthily negotiated contract between sophisticated parties in a relatively equal footing, and without

³⁸ Kraus and Scott (n 35) 1368.

³⁹ See, e.g., Charles J Goetz and Robert E Scott, 'Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach' (1977) 77 Columbia Law Review 554. I am ignoring here, as the traditional economic argument does, questions about externalities—and particularly externalities that affect courts and other public institutions in charge of legal enforcement.

⁴⁰ Markovits and Schwartz (n 34) 1952 note 29.

⁴¹ Theresa Arnold and others, 'The Myth of Optimal Expectation Damages' (2020) 104 Marquette Law Review 42, 145.

⁴² Shffrin (n 36) 420–421.

infringement of third parties' rights.

IV. JUSTIFYING THE COMMON LAW'S STANCE ON SPECIFIC PERFORMANCE

The argument so far has been somewhat one-sided, voicing concerns about the state of the law of specific performance, but postponing some relatively obvious rejoinders and justifications in its favor. In this section, I turn to several common and plausible justifications for the relative unavailability of specific performance.

A. Personal Autonomy

There is an obvious tension between personal autonomy and a coercive judicial order specifically imposing an obligation to perform a promised action. From this perspective, perhaps personal autonomy offers a response to the concerns about the general unavailability of specific performance. This unavailability might reflect a commitment to the autonomy of the promisor's future self and their ability to change their mind.⁴³ A liberal legal regime cannot ignore, according to this argument, the fact that people sometimes change their mind, and that specifically enforcing a contract might have a negative impact on the autonomy of individuals.⁴⁴

This is, perhaps, the explanation for why many deontological accounts of contract law might be friendly to expectation damages as the standard remedy.⁴⁵ As Smith puts it, the direct enforcement of contractual obligations is a *prima facie* intrusion on personal liberty, the coercive imposition of an obligation to perform positive acts in the benefit of another

⁴³ Hanoch Dagan and Michael Heller, 'Specific Performance' (2020) 21–22 <<https://papers.ssrn.com/abstract=3647336>>.

⁴⁴ *ibid* 25.

⁴⁵ Perhaps the clearest example, because he does not even refer to specific performance, is Fried (n 26). See Dori Kimel, 'Remedial Rights and Substantive Rights in Contract Law' (2002) 8 Legal Theory 313, 320–321.

person.⁴⁶

One obvious response to this concern is that the parties have actually bound themselves to do something in the future. They have deliberately decided to restrict their future freedom, and enforcement through specific performance simply reaffirms the parties' voluntary restriction.⁴⁷ Under this view, specific performance is simply a form of honoring the self-imposed obligations of autonomous individuals. The personal autonomy argument against specific performance is somewhat incomplete, from this perspective.⁴⁸ Moreover, at least in some instances, specific performance is no more of an impingement on personal autonomy than a monetary award.⁴⁹

At a more general level, autonomy concerns might exist in the specific enforcement of particular types of contracts, such as contracts for personal services.⁵⁰ This is something the current legal regime already recognizes.⁵¹ But beyond these exceptional situations, it is hard to see why enforcing the sale of a good, the rendering of a service by a corporate entity, or the payment of an agreed sum through specific performance would be particularly troublesome.⁵² The autonomy justification justifies too little, as it does not

⁴⁶ Stephen Smith, *Contract Theory* (Oxford University Press 2004) 400–401. Dori Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Hart Publishing 2003) 100–109.

⁴⁷ Martin Hogg, *Promises and Contract Law: Comparative Perspectives* (Cambridge University Press 2011) 352.

⁴⁸ Kimel, 'Remedial Rights and Substantive Rights in Contract Law' (n 45) 322.

⁴⁹ *ibid.*

⁵⁰ *Fitzpatrick v. Michael*, 9 A.2d 639 (Md. 1939). See also Dagan and Heller (n 43) 35.

⁵¹ RESTATEMENT (SECOND) OF CONTRACTS § 367(1).

⁵² The order to payment of an agreed sum occupies a curious position in the common law. At one level, one could argue it is the best and most routine case of specific performance—which, incidentally, would show that specific performance is not *as rare* as the received wisdom seems to suggest. See Daniel Friedmann, 'The Performance Interest in Contract Damages' (1995) 111 *Law Quarterly Review* 628, 630. At a different level, the remedy could also be seen as the ideal version of expectation damages: a monetary remedy that *genuinely* puts the promisee in an equivalent position to that she would have been in in case of

cover many instances in which the common law of contracts denies the availability of specific performance.

B. The Harm Principle

Dori Kimel has offered a modified version of the autonomy argument that seems more promising. According to this argument, specific performance, while not an absolute infringement on personal autonomy, is *ceteris paribus* more intrusive than a monetary remedy. This gives us at least one reason to prefer the latter over specific performance.

In order to make this argument, Kimel alludes to the Harm Principle. According to its classic formulation by John Stuart Mill, the principle states that the only legitimate aim of exercises of state coercion against an individual are the prevention of harm to third parties.⁵³ As Kimel argues, at face value the Harm Principle seems incapable of telling us much about the appropriate remedy for breach of contract, as long as whatever remedy we choose aims at preventing or repairing a harm to the promisee.⁵⁴ However, as Kimel explains, the full justification and identification of the content of the Harm Principle is only possible within the context of a larger substantive theory about the value of political freedom.⁵⁵ Within that context, it is easy to see that a commitment to the Harm Principle should also direct us, whenever a certain harm can be prevented or repaired in multiple ways, to choose the measure that is comparatively less intrusive against individual freedom. From this perspective, specific performance should—assuming it is more intrusive than monetary damages—only be available when the less intrusive remedy

performance by the promisor, a perfectly compensatory monetary remedy. See Nadler (n 18). The reason for this curiosity, I think, is that the remedy really collapses the distinction between specific performance and expectation damages.

⁵³ John Stuart Mill, *Utilitarianism* (Hackett Publishing 2002) ch 1.

⁵⁴ Kimel, 'Remedial Rights and Substantive Rights in Contract Law' (n 45) 331.

⁵⁵ *ibid* 332.

cannot fully redress the harm caused by breach.⁵⁶ In Kimel's view, while the specific performance remedy is logically speaking the most obvious and standard remedy, whenever an award of damages is sufficient to protect the promisee from harm, this deviation from the logical remedy would be morally warranted.⁵⁷

This is an ingenious argument, but again one that relies on the premise that, for the vast majority of cases, specific performance would be more intrusive than money damages. In other terms, Kimel's argument explains why certain contracts should not be enforced through specific performance. But it is not an argument for the *general* unavailability of specific performance.

C. Administrability

Perhaps the justification for the common law's position on specific performance is connected to more mundane concerns. Perhaps the concerns about specific performance are not so much about individual freedom or personal autonomy, but about the more pragmatic issue of judicial administrability. The argument is that, unlike a money damages award, an order of specific performance requires courts to oversee that the performance is actually rendered in the contracted for conditions.⁵⁸

The argument, while plausible and consistent with a relatively common judicial standard for denying specific performance,⁵⁹ is not always correct. In many instances, specific performance might be cheaper to administer than expectation damages.⁶⁰ Moreover, even when successful, the

⁵⁶ *ibid.*

⁵⁷ Dori Kimel, 'The Morality of Contract and Moral Culpability in Breach' (2010) 21 King's Law Journal 213, 224.

⁵⁸ Kronman (n 8) 373.

⁵⁹ See *Lorch, Inc. v. Bessemer Mall Shopping Center*, 210 So. 2d 972 (Ala. 1975).

⁶⁰ Steven Shavell, 'Specific Performance versus Damages for Breach of Contract: An Economic Analysis' (2006) 84 Texas Law Review 831, 845–846.

argument by itself is inconclusive, given that it is unclear whether the administrability costs of specific performance would exceed the benefits generated by its availability.⁶¹ The question can only be answered empirically. There is nothing telling us *a priori* that the administrative costs of specific performance cannot be outweighed by whatever benefits its availability generates.

D. Efficiency

This leads me to the final, and perhaps most familiar, argument in favor of the expectation damages default and against a greater availability of specific performance. This view is partly connected to the theory of efficient breach. According to the most basic version of the theory (which, following Gregory Klass, we could call “simple efficient breach”⁶²), the expectation remedy is justified because, and insofar, it facilitates the optimal allocation of goods and services. The remedy deters breach as long as performance is socially optimal, but incentivizes breach when the latter is a more efficient alternative.⁶³ In this second situation, the expectation remedy allows for a Pareto improvement: the promisee is left as good as in the case of performance, and the promisor is better off.⁶⁴ Thus, the theory, starting from the reasonable premise that performance is not always socially desirable,⁶⁵ claims that contract law should

⁶¹ Alan Schwartz, ‘The Case for Specific Performance’ (1979–1980) 89 Yale Law Journal 271, 293.

⁶² Klass (n 5).

⁶³ Robert L Birmingham, ‘Breach of Contract, Damage Measures, and Economic Efficiency’ (1969) 24 Rutgers Law Review 273, 292.

⁶⁴ “The Pareto-superior criterion relates two states of affairs and says that one is an improvement over the other if at least one person’s welfare improves while no one else’s welfare is diminished.” Jules L Coleman, ‘Efficiency, Utility, and Wealth Maximization’ (1980) 8 Hofstra Law Review 509, 513.

⁶⁵ Richard Posner, *Economic Analysis of Law* (Aspen Publishers 2011) 150.

sometimes encourage breach of contract.⁶⁶

There is one very simple problem with this view. We do not know whether it is true. Economic analysis does not provide one single answer regarding the (in)efficiency of specific performance, even if judged exclusively from the perspective of the incentives it generates regarding the decision to perform or breach. Thus, although many commentators argue that the common law's position on specific performance is justified on efficiency grounds,⁶⁷ many others make the opposite argument: specific performance should not be routinely denied, because it is more efficient than the expectation remedy.⁶⁸ In the end, any rule will have advantages and disadvantages in terms of efficiency.⁶⁹ The efficiency criterion does not provide a univocal answer because remedies have incentive effects on multiple decisions.⁷⁰ The question about the all-things-considered economically optimal remedy is too complicated to lend itself to a univocal answer, such as the one that would be needed to justify the common law's stance on specific performance.

V. RIGHTS, REMEDIES, AND SPECIFIC PERFORMANCE

So, it seems the law refuses to enforce contracts as a general matter through a judicial order of specific performance. This refusal is relatively robust. It is not affected by the fact that performance might still be possible. The refusal

⁶⁶ Stephen Smith, 'Performance, Punishment and the Nature of Contractual Obligation' (1997) 60 *The Modern Law Review* 360, 360. See also Smith, *Contract Theory* (n 46) 403.

⁶⁷ For example, Posner (n 65); Kronman (n 8).

⁶⁸ Thomas S Ulen, 'The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies' (1984) 83 *Michigan Law Review* 341. It could also turn out that, from the standpoint of efficiency, multiple remedies are in equipoise. See Richard RW Brooks, 'The Efficient Performance Hypothesis' (2006) 116 *The Yale Law Journal* 568.

⁶⁹ Smith, *Contract Theory* (n 46) 403–408.

⁷⁰ See, e.g., Eric A Posner, 'Contract Remedies: Foreseeability, Precaution, Causation and Mitigation' in Boudewijn Bouckaert and Gerrit De Geest (eds), *The Encyclopedia of Law and Economics* (Edward Elgar 2000).

seems puzzling given that the primary contractual right is, at least on the standard view, a right to obtain performance. It is also puzzling given that promises impose obligations of performance. The refusal is particularly puzzling in the face of explicit party preferences for specific performance. And it seems puzzling given that, despite the multiple attempts one can find in the literature, there is no clear answer as to why specific performance shouldn't be available as a general matter.

The law of contract remedies, thus, puts contract theorists in a bind. It seems we must either accept that (i) contractual obligations, as Holmes suggested, are defined in their content by remedies—in which case, most of these problems disappear—or (ii) that the legal system deliberately chooses not to enforce primary rights as such, even when that is feasible and even when the parties have explicitly stated that they want specific performance.

My suggestion is that we do not need to choose between these two extremes. The theoretical bind is premised on a very strong interpretation of the intuitive idea that remedies are the servants of primary rights. This strong interpretation sees primary rights as exhausting the space of normative considerations that influence the remedial regime. This position is not warranted as a matter of legal interpretation. It is at odds with the general perspective of our legal system, which usually accepts divergences between primary rights and enforcement mechanisms.⁷¹ It is also at odds with contract doctrine, and the multiple instances in which its enforcement mechanisms diverge from the primary rights they enforce. One of such instances is the duty of good faith and fair dealing. As Paul MacMahon has argued, good faith is an underenforced legal norm that shows a mismatch between judicial

⁷¹ See, generally, Meir Dan-Cohen, 'Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law' (1984) 97 *Harvard Law Review* 625; Emily Sherwin, 'An Essay on Private Remedies' (1993) 6 *Canadian Journal of Law and Jurisprudence* 89.

discourse about primary norms of behavior and enforcement mechanisms.⁷²

The way out is actually quite simple. While remedies follow upon violations or threats against primary rights, the two categories are distinct. In fact, they are part of a more complicated structure. That structure distinguishes between the primary right, the interpersonal inchoate obligations that follow from its infringement, and the judicial enforcement mechanisms that are available to the right-holder.⁷³ In the case of contracts, this entails distinguishing between the primary right to performance, the compensatory obligations that arise out of breach, and the remedies available to the promisee. These remedies, as enforcement mechanisms, could as a logical matter directly enforce the primary right as such, when it has only been threatened but not violated;⁷⁴ treat threats as violations in order to anticipate compensatory measures and reduce unnecessary costs;⁷⁵ directly enforce the primary right after its violation, to the extent possible;⁷⁶ order compensatory measures as a response to the violation of the right, in ways that authoritatively settle the promisee's interest in compensation; etc. The remedies established by the legal system do not need to replicate either the primary right or the inchoate compensatory obligations that arise from breach.

⁷² Paul MacMahon, 'Good Faith and Fair Dealing as an Underenforced Legal Norm' (2015) 99 Minnesota Law Review 2051.

⁷³ Here I build upon Andrew S Gold, *The Right of Redress* (Oxford University Press 2020) 3, 6, 88; Charlie Webb, 'Performance and Compensation: An Analysis of Contract Damages and Contractual Obligation' (2006) 26 Oxford Journal of Legal Studies 41.

⁷⁴ This is not typically the case in contract law. The remedy for cases of anticipatory breach is still monetary, although in certain exceptional situations courts grant injunctive relief that prevents the promisor from engaging in behaviors that are incompatible with performance of the contract. See *Lumley v Wagner* [1852] EWHC (Ch) J96. This is not, strictly speaking, specific performance of the primary right.

⁷⁵ See Farnsworth (n 3) 581–597.

⁷⁶ I say "to the extent possible" because, by definition, late specific performance is not exactly replicative of the original primary duty. Chen-Wishart (n 16) 1620.

Now this is all a matter of structural distinction. The question is whether the divergences that are made possible by the distinction are justified. The answer, against what the critics seem to assume, is not straightforward. It might turn on many considerations. A commitment to personal autonomy, for instance, might explain both the common law's reluctance to grant specific performance as a matter of course and the availability of the remedy in exceptional cases.⁷⁷

But the crucial point here is that specific performance is not the baseline against which other remedies ought to be judged. Specific performance does not have a privileged normative standing. We don't need to find particularly compelling reasons to explain why specific performance might not be granted in many instances.

Moreover, remedies bring with them specific and differentiated concerns that are not present in the purely bilateral relationship between the parties.⁷⁸ These differential concerns about enforcement might explain why there is a legitimate divergence between the primary right generated by the parties' bilateral relationship and the public enforcement mechanisms available to judges.

Now of course one's disposition to be persuaded by this argument will depend to some extent on one's underlying view about contractual rights. For those who believe that contractual rights are purely formal rights that do not track any moral entitlements, the argument is obviously plausible and perhaps even obvious.⁷⁹ But one might also think that contractual rights are genuine rights, and that a political community that failed to vindicate those rights is committing an additional wrong, on top of the promisor's wrong, against the promisee. Under this view, breaches of contract are not just the

⁷⁷ See Dagan and Heller (n 43).

⁷⁸ Gold (n 73) 102; Shiffrin (n 36).

⁷⁹ See, e.g., Liam Murphy, 'The Artificial Morality of Private Law: The Persistence of an Illusion' (2020) 70 University of Toronto Law Journal 453.

condition for imposing remedies but the *reason* for them.⁸⁰ I readily accept that this type of view might constrain, in some ways, the state's legitimate responses to breach of contract. Perhaps this view demands remedies to be genuinely vindicatory of primary rights. But this seems to be a long shot from the view that remedies can *only* replicate the content of primary rights.

This suggests that the alleged puzzles generated by specific performance are a symptom of a more basic theoretical confusion: the view that remedies ought to simply replicate our pre-existing primary duties.⁸¹ The correct view, instead, is seeing remedies simply as judicial orders.⁸² From this perspective, there is nothing mysterious about the common law's position on specific performance.

⁸⁰ Weinrib, 'Two Conceptions of Remedies' (n 20).

⁸¹ Stephen Smith, 'Rights and Remedies: A Complex Relationship' in RJ Sharpe and K Roach (eds), *Taking Remedies Seriously* (Canadian Institute for the Administration of Justice 2010) 43.

⁸² Stephen A Smith, *Rights, Wrongs, and Injustices: The Structure of Remedial Law* (Oxford University Press 2019) 6.