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## CONTRACT REMEDIES IN ACTION: SPECIFIC PERFORMANCE

Yonathan A. Arbel\*

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### ABSTRACT

How is a right to specific performance of a contract used by parties? Despite longstanding scholarly interest in the topic, this question has been largely left unexplored. This Article presents a qualitative study of parties and attorneys involved in specific performance litigation. It investigates how parties choose between remedies, whether they negotiate after judgment for specific performance, whether specific performance is implemented, and the difficulties involved in its implementation.

The findings reveal important theoretical oversights and challenges to prevailing law. In practice, many plaintiffs opt out of specific performance. This is puzzling as expectation damages are notoriously under compensatory relative to performance. A primary explanation is that it is harder to execute specific relief than a money judgment. Focusing attention on execution provides a valuable lesson: in exactly these circumstances where U.S. law grants specific performance—unique goods—it is least valuable due to a lack of clear standards by which to evaluate performance. Another explanation is lawyer's bias: attorneys will often advise clients to sue for money damages to ensure easy collection of their own fees.

Another set of findings reveal that parties think about specific performance in ways that are inconsistent with both economic and rights-based theories. Sometimes plaintiffs will not negotiate a judgment as they will be reluctant to commodify it, in contrast to economic theories, and other times they will treat specific performance instrumentally, to achieve other ends but performance of the contractual promise, which is in tension with rights-based theories. The Article concludes by discussing the theoretical and policy implications of these findings, and highlights the ways in which qualitative research could enrich, challenge, and contextualize contract theory.

### I. INTRODUCTION

A central debate in modern contract theory concerns the choice of remedies for breach of contract—should courts award money damages or

specific relief? This debate is seen as central because it involves some of the most fundamental dilemmas of contract law:<sup>1</sup> whether the law should protect rights or promote efficiency, bind parties to past commitments or evolve in light of new information, ensure proper compensation or create optimal incentives, etc.<sup>2</sup>

This debate is often understood as being between normative economic analysis and an assortment of moral philosophies, which can be grouped, for convenience, under the heading of rights-based theories.<sup>3</sup> The economic analysis stresses efficiency and social welfare, while rights-based theories are more concerned with the morality of actions and intentions.<sup>4</sup> Beyond this primary normative distinction, these theories base their respective legal prescriptions on contrasting assumptions about the world in which people contract: their motivations, understandings, and expectations.<sup>5</sup>

For concreteness, rights-based theories often favor specific performance because it is supposed to offer better compensation to victims of breach than money damages. Additionally, giving the promisee what was promised in the contract is deemed important, and it is supposed that specific performance will be used to achieve performance and not instrumentally to other ends. Economic theories alternatively assume that judgments are used instrumentally to maximize victim's welfare rather than coercing performance. As a corollary, victims will prefer specific performance to expectation damages, because it can be used either to demand performance or as leverage in negotiations to extract higher value payment. Lastly, both theories omit from consideration the choice that victims have between remedies, implicitly assuming that the choice has no impact on the legal process. If judges, for example, draw inferences from the choice of remedies on the merit of the case, or if lawyers are biased in favor of one of these remedies, providing victims a choice has broader implications than recognized. These assumptions, while not always explicit, are fundamental to justifying the legal prescriptions that

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<sup>1</sup> See STEPHEN A. SMITH, *CONTRACT THEORY* 387 (1993) (discussing the relationship between contract remedies and contract theory).

<sup>2</sup> For a recent review of the debate, see Gregory Klass, *Efficient Breach*, in *THE PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW* 362 (Gregory Klass, George Letsas & Prince Saprai eds., Oxford Univ. Press 2015).

<sup>3</sup> While labels are notoriously difficult in this area, given the many applicable nuances and inter-connections, most scholars adopt a generalized dichotomy between some variant of consequentialism and a residual category for non-consequentialist theories.

<sup>4</sup> See STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 595–605 (2004) (comparing the welfarist view with other moral philosophies).

<sup>5</sup> For a critique of some of these assumptions and of promise-based theories, see generally LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 155–224 (2002).

follow, and their exploration promises a hope of advancing the debate beyond a normative stalemate.<sup>6</sup>

It is therefore disappointing that despite a growing empirical literature on contract remedies,<sup>7</sup> much is still unknown about the empirical validity of these assumptions.<sup>8</sup> An important missing piece of the puzzle is an examination of the parties' internal point of view: What are parties' expectations, motivations, reasons, and actual behaviors with respect to the legal remedy of specific performance? How do they put remedies into use, and what is their practical significance? How do they implement the remedies? The answers to all of these questions are frustratingly scarce.

This Article makes explicit some of these assumptions and explores their validity. Its main contribution is a qualitative investigation, consisting of interviews with litigants and their lawyers who were involved in specific performance litigation.<sup>9</sup>

A preliminary design issue is the choice of jurisdiction, because in the United States specific relief is only awarded in exceptional circumstances. As a result, the conclusions of any domestic investigation might be limited to these circumstances rather than the actual nature of specific performance. To overcome that, what is needed is a jurisdiction where contract law is sufficiently close to American contract law but nonetheless has specific performance set as the default remedy. Israel presents exactly such an opportunity.<sup>10</sup>

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<sup>6</sup> Hence, Peter Benson's pessimistic view that "[t]he effort to develop a coherent explanation of contract seems to have reached an impasse." Peter Benson, *Contract*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 29 (Dennis Patterson ed., 2d ed. 2010).

<sup>7</sup> Some recent examples of empirical work in contract law include: Yuval Feldman, Amos Schurr & Doron Teichman, *Reference Points and Contractual Choices: An Experimental Examination*, 10 *J. EMPIR. LEGAL STUD.* 512–41 (2013) (psychological experiments); Tess Wilkinson-Ryan & Jonathan Baron, *Moral Judgment and Moral Heuristics in Breach of Contract*, 6 *J. EMPIR. LEGAL STUD.* 405 (2009) (psychological experiments); Theodore Eisenberg & Geoffrey P. Miller, *Damages Versus Specific Performance: Lessons from Commercial Contracts* (N.Y.U. Ctr. for Law, Econ. & Org., Working Paper No. 13-09, 2013) (studying inclusion of specific performance provisions in commercial contracts). For a review of some of the general empirical literature on contracts, see Russell B. Korobkin, *Empirical Scholarship in Contract Law: Possibilities and Pitfalls*, 2002 *U. ILL. L. REV.* 1033, 1036, and Russell J. Weintraub, *A Survey of Contract Practice and Policy*, 1992 *WIS. L. REV.* 1, 4 n.10.

<sup>8</sup> Daniel Keating described the legal landscape as "the land of the blind" due to the scarcity of broad empirical data on contracting practices. Daniel Keating, *Measuring Sales Law Against Sales Practice: A Reality Check*, 17 *J.L. & COM.* 99, 99 (1997).

<sup>9</sup> An important source of inspiration is the study conducted by Ward Farnsworth, *Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral*, 66 *U. CHI. L. REV.* 373 (1999), in which he interviewed lawyers involved in nuisance litigation and inquired regarding post-judgment renegotiations.

<sup>10</sup> See *infra* Part III.

The results are grouped by the chronological stage in the life of a litigated contract case: choice of remedies, post-judgment renegotiation, and the implementation and execution of the judgment. Working backwards, the Article describes, in each stage, findings that challenge traditional assumptions of contract theory.

Starting with the execution of specific performance awards, enforcement is found to be rife with practical problems, which are most pronounced when goods are unique.<sup>11</sup> The principal problem is that performance, unlike damages, often requires the good will of the performing party—which, by the time the trial is over, is often non-existent and may actually turn into spite and bad faith. When there are no clear standards by which to judge the quality of performance, courts lack means of ensuring quality. When goods are unique, it generally means that clear quality standards are absent, meaning that in exactly these circumstances where specific performance is available under American law, it will be hardest to enforce. The Article also addresses the role of plaintiffs' and promisors' liquidity, and explains that specific performance is not a silver bullet against a promisee's insolvency. Social norms and reputation are important leverages, but their effects are not always in the direction of greater enforcement.

Before the judgment is implemented, economic theory predicts that the parties will negotiate over the decree if performance is inefficient. A surprising finding is that some parties (although not all) have refrained from negotiation despite the existence of an ostensible financial incentive to do so. The explanation seems to be derived, first, from the litigation dynamics that often contribute to the animosity between the parties and, second, from the cognitive perception of specific performance decrees as being qualitatively different from other goods on the market that may be freely traded. The framing of these decrees as default rights seems to affect parties' willingness to negotiate over them.<sup>12</sup>

Despite a general theoretical expectation that, given the choice of remedies, plaintiffs will sue for specific performance, it was found that many opt-out of the default in favor of money damages.<sup>13</sup> Of the reasons identified,

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<sup>11</sup> See generally Steven Shavell, *Specific Performance Versus Damages for Breach of Contract: An Economic Analysis*, 84 TEX. L. REV. 831 (2006).

<sup>12</sup> Various lab experiments find that default rules do indeed change parties' preferences and therefore may affect the likelihood of settlement. See Russell B. Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 633–37 (1998); Stewart Schwab, *A Coasean Experiment on Contract Presumptions*, 17 J. LEGAL STUD. 237, 237–38 (1988).

<sup>13</sup> In economic theory, specific performance is expected to be used as a bargaining chip to extract side payments from the defendant that exceed the value of expectation damages. See, e.g., Marco J. Jimenez, *The Value of a Promise: A Utilitarian Approach to Contract Law Remedies*, 56 UCLA L. REV. 59, 69 (2008). In deontological theory, the plaintiff motivations are far less explicit, but it is regularly implied that specific performance will be pursued out of a sense of vindication of moral rights.

one that stands out is lawyer's bias. Attorneys have a general preference for money damages out of concern for their own fees and their ability to collect them, which is harder in the case of specific performance decrees.

Of course, not all plaintiffs choose to opt-out. This is predicted by mainstream theory and may therefore seem to be of lesser interest, but delving deeper into plaintiffs' motivations suggests a more involved story. First, because the plaintiffs are given a choice between different contract remedies, courts may draw inferences from the choices made and use them to assess the merits of the case. Lawyers reported that a belief that opting out of specific performance sends a signal of bad faith to the court, as if the plaintiff is behaving opportunistically and only cares about money, not performance. Second, specific performance may be sued for to speed up the resolution of the case and to reduce the costs of litigation, because the costs of proving damages are spared. Third, parties occasionally sue for specific performance to use it as a bargaining chip.<sup>14</sup>

The Article concludes by discussing various theoretical and legal implications of these findings. It is argued that rights-based theory should directly address the instrumental uses that parties make of specific performance judgments, as they create a wedge between what was promised and what is legally prescribed. The under-compensatory nature of specific performance should be recognized within corrective justice theories of contract law, and due attention should be given to the fact that the problem will not vanish simply by giving the promisee a choice between damages and enforcement. These findings suggest new areas for exploration for economic theories—primarily, the signaling effects of remedies and the attorney's influence on choice of remedies. The aversion to post-judgment renegotiation suggests that judgments are sticky and parties should not be trusted to renegotiate as a general matter. Concerns with a flood of litigation following a more liberal approach to specific performance should also be alleviated. Finally, it is explained that specific performance is not a silver bullet against a promisor's insolvency. Regarding the law, it is argued that limiting the scope of specific performance to cases of unique goods is non-constructive, as these are the cases where enforcement is most likely to be ineffective. Additionally, it is argued that lawyers should pay much closer attention to enforcement mechanisms.

The organization of this Article is as follows: Part II lays out the necessary theoretical framework. Specifically, it points out the relevant empirical assumptions and the role they play in theory. Part III presents stylized facts about Israeli and U.S. contract law, emphasizing the similarity of the systems in the context of this Article. Part IV delves into the methodology and explains the research protocol. Parts V, VI, and VII discuss the primary

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<sup>14</sup> While this is exactly what is envisioned by economic theory, it is worth nothing since other studies have doubted the prevalence of this kind of motive. See Farnsworth, *supra* note 9, at 391–414 (finding that parties are averse to renegotiate their judgments).

findings of the study. These Parts cover three time periods: the parties' choices before and during litigation, the parties' post-judgment renegotiations, and, finally, the implementation of the judgment in these cases where no post-judgment settlement has occurred. The final Part considers the chief theoretical and legal implications of these findings.

## II. CONTRACT REMEDIES IN THEORY: NORMATIVE AND EMPIRICAL ASSUMPTIONS

This Article responds to the theoretical literature, and a brief review of this literature is in order. This review will be brief, general, and mostly focused on those assumptions that will be later examined empirically; the interested reader may refer to one of the many extensive surveys of the literature developed elsewhere.<sup>15</sup> As is conventional, the discussion is divided into rights- (and duties-) based theories and economic theories.<sup>16</sup>

### A. Rights-Based Theories

#### 1. Common Structure

Probably the most common and influential perspective on contract remedies has been that of the rights-based theories. By rights-based theories I denote a large (and diverse) class of theories, which adhere to non-economic principles. Generally, these theories judge the morality of choices, actions, or relationships between individuals based on their adherence to a-priori moral principles rather than on the basis of their consequences.<sup>17</sup> In the contractual context, the fundamental challenge of these theories is to justify legal institutions that allow the use of state power to enforce financial obligations

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<sup>15</sup> See, e.g., Peter Benson, *Introduction*, in *THE THEORY OF CONTRACT LAW* (Peter Benson ed., 2001); Hermalin et al., *infra* note 42, at 99–127; Paul G. Mahoney, *Contract Remedies: General*, in 3 *ENCYCLOPEDIA OF LAW AND ECONOMICS* § 4600, at 117 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000) (economic theories); Jeffrey L. Harrison, *A Nihilistic View of the Efficient Breach*, 2013 *MICH. ST. L. REV.* 167.

<sup>16</sup> It is worth noting that many non-economic theories also care, at least to an extent, about consequences. See JOHN RAWLS, *A THEORY OF JUSTICE* 26 (1971) (“All ethical doctrines worth our attention take consequences into account in judging rightness. One which did not would simply be irrational, crazy.”). For a more general discussion, see Christopher P. Taggart, *A Critical Analysis of Kaplow and Shavell’s Project Concerning the Foundations of Normative Law and Economics* 12–14, 73–76 (Nov. 2012) (unpublished S.J.D. dissertation, Harvard Law School) (on file with the Harvard Law School Library); see also EYAL ZAMIR & BARAK MEDINA, *LAW, ECONOMICS, AND MORALITY* (2010) (exploring intermediate positions between consequentialism and deontology).

<sup>17</sup> For a survey of deontological theories, see Larry Alexander & Michael Moore, *Deontological Ethics*, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Dec. 12, 2012), <http://plato.stanford.edu/archives/win2012/entries/ethics-deontological/>.



which are against the *ex-post* will of the promisor.<sup>18</sup> A second challenge, and equally complex, is the derivation of specific legal remedies from core moral principles.<sup>19</sup>

Various theories have been developed to address these challenges.<sup>20</sup> Famously, Charles Fried has claimed that the justification of legal enforcement owes to the promisor's duty to keep his promise, resulting from her willful solicitation of expectations of performance through the speech act of promise.<sup>21</sup> After invoking this trust, breaking the promise is immoral.<sup>22</sup> Other important variants include Randy Barnett's consent theory, which emphasizes objective manifestations of assent to enforcement as the basis for the duty to uphold contracts,<sup>23</sup> or Thomas Scanlon's expectation theory, which is based on the obligation not to cause harm after invoking expectation of performance by the act of promise.<sup>24</sup> A relatively different theory is Seana Shiffrin's view, which is derived from virtue ethics.<sup>25</sup> To her, contract law must not create rules that are

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<sup>18</sup> Duncan Kennedy and Frank Michelman lucidly explain the anti-liberal character of enforcement "the meaning of enforcement of contracts is the application of ineluctable force to make people do things they don't then want to do." Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711, 741 (1980); see also T. M. Scanlon, *Promises and Contracts*, in THE THEORY OF CONTRACT LAW 86, 100 (Peter Benson ed., 2001). The Harm Principle has been interpreted in this context as limiting the use of state enforcement. See (a critical) review in Brian H. Bix, *Theories of Contract Law and Enforcing Promissory Morality: Comments on Charles Fried*, 45 SUFFOLK U. L. REV. 719, 726–33 (2011).

<sup>19</sup> See generally Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489 (1989).

<sup>20</sup> For a survey of some of these theories, including the will, bargain, reliance, and fairness, see Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 271–91 (1986).

<sup>21</sup> For an early statement of the idea of promise as a speech act, see J. L. AUSTIN, HOW TO DO THINGS WITH WORDS 156–57 (J.O. Urmson ed., 1962).

<sup>22</sup> See CHARLES FRIED, CONTRACT AS PROMISE 17 (1981) ("There exists a convention that defines the practice of promising and its entailments. . . . [I]t is wrong to invoke that convention in order to make a promise, and then break it.").

<sup>23</sup> See Barnett, *supra* note 20, at 291–319.

<sup>24</sup> See Scanlon, *supra* note 18, at 98–99.

<sup>25</sup> See Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 732–33 (2007) [hereinafter Shiffrin, *Divergence*]. Shiffrin's view is complicated by the fact that she distinguishes between moral and legal reasons, with the latter being a sub-set of the former. Morally, there is an advantage to specific performance over expectation damages, but legally, she says, "legal" considerations such as the cost of supervision may trump the desirability of specific performance. See also Seana Shiffrin, *Could Breach of Contract Be Immoral?*, 107 MICH. L. REV. 1551, 1568 (2009) [hereinafter Shiffrin, *Breach of Contract*] ("There may be distinctively legal reasons to reject [specific performance] given the difficulties of judicial supervision, risks of arbitrary enforcement, and in some cases, the hazards of involuntary servitude."). Overall, I take her approach to be *prima facie* in favor of the legal remedy of specific performance subject to circumstantial practical considerations.

incompatible with the moral judgments of a virtuous agent. A law allowing the promisor a breach option runs afoul of her criteria.<sup>26</sup>

What should be the legal consequence of a breach of contract? It would seem that the most natural implication of a promise to do X is a duty to do X rather than deliver its monetary equivalent.<sup>27</sup> And with the notable and widely criticized exception of Charles Fried,<sup>28</sup> most theorists agree that specific performance is the preferred remedy.<sup>29</sup> For these scholars the American law's approach of setting expectation damages as the default remedy in most breach of contract cases is opposed to the dictates of morality, and perhaps even undermines them.<sup>30</sup>

## 2. Common Assumptions

Despite the many differences between the theories, there are a few assumptions commonly shared that are of interest here, and I will focus on three. The first concerns the consequences of the specific performance judgment. Close reading of many of the rights-based theories show that they will often use specific performance as a shorthand for actual performance of the contract.<sup>31</sup> The difficulty of enforcing either a money judgment or specific

<sup>26</sup> All of these views are heavily contested, even within class of rights-based theories, as documented in Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603 (2009).

<sup>27</sup> Jody S. Kraus, *A Critique of the Efficient Performance Hypothesis*, 116 YALE L.J. POCKET PART 423 (2007) (“[A] promise to do X imposes on the promisor an obligation to do X and confers on the promisee a right to have the promisor do X.”). Similarly, Seana Shiffrin contends that “[a]bsent the consent of the promisee, the moral requirement would not be satisfied if the promisor merely supplied the financial equivalent of what was promised.” Shiffrin, *Divergence*, *supra* note 25, at 722; *see also* Stephen A. Smith, *Performance, Punishment and the Nature of Contractual Obligation*, 60 MOD. L. REV. 360, 361 (1997) (“The natural way to make good a failure to do that which one has an obligation to do is to perform the obligatory action”).

<sup>28</sup> *See* FRIED, *supra* note 22 (arguing for expectation damages), and the intermediate approach taken by Thomas Scanlon, *Promises and Practices*, 19 PHIL. & PUB. AFF. 199, 205 (1990) (contending that if compensation and performance are of equal value to the promisee then moral principles will be neutral between the two). For the critique of this approach, *see, for example*, KAPLOW & SHAVELL, *supra* note 5, at 161 n.18, and Kraus, *supra* note 26, at 1605.

<sup>29</sup> Notable in this regard is Dori Kimel who, while favoring specific performance in principle, allows promisors a choice between specific performance and damages, in cases where both are equally compensatory, as a means of minimizing the infringement on the promisor's autonomy. *See* DORI KIMEL, FROM PROMISE TO CONTRACT: TOWARDS A LIBERAL THEORY OF CONTRACT 95–102 (2003).

<sup>30</sup> *See* Shiffrin, *Divergence*, *supra* note 25, at 733 n.47 (arguing that law's content should promote a culture that would be acceptable by a morally decent person). *See id.* for my interpretation of her argument.

<sup>31</sup> *See, e.g.*, SMITH, *supra* note 1, at 401 (“[W]hile it is true that late performance is not identical to timely performance, in most cases this difference would seem to relate only to the form of the obligation rather than its essence.”); Melvin Aron Eisenberg, *The Bargain Principle*

relief are abstracted at least in the general case, and it is assumed that the *absolute enforceability* of both is high.

Second, and more common than the former, is the view that, even if specific performance is not the same as performance, it will nonetheless better protect the promisee's interests than expectation damages.<sup>32</sup> That is, even after accounting for problems of enforceability, specific performance would yield greater value to the promisee than would expectation damages, especially given the problems of quantifying the latter. This assumes the *relative enforceability* of specific performance to be higher than or equal to that of money judgments. It implies that generally, promisees would opt for specific performance given the choice.

The third is that the judgment will be used to obtain performance and not some other ends. Specific performance is favored for awarding the promisee with exactly what she expected to receive, i.e., performance.<sup>33</sup> If the promisee uses the right for some other end besides performance, then even if this end is not objectionable in its own right, it would require a separate justification besides expectation of performance.<sup>34</sup>

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*and Its Limits*, 95 HARV. L. REV. 741, 744–45 n.10 (1982) (“[I]n those cases in which [specific performance] is feasible, it is often simply a special technique for putting plaintiff in the position he would have been in if the contract had been performed.”); Nathan B. Oman, *The Failure of Economic Interpretations of the Law of Contract Damages*, 64 WASH. & LEE L. REV. 829, 869 (2007) (“[S]o long as damages compensate the promisee for her loss, we ought to choose the remedy that intrudes on liberty the least.” This account implies that specific performance is closer to the value of promised performance.); Shiffrin, *Breach of Contract*, *supra* note 25, at 1566 (“[T]he practice of making [contracts] could not flourish or perform its function if paying expectation damages became the default method of their satisfaction. But, the practice would flourish if performance were the default method of satisfaction.”).

<sup>32</sup> See Michael D. Knobler, *A Dual Approach to Contract Remedies*, 30 YALE L. & POL’Y REV. 415, 427 (2012) (arguing that specific performance is the solution for the under-compensatory nature of expectation damages so that it will be in the promisee’s interest). Also, most of the authors noted in the previous note can also be read in this light, as they are generally aware of practical impediments to enforcement, although it is unclear whether these considerations play more than a secondary role in their analysis.

<sup>33</sup> See generally Shavell, *supra* note 11.

<sup>34</sup> While in principle a right to something implies the power to sell it or use it in other ways, this is not why most promise-based theories believe specific performance is appropriate. Using the judgment for financial gain may actually be frowned upon. After all, if the goal was to give the plaintiff greater bargaining power rather than the right to performance, these theories would have advocated super compensatory remedies, which they do not. See KAPLOW & SHAVELL, *supra* note 5, 161–62 (surveying the role of super compensatory remedies in promise based theories).

## B. Economic Theories

### 1. Common Structure

Normative economic theories are consequentialist moral theories that adopt some variant of welfarism. As such, economic theories focus solely on the consequences of legal rules and rank their desirability exclusively on the basis of their effect on overall social welfare, however aggregated.<sup>35</sup> In the context of contract law, this leads to the claim that the choice of remedies should be decided solely by what would maximize the parties' joint interests at the time of contracting.<sup>36</sup>

The exact role of specific performance within the economic framework is complex: four decades of analysis have demonstrated that a myriad of parameters are relevant to the choice of remedies.<sup>37</sup> Opponents of specific performance argue, for example, that this remedy can lead promisors to perform even when it is inefficient for them to do so. While the promisee might be willing to give up her right to performance in exchange for due compensation, a right to specific performance could engender a hold-up scenario where the promisee uses the judgment to extract high payments from the promisor. To protect himself, the promisor would need to take wasteful *ex-ante* measures against breach.<sup>38</sup> Moreover, the enforcement of specific performance is likely to be complicated and costly in cases involving the rendering of a service or the production of goods (as opposed to the

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<sup>35</sup> See Amartya Sen, *Utilitarianism and Welfarism*, 76 J. PHIL. 463, 468 (1979). For a development of these ideas, see KAPLOW & SHAVELL, *supra* note 5, at 15–85, 403–65, and Louis Kaplow & Steven Shavell, *Any Non-Welfarist Method of Policy Assessment Violates the Pareto Principle*, 109 J. POL. ECON. 281, 281–86 (2001) (explaining that non-exclusive approaches will lead to prescriptions that would make some people worse off while not benefitting anyone).

<sup>36</sup> For early proponents of the *ex-ante* joint interests perspective of contract damages, see Steven Shavell, *Damage Measures for Breach of Contract*, 11 BELL J. ECON. 466 (1980), and RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977). In the past, some purportedly economic analyses were focused on minimizing *ex-post* waste, failing to consider the *ex-ante* effects of so doing. See the critical review in Robert E. Scott & Alan Schwartz, *Market Damages, Efficient Contracting, and the Economic Waste Fallacy*, 108 COLUM. L. REV. 1610, 1614–16 (2008).

<sup>37</sup> See Richard Craswell, *Contract Remedies, Renegotiation, and the Theory of Efficient Breach*, 61 S. CAL. L. REV. 629 (1988) (arguing that choice of remedies has a variety of incentive effects on all stages of contracting, from searching for partners to breach decisions); Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829 (2003) (criticizing law and economics for not providing any determinate answers to the core questions of contractual doctrine and using contract remedies as a key example).

<sup>38</sup> See Shavell, *supra* note 11, at 844–45 (exploring wasteful precautions against breach taken by the promisor).

conveyance of ready-made goods).<sup>39</sup> Proponents, on the other hand, claim that if performance is inefficient, the parties will trade in the specific performance award, and the transaction costs involved will likely be low enough to facilitate that.<sup>40</sup> Specific performance should be preferred, on these views, because it can capture the value of performance to the promisee while avoiding the costly process of damages quantification.<sup>41</sup> Finally, specific performance can be desirable because it encourages breach only when breach is clearly efficient, whereas expectation damages, which are often under-compensatory, could lead to excessively frequent breach.

## 2. Common Assumptions

As noted, economic theory is far from settled on whether specific performance is desirable. Of the various assumptions made, let me note three.

First, it is expected that parties would generally try to engage in some form of post-judgment renegotiation. The fact of breach suggests that performance is inefficient and therefore the parties could both benefit from trading the right to specific performance for some payment.<sup>42</sup> This would require transaction costs to be low, but they usually are in contractual settings.<sup>43</sup> Consequently, efficiency-minded judges need not overly worry about the disposition of rights, as those rights will be efficiently traded.<sup>44</sup> Indeed, these

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<sup>39</sup> See Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 292–96 (1979) (discussing various “administrative” costs of enforcing specific performance); Shavell, *supra* note 11, at 833 (exploring the different costs of specific enforcement of contracts to produce goods and contracts to convey property and arguing that costs would be significantly lower in the latter case).

<sup>40</sup> See, e.g., Ian R. Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947, 951–53 (1982).

<sup>41</sup> See Schwartz, *supra* note 39.

<sup>42</sup> See, e.g., Benjamin E. Hermalin et al., *Contract Law*, in THE HANDBOOK OF LAW AND ECONOMICS 3, 117–18 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

<sup>43</sup> Most contractual disputes involve two to three direct parties, who knew each other well enough to transact in the first place. See THOMAS J. MICELI, *ECONOMICS OF THE LAW* 88 (1997) (“Presumably, transaction costs are low in most contract settings, given that the parties have already demonstrated an ability to bargain.”); A. Mitchell Polinsky & Steven Shavell, *Law, Economic Analysis of*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS 1, 19 (Steven N. Durlauf & Lawrence E. Blume eds., 2d ed. 2008) (“[M]uch of the economics literature . . . assumes that renegotiation always occurs.”).

<sup>44</sup> The core idea stems from Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960), but is adapted to the legal context by the work of Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106–10 (1972) (arguing that due to informational advantages parties have over the social planner, liability rules should be assigned only in places where transaction costs prohibit efficient negotiations between the parties), which was later expanded to the specific

negotiations might break down, but the expectation is that the parties will at least attempt to renegotiate.<sup>45</sup>

Second, there is a common assumption, although not universal, that the value of the renegotiated agreement would be equal to or exceed the value of the performance to the promisee. If it would not, the promisee could simply insist on performance and receive performance value. This is what underlies the justification of specific performance as protecting the promisee's subjective value; the opposition to specific performance as engendering a hold-up scenario; and the concern that if promisees will be given a choice, they will flood the courts with specific performance suits.<sup>46</sup>

Third, there is much concern with which remedy would be more efficient, but pronouncedly less interest in the effects of letting promisees choose their remedies. Specifically, there is no account of how providing such a choice could affect plaintiff-attorney or plaintiff-court interactions and strategic behavior, either due to an oversight or to a more concrete assumption that such effects are of marginal relevance.

### III. THE LEGAL FRAMEWORK

In Common Law, expectation damages are the default remedy.<sup>47</sup> The hallmark of this preference is the oft-cited, and arguably misunderstood,<sup>48</sup> quote of Justice Oliver Wendell Holmes that the duty to keep a contract "means a prediction that you must pay damages if you do not keep it,—and nothing

performance domain in Anthony T. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 351–55 (1978).

<sup>45</sup> Most economic studies of specific performance make this assumption. See, e.g., Polinsky & Shavell, *supra* note 43.

<sup>46</sup> See, e.g., MICELI, *supra* note 43, at 88 ("[S]pecific performance protects the promisee's subjective valuation of performance."); see also Hermalin et al., *supra* note 42, at 113 ("[I]f the buyer has the threat of a remedy of specific performance, thereby requiring the seller to incur the costs of performance, that should allow the buyer to capture more of the gains than he could if his only legal threat were to hold the seller responsible for some smaller monetary remedy."); Harrison, *supra* note 15, at 196 ("Routine availability of specific performance means the worst-case scenario for the non-breaching party will be full compensation while, in the case of expectancy, it is merely a possibility."); Jimenez, *supra* note 13, at 69 (arguing that specific performance will lead to compensation over and above the value of performance to the promisee).

<sup>47</sup> This preference dates back to Lord Coke, in *Bromage v. Genning* (1616) 81 Eng. Rep. 540.

<sup>48</sup> See Joseph M. Perillo, *Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference*, 68 FORDHAM L. REV. 1085, 1086 n.6 (2000) (quoting Holmes' letter to Sir Frederick Pollock, saying that "I don't think a man promises to pay damages in contract any more than in tort. He commits an act that makes him liable for them if a certain event does not come to pass, just as his act in tort makes him liable simpliciter." (quoting OLIVER W. HOLMES ET AL., *HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874–1932*, 233 (Mark DeWolfe Howe ed., Harvard Univ. Press 1941)).

else.”<sup>49</sup> As a result, specific performance is only awarded in cases in which damages are deemed inadequate.<sup>50</sup> Categories of such cases evolved over time, some being mundane (e.g. sale of land) while others border on the esoteric (e.g. contracts for the sale of *standing* timber).<sup>51</sup> Even if damages are found to be inadequate, specific performance will not be granted if it imposes a disproportionate amount of hardship on the defendant, requires excess supervision by the courts, or does not serve the public interest.<sup>52</sup>

While there is some debate on whether the granting of specific performance has been liberalized by section 2-716(1) of the Uniform Commercial Code,<sup>53</sup> many still believe that specific performance is the exception rather than the rule.<sup>54</sup>

For this reason, this study sought a jurisdiction which is similar enough to the Common Law but has the Civil Law feature of setting specific performance as the preferred remedy. This is at the behest of previous scholarship that urged such an investigation.<sup>55</sup> Israel provided exactly such an opportunity, as it mixes Civil and Common Law elements. Importantly, Israeli contract law is sufficiently close to United States law to draw meaningful conclusions, and the rest of this Part will note the main points of similarity as well as the role specific performance plays.<sup>56</sup>

<sup>49</sup> Oliver Wendall Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).

<sup>50</sup> RESTATEMENT (SECOND) OF CONTRACTS § 359 (AM. LAW INST. 1981).

<sup>51</sup> See a review of some of the remedies in Thomas S. Ulen, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies*, 83 MICH. L. REV. 341, 364 n.83 (1984).

<sup>52</sup> RESTATEMENT (SECOND) OF CONTRACTS §§ 362–66(a) (AM. LAW INST. 1981).

<sup>53</sup> U.C.C. § 2-716(1) (AM. LAW INST. & UNIF. LAW COMM’N 1977) (allowing specific performance when “the goods are unique or in other proper circumstances”).

<sup>54</sup> See Peter Linzer, *On the Amoralty of Contract Remedies—Efficiency, Equity, and the Second Restatement*, 81 COLUM. L. REV. 111, 121 (1981) (viewing the UCC as a “modest expansion”); Shiffrin, *Divergence*, *supra* note 27, at 722–23 (“Contract law’s dominant remedy is not specific performance but expectation damages.”). *But see* Barbara H. Fried, *What’s Morality Got to Do with It?*, 120 HARV. L. REV. F. 53 (2009) (criticizing Shiffrin for overlooking modern trends in the availability of specific performance). There is also some empirical evidence that supports the view that specific performance is liberally granted. See Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 707 (1990).

<sup>55</sup> See Shavell, *supra* note 11, at 876 (“It would thus be fruitful for researchers in the future to gather information about parties’ choice of remedy for breach . . . using social scientific empirical methodology. Of particular value would be information about parties’ choice of remedy in Germany for contracts to produce things or to perform services, since specific performance is the general remedy there.”). Germany is similar to Israel in that specific performance is the default remedy although Israel allows for specific performance in a broader range of circumstances.

<sup>56</sup> On the proximity of Israeli contract law to American contract law, see the analysis by Daphne Barak-Erez, *Codification and Legal Culture: In Comparative Perspective*, 13 TUL. EUR. CIV. L.F. 125, 133 (1998) (“[T]he remedial scheme in Israeli contract legislation is highly

Israeli contract law is an amalgam of statutory legislation and common law.<sup>57</sup> Like American Law, it is also largely substance centric, and much of the modern law is judge-made. Israeli judges often cite to American law as a source of inspiration, and many American doctrines and cases such as *Hadley v. Baxendale*, *Leonard v. Pepsico*, and *Carlill v. Carbolic Smoke Ball Co.* are routinely taught in law schools, analyzed in Israeli scholarship, and cited by judges.<sup>58</sup>

If a contract is breached, the aggrieved party has the option of choosing her remedies, including specific performance where feasible.<sup>59</sup> If specific relief is sought, it will be granted unless the defendant can prove that certain statutory exceptions obtain, mainly that the relief would be “unjust” because, for example, delay on the promisee’s part has made performance too costly.<sup>60</sup>

Specific performance is not only the default remedy, it is considered morally superior to damages. As such, it is commonly referred to by courts and scholars alike as being “the first and foremost” among all other remedies.<sup>61</sup> Conversely, expectation damages are viewed as inducing morally wrongful behavior, subjecting the promise to financial calculation by the promisor. This sentiment is traceable to civil law and, presumably, has its roots in Canon Law.<sup>62</sup>

To enforce a specific performance, three main venues exist.<sup>63</sup> The plaintiff could file a petition for an order of contempt, and the court has broad formal discretion in choosing sanctions, whether financial or criminal.<sup>64</sup> However, this is not a penal procedure and is only used to achieve performance

influenced by English and American law.”); see also Jonathan Yovel & Ido Shacham, *An Overview of Israeli Contract Law*, in THE INTERNATIONAL CONTRACT MANUAL (2014).

<sup>57</sup> For an overview of Israeli contract law, see Yovel & Shacham, *supra* note 56.

<sup>58</sup> *Leonard v. Pepsico, Inc.*, 88 F. Supp. 2d 116 (S.D.N.Y. 1999), *aff’d*, 210 F.3d 88 (2d Cir. 2000); *Carlill v. Carbolic Smoke Ball Co.* [1893] Q.B. 256 (C.A.); *Hadley v. Baxendale* (1854) 156 Eng. Rep. 145.

<sup>59</sup> In my own analysis of 100 randomly chosen cases where specific performance was sought, I found that specific performance was granted in 45% of the cases, and partial specific performance in an additional 15% (for a total of 60%). For the methodology employed, see *infra* note 82.

<sup>60</sup> Contracts (Remedies for Breach of Contract) Law, 5731–1970, SH No. 610 § 3 (Isr.).

<sup>61</sup> See CA 5131/10 *Azimov v. Binyamini* (not reported) (2013) (Isr.), <http://elyon1.court.gov.il/files/10/310/051/v08/10051310.v08.htm> (emphasizing the moral value of keeping promises and seeing specific performance as a tool for encouraging promise-keeping).

<sup>62</sup> See JANWILLEM OOSTERHUIS, SPECIFIC PERFORMANCE IN GERMAN, FRENCH AND DUTCH LAW IN THE NINETEENTH CENTURY 34 (2011).

<sup>63</sup> See Stephen Goldstein, *The Reciprocal Relationships Among Methods of Enforcing Non-Monetary Court Orders: The Doctrine of the Least Harsh Alternative*, 16 MISHPATIM 176 (1986) (Isr.).

<sup>64</sup> §6(1) Contempt of Court Ordinance, 5689–1929, SH No. 1 (Isr.).



and never to punish for non-performance.<sup>65</sup> Courts are wary of this specific power and tend to limit its use.<sup>66</sup>

Alternatively, the Enforcement and Collection Agency is a government run agency that is designed to assist creditors in enforcing contractual obligation, and has numerous powers, including the ability to foreclose and seize property, as well as to place liens on bank accounts, to order wage garnishment, and to limit international travel. Lastly, the plaintiff may file for appointment as a receiver over the defendant's assets or company, but this is rarely invoked.<sup>67</sup>

In summary, while the general structure of Israeli law of contracts and private law in general exhibits strong semblances to American law, the two systems diverge on the prominence of remedies. The (arguable) liberalization of contract remedies in American law further emphasizes the value of the study of a jurisdiction where specific performance is unambiguously set as default.

#### IV. METHODOLOGY

The basis of the empirical investigation is an exploratory qualitative study—interviews with relevant stakeholders in Israel.<sup>68</sup> The choice of this methodology is driven by the absence of previous empirical work of this kind on this issue and the theoretical gap created by this omission, strongly felt by prior scholarship.<sup>69</sup> The goal here, in general terms, is to capture the law-as-it-is-experienced,<sup>70</sup> owing to the familiar insight that a great deal of individual action takes place in the “shadow of the law.”<sup>71</sup>

<sup>65</sup> See *CrimA 6/50 Levitt v. Angel*, 4 PD 5710 459 (1950) (Isr.).

<sup>66</sup> See *CC 6807/06 Kugler v. Kugler*, (not reported) (2007) (Isr.).

<sup>67</sup> See DAVID KATZIR, *REMEDIES FOR BREACH OF CONTRACT*, pt. A, at 356, 378–80 (1991) (Isr.).

<sup>68</sup> The interviews were conducted based on the ethical approval of the Institutional Review Board (IRB), IRB protocol no. 15682.

<sup>69</sup> See Shavell, *supra* note 11, at 876 (“It would thus be fruitful for researchers in the future to gather information about parties’ choice of remedy for breach . . . using social scientific empirical methodology.”).

<sup>70</sup> See PIERGIORGIO CORBETTA, *SOCIAL RESEARCH: THEORY, METHODS AND TECHNIQUES* 264 (2003) (“[The interview’s] basic objective remains that of grasping the subject’s perspective: understanding his mental categories, his interpretations, his perceptions and feelings, and the motives underlying his actions.”).

<sup>71</sup> The shadow of the law paradigm was coined by Robert H. Mnookin and Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950 (1979). A famous study in this vein is Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 *AM. SOC. REV.* 55 (1963) (studying through interviews contractual behavior of businesspersons in Wisconsin). There are also studies that suggest that certain social structures substitute the formal law, so that parties operate in the shadow of social norms. See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 40–65 (1991) (providing evidence of social norms of dispute resolution that diverge from legal prescriptions);

Obtaining the cooperation of parties to private litigation and asking them to volunteer sensitive private information is difficult.<sup>72</sup> Acquiring a random statistically representative sample was bound to fail; instead, a “maximum variation” approach was employed, meaning that the group assembled was meant to represent a heavily diverse group of participants.<sup>73</sup> The results should therefore be interpreted as providing insight into different groups within the population, but not as being representative of the frequency of the phenomena described.<sup>74</sup>

The relevant population from which the sample was drawn is comprised of all cases reported to a commercial database (Nevo) matching relevant general criteria, such as the dates and the subject matter of contracts. These cases were ordered randomly, and in each case, at least one of the parties or their lawyers were contacted. Consent to participate was acquired in 18 cases (in approximately 60 cases contact was attempted, implying about 36% response rate). The number of participants chosen reflects similar past scholarly work in contracts and other fields of law.<sup>75</sup>

Demographics: 6 interviewees were private parties who had been involved in specific performance litigation over the past 10 years (of which one was a CEO of a company), 11 were lawyers, and 1 was a magistrate judge acting as the head of a local office of the Enforcement and Collection Agency.<sup>76</sup> Of the private parties, five had prevailed in litigation as plaintiffs and one had lost as a defendant. Of the lawyers, four lawyers were senior partners, and one was a senior associate in one of Israel’s top law firms (all reported heavy involvement, at least in the strategic management of the case); another

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Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992) (describing internal dispute resolution mechanisms in the diamond industry).

<sup>72</sup> Other obstacles included the acquisition of parties’ contact information from legal cases and providing motivation to contribute their time for the sake of the study.

<sup>73</sup> See SARAH J. TRACY, *QUALITATIVE RESEARCH METHODS* 135–36 (2013).

<sup>74</sup> Such an approach is common in qualitative studies. See, e.g., CORBETTA, *supra* note 70, at 268 (stating that “the qualitative researcher does not follow a criterion of statistical representativeness, but rather one of substantive representativeness, in that the aim is to cover all the social situations that are relevant to the research, rather than attempting to reproduce the characteristics of the population in full”); see also MATTHEW B. MILES, A. MICHAEL HUBERMAN & JOHNNY SALDAÑA, *QUALITATIVE DATA ANALYSIS* 31 (3d ed. 2013) (“Qualitative samples tend to be *purposive* rather than random.”).

<sup>75</sup> See Keating, *supra* note 8, at 100 (13 interviewees); Farnsworth, *supra* note 9, at 382 (interviewing 20 attorneys). A relatively more comprehensive study was conducted by Stewart Macaulay and his research assistants, covering 68 interviewees. Macaulay, *supra* note 71.

<sup>76</sup> See *supra* Part II.

four were affiliated with mid-sized law firms, whereas the remaining two lawyers were employed by small law firms.<sup>77</sup>

The interviews were all conducted by the Author and followed a semi-structured research protocol, which is a combination of standard questions, specific inquiries concerning the case, and dynamic follow-ups to respondents' responses. In the course of the interview, the facts of the case were reviewed; then, the interviewee was asked about her motivations and experiences in both the pre-trial and post-trial stage. Lawyers were asked about their own motivations and that of their clients'. Hypothetical questions were used to elicit information on the attitudes of the parties.

Before proceeding, the point should be restated that the current methodology does not aim to represent the distribution of cases generally, but only speaks to the existence of certain phenomena. Having said that, the findings reported here are those that there is good reason to believe would be of general application.

## V. FINDINGS ON SPECIFIC PERFORMANCE PRE-JUDGMENT

With the theoretical background in mind, let us move now to describe the findings. I start by examining how plaintiffs choose between remedies when they litigate their case.

A preliminary finding is that plaintiffs opt-out of specific performance in what seems like many cases. This is somewhat surprising as theory imputes a higher value to specific performance than to money damages. To explain this unlikely finding, the interviews suggest three reasons: low enforceability might make specific performance *inferior* to expectation damages in terms of value; attorneys are biased in favor of money damages, as they facilitate collection of their own fees, so that they might consult the plaintiff to pursue this remedy even when it runs counter to the client's interests; and finally, litigation is lengthy and plaintiffs' preferences are dynamic—suing for money damages might be safer for the plaintiff even when she currently prefers performance to money damages.

But even when plaintiffs act consistent with theory and sue for specific performance, their motivations are more involved than is generally appreciated. Suing for specific performance may be motivated by a desire to signal to the court something about the merits of the case, to minimize procedural costs and delay, or to use as leverage in negotiations. These uses may or may not be objectionable on their own right, but they clearly deviate from the common justification of specific performance as giving the plaintiffs what was promised in the contract.

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<sup>77</sup> Future endeavors to increase sample size should include a greater sample of people who have lost in litigation and had to perform. This demographic proved especially interesting and fruitful in this study.

A. *Why Do Parties Not Sue More Frequently for Specific Performance?*

When plaintiffs file a lawsuit for breach of contract, they have a choice between various remedies, including specific performance and expectation damages.<sup>78</sup> The conventional wisdom in the literature is that, given the option, plaintiffs would tend to sue for specific performance. First, promisees are sometimes seen as the disappointed victims of a breach, which will not be remedied by mere payment of money.<sup>79</sup> Second, promisees are expected to benefit from the judgment indirectly, even if they do not care about performance, as they can use it as a bargaining chip to extract value from the promisor.<sup>80</sup>

However, early in the process of the research, there were various indications that parties regularly abstain from suing for specific performance, despite having the right to do so.<sup>81</sup> First, a sample analysis of contract cases found that specific performance was only sought in a minority of these cases (much fewer than 33%).<sup>82</sup> By itself, however, this is an ambiguous finding, as it does not convey information on the population of cases that settle.<sup>83</sup> To overcome this problem, and to get a sense of the overall population of cases, a question was included on the choice of remedies for all the lawyers interviewed, as they have been involved also in cases that settle. Consequently, some of the lawyers reported that they frequently advise their clients to opt for expectation damages over specific performance, and that, from their

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<sup>78</sup> See *supra* Part II.

<sup>79</sup> See Shiffrin, *Breach of Contract*, *supra* note 25, at 1564 (“If the no-show plumber were to appear next time matter-of-factly presenting you with a check or a discount reflecting the value of your time that was wasted, I suspect that, after emerging from shock, the resentment would not fully dissipate.”).

<sup>80</sup> For the proposition that renegotiation with a specific performance judgment in hand would yield high value to the promisee, see, for example, Daniel Markovits & Alan Schwartz, *The Expectation Remedy Revisited*, 98 VA. L. REV. 1093, 1102 (2012) (“[T]he property rights contract [i.e., specific performance] induces an ex post renegotiation, in which the promisee releases the promisor from her trade obligation in exchange for a share of the gains that the release engenders.”).

<sup>81</sup> Importantly, note that as a general matter, laypersons tend to exaggerate the rates at which specific performance will be given. See Tess Wilkinson-Ryan, *Fault in Contracts: A Psychological Approach*, in *FAULT IN AMERICAN CONTRACT LAW* 289, 293, 298 (Omri Ben-Shahar & Ariel Porat eds., 2010) (finding in an experiment run in the U.S. that respondents believed a judge should and would award specific performance even in circumstances where such a prediction was unlikely).

<sup>82</sup> The methodology consisted of identifying a pool of 900 cases in one of the commercial databases (Nevo) that met criteria indicating that they deal with contract remedies within a given time range. Three hundred of the cases were analyzed, and in only 102 of them, specific performance was sought. This indicates that, roughly, specific performance is sought in about one-third of the cases.

<sup>83</sup> See *supra* note 22.

experience, specific performance is frequently not sued. These findings are bolstered by similar findings in civil law countries where expectation damages are chosen over specific performance.<sup>84</sup> The following sections explore several reasons for this deviation from theoretical prediction.

### 1. Low Enforceability

Parts VI and VII detail various impediments to both post-judgment renegotiation and the enforcement of judgments. For now, it should be noted that the existence of such impediments has two implications: first, these impediments mean that there is no guarantee that the judgment would eventually be sold, so that if a party is not interested in performance, suing for specific performance carries a risk. Second, the value of the sale of the judgment in renegotiation might be low, as the threat of enforcement would have a weak bite on the promisor. If the promisor knows he can effectively avoid the enforcement of the judgment, he might be willing to pay a low sum in exchange for release from it, an amount that might be lower than expectation damages. That means that suing for specific performance in order to use it as a bargaining chip to extract extra payments from the promisor might end up being a losing proposition.

### 2. The Lawyers' Agency Problem

An analysis of the interviews reveals an important contributor for low rates of specific performance litigation: a conflict of interest of the plaintiff's attorney regarding their fees.<sup>85</sup> For reasons presently explored, lawyers have a systematic bias towards money damages, and this bias may lead them to sway their clients in favor of seeking money damages even when the client's best interest is served by a specific performance award.<sup>86</sup>

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<sup>84</sup> A similar finding is noted in Henrik Lando & Caspar Rose, *On the Enforcement of Specific Performance in Civil Law Countries*, 24 INT'L REV. L. ECON. 473, 486 (2004) ("[Specific performance] is available but rarely sought in Germany and France."); see also John P. Dawson, *Specific Performance in France and Germany*, 57 MICH. L. REV. 495, 530 (1959) ("But despite . . . formal limitations the damage remedy is in fact resorted to, by the choice of litigants, in a high percentage of cases."); Bernard Rudden & Philippe Juillard, *La Théorie de la Violation Efficace*, 38 REVUE INTERNATIONALE DE DROIT COMPARÉ 1015, 1035 para. 72 (1986) (observing that, practically, damages are the most sought after remedy in France, despite the general legal priority of specific performance).

<sup>85</sup> See generally Herbert M. Kritzer, *Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?*, 80 TEX. L. REV. 1943 (2002) (discussing the various effects of attorney fees on their behavior and noting the complexity of this question).

<sup>86</sup> This may be considered malpractice, but proving this in court would be difficult, as lawyers' motives may be easily disguised.

One issue arises when lawyers are paid on the basis of a contingency fee. Structuring a specific performance decree so it will be effective requires a lot of dedicated work by the attorney, for which she is not compensated. Moreover, assessing attorney fees requires the evaluation of the market value of performance. This is difficult, costly, and open to conflicting interpretations, and in fact, quite often plaintiffs sue for specific performance because they wish to avoid these costs.<sup>87</sup> One lawyer referred to this prospect as a “needless headache.”<sup>88</sup> Instead, lawyers can steer the client to sue for a damages suit, where these issues are avoided.<sup>89</sup>

But even if attorneys are not paid on a contingency basis, specific performance is less favorable, because of the problem of collecting the fees.<sup>90</sup> With expectation damages, the client’s liquidity is assured, but this may not be the case with respect to specific performance of a good or service. Moreover, the lawyer enjoys a mechanic’s lien on damages awards, which guarantees her fees.<sup>91</sup> The lawyer would have a private incentive, again, to recommend suing for specific performance.

### 3. Preferences over Time

People have different tastes and preferences at different times of their lives. This is obviously a familiar point, but it is of special interest in the context of specific performance litigation, due to an expected change in preferences over both the performance and the relationship with the other party.<sup>92</sup>

One of the lawyers related the case of a client who bought a brand new model of a luxury car.<sup>93</sup> The retailer committed an inventory mistake and could not supply the car on time. The client and the lawyer decided jointly against filing a claim for specific performance. Considering the fact that litigation

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<sup>87</sup> See, e.g., Kronman, *supra* note 44, at 362 (“In asserting that the subject matter of a particular contract is unique and has no established market value, a court is really saying that it cannot obtain, at a reasonable cost, enough information about substitutes to permit it to calculate an award of money damages without imposing an unacceptably high risk of undercompensation on the injured promisee.”).

<sup>88</sup> Interview with Yaron Reiter, Esq., Ron Gazit, Rotenberg & Co. (Dec. 29, 2008) [hereinafter Reiter, Interview].

<sup>89</sup> Lawyers incentives have a marked effect on the choice of litigation strategy. See generally Kritzer, *supra* note 85 (surveying the empirical literature).

<sup>90</sup> Interview with Anonymous Lawyer #1, specializing in debt collection (Jan. 3, 2009).

<sup>91</sup> The mechanic’s lien is provided for in Section 88 to the Chamber of Advocates Law, 5721–1961, SH No. 1678 (Isr.).

<sup>92</sup> For a similar conclusion, see Lando & Rose, *supra* note 84, at 481–82.

<sup>93</sup> Reiter, Interview, *supra* note 88.

would take a few years to resolve,<sup>94</sup> the client would have no use for the car. The parties contemplated the possibility of suing under the doctrine of *cy-pres* or “approximate performance,” i.e., suing for another new car from the same manufacturer.<sup>95</sup> However, this option was rejected as well, because the client was not sure whether he would still be interested in this brand of car in the future.

Another change in preferences relates to the relationship between the parties. At the time of contracting, the relationship is benign. However, the litigation process is aimed at finding who is at fault and not to remedy the pathologies of the underlying relationship. Consequently, some of the interviewees reported that the litigation process exacerbated existing tensions between the parties and created animosity,<sup>96</sup> and when asked about the other parties, one of the interviewees responded in the following typical way, describing him as “stiff-necked and economical with the truth.”<sup>97</sup>

The adverse relational effect of litigation is of special concern in cases of specific performance, as the decree implies greater future interaction than is expected with a damages award. This issue reduces the relative value of specific performance vis-à-vis expectation damages, even when the direct financial value of performance is still higher.

In sum, change in preferences would reduce the value of specific performance, as it requires plaintiffs to bear the risk that they would change their mind over the course of litigation.

### *B. Why Do Parties Sue for Specific Performance?*

Of course, there are also cases where specific performance is indeed sought. As this is the basic premise of the literature, it may seem that it would require no further justification. As the interviews reveal, however, parties sue for specific performance not only for the reasons assumed in the literature, but also for different reasons that are more strategic in nature: signaling of the merit of the underlying case, the minimization of procedural costs and delays, and leverage in post-judgment renegotiation.<sup>98</sup>

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<sup>94</sup> Contract litigation is relatively lengthy. An earlier study reports a median of 17.8 months for cases that go to trial on the federal level (24.8 in the state level). See Theodore Eisenberg et al., *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 SEATTLE U. L. REV. 433, 448 (1996).

<sup>95</sup> The *cy-pres* doctrine is found in RESTATEMENT (SECOND) OF CONTRACTS § 358 (AM. LAW INST. 1981).

<sup>96</sup> Interview with Mike York-Reed, Esq., (Dec. 25, 2008) [hereinafter York-Reed, Interview]; Interview with Omri Negev (Dec. 24, 2008) [hereinafter Negev, Interview].

<sup>97</sup> Interview with Anonymous Party #1.

<sup>98</sup> Two additional strategic reasons that were identified in the literature but could not be verified in this study are spite (suing in order to inflict a loss on the other side) and creating

## 1. Signaling

For the plaintiff to be awarded a remedy for a breached contract, the court must be first convinced that the plaintiff is in the right. This is often not a simple task. Contractual breaches are typically a nuanced dynamic of escalating breaches, which involve varying degrees of fault by both parties. It is common in these situations that the plaintiff would face allegations of bad faith or prior breach by the defendant, making it essential to prove the good faith of the plaintiff.

When the plaintiff has a choice of remedies, the choice made can be taken as a signal of the merits of the case.<sup>99</sup> In this context, one of the lawyers interviewed complained that it is difficult to opt for expectation damages without sending an unwanted signal to the court. The concern is that the court might infer that if the plaintiff opts for monetary compensation instead of performance, she is not sincere in her motives and that she is “in it for the money.”<sup>100</sup> Since judges constantly extol the moral merits of specific performance, choosing the “wrong” remedy might convey the wrong message.

In other words, by choosing to deviate from the default of specific performance, the plaintiff signals that she no longer has interest in the contract, which may weaken the plaintiff’s position in litigation. It may well be the case that neither party is interested in the actual performance of the contract, yet the benefits of signaling and thus winning the case may outweigh the costs of performance to the plaintiff.

## 2. Achieving Faster, Cheaper Case Resolution

The procedure for specific performance actions is much faster and cheaper than the corresponding procedure for damages. The reason is straightforward: a specific performance case does not involve the quantification of damages, which is a highly complex and expensive procedure that involves experts, the introduction of various evidence, bringing witnesses, and so forth.<sup>101</sup>

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reputation as being performance-oriented. See Edward Yorio, *In Defense of Money Damages for Breach of Contract*, 82 COLUM. L. REV. 1365, 1373 (1982).

<sup>99</sup> It is rational for courts to draw this inference, because sending this signal is more costly for someone who is not interested in the performance of the contract than it is for someone who seeks performance. Alternative interpretation of opting for specific performance is that the plaintiff places an especially high value on performance and inasmuch as it would increase her odds of winning, we might expect this to contribute to the overuse of this remedy.

<sup>100</sup> Interview with Ram Zan, Esq., Ron Gazit, Rotenberg & Co. (Dec. 29, 2008) [hereinafter Zan, Interview].

<sup>101</sup> If—as is the case under American law—the plaintiff has to show the inadequacy of damages to receive specific performance, this will introduce additional costs that would reduce the cost saving involved.



By opting for a specific performance suit, the plaintiff can economize on litigation costs (for both himself and the defendant). The shorter period it takes to litigate the case will reduce costs and might be beneficial to both the parties and the public.<sup>102</sup>

This benefit may accrue even if the plaintiff intends to ultimately renegotiate the decree, which means that quantification would be required (for trade to occur). But it may still be beneficial to sue for specific relief and then renegotiate if the parties have a comparative advantage over the court in quantifying damages and a comparative disadvantage over the court in assigning fault.<sup>103</sup>

Some of the interviewees reported suing for specific performance for these reasons. For example, a lawyer reported that he was facing litigation that combined both motions for specific performance and for damages. In litigation, he tried to separate the proceedings despite the costs involved in handling two separate suits, because he felt that the benefits of the quicker and cheaper resolution of the specific performance suit outweighed the additional costs of having two distinct cases.<sup>104</sup>

### 3. Post-Judgment Renegotiation

Finally, the interviews revealed that in some cases parties were at least partially motivated by the ability to sell their rights to the other party *ex-post*.<sup>105</sup> This is in line with much of economic theory that predicts such a result, but is surprisingly at odds with a previous study (albeit in torts) that found that post-judgment renegotiations are scarce.<sup>106</sup>

## VI. POST-JUDGMENT RENEGOTIATION AND ITS FAILURES

With the judgment in hand, the parties may seek to renegotiate. A common theme in economic analysis is the notion that if performance is inefficient—which the fact of breach suggests it is—the parties may benefit

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<sup>102</sup> However, Alan Schwartz contends that specific performance decrees may be more costly to issue than expectation damages, as the judge would have to spend considerable time fashioning the decree. *See* Schwartz, *supra* note 39, at 293.

<sup>103</sup> The theory of the bifurcation of the litigation process is complex and the merits of so doing may depend on a broad set of parameters. *See* Kathryn E. Spier, *Litigation*, in *THE HANDBOOK OF LAW AND ECONOMICS* 259, 293–95 (A. Mitchell Polinsky & Steven Shavell eds., 2007) (reviewing some of the considerations that factor into the decision to bifurcate suits).

<sup>104</sup> Interview with Avi Shachar, Dir., A.G.M.R. Eng'g & Inv. Co. Ltd. (Dec. 23, 2008) [hereinafter Shachar, Interview].

<sup>105</sup> Zan, Interview, *supra* note 100.

<sup>106</sup> *See* Farnsworth, *supra* note 9.

from agreeing not to enforce the judgment in exchange for some payment.<sup>107</sup> Despite that, the leading research on the topic of post-judgment renegotiation (“PJR”) has found that in nuisance cases, no PJR took place.<sup>108</sup> This makes an investigation of this issue in the context of specific performance especially important.

The analysis finds that specific performance PJR sometimes takes place: of the interviewees, two reported that they were engaged in successful PJR.<sup>109</sup> One was a defendant who lost in a specific performance suit and was ordered to transfer title in a house to the plaintiff. He actively avoided the enforcement of the judgment for a few years, and so the plaintiff found it necessary to renegotiate the judgment, and they have settled for half the price of the value of the judgment. In another case, the PJR failed apparently because of mistrust and a hard bargain by the defendant.<sup>110</sup> In addition, one lawyer reported that he had been involved in “some” PJRs throughout his career.<sup>111</sup>

However, PJRs do not always occur—that is, in some cases, parties do not even attempt to renegotiate the claim.<sup>112</sup> As noted, this is puzzling from an economic perspective. And while it is only indicative, the analysis of the reasons for failure of PJR suggests that the failure has to do more with psychological reasons than lack of potential gains from trade: animosity, the endowment effect, and an incommensurability bias.

Consider first the issue of animosity. Breach of contract, and specifically the process of litigation, can lead to the entrenchment of the mistrust between the parties, making them skeptical of any new agreement. Moreover, the mistrust may escalate to actual spite between the parties, which will further motivate them not to negotiate.<sup>113</sup> For example, in one of the cases, the parties sat down and negotiated a settlement. The defendant asked, “How much would you be asking in settlement?”; but the plaintiffs thought it was a legal trick, aimed at showing in court that the plaintiffs were cynically

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<sup>107</sup> See *supra* note 106 and accompanying text.

<sup>108</sup> See *infra* note 115 and accompanying text.

<sup>109</sup> Zan, Interview, *supra* note 100; Negev, Interview, *supra* note 96.

<sup>110</sup> York-Reed, Interview, *supra* note 96. The case referred to was CA 4018/03 Isodor Sharvit v. Ben Aharon 49(4) PD 343 (2005) (Isr.).

<sup>111</sup> Interview with Gerald Benichou, Esq., Burnstein-Benichou Law Firm (Jan. 10, 2009) [hereinafter Benichou, Interview].

<sup>112</sup> On the issue of failure of PJR from behavioral perspective, see Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1138 (2000), and Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1497–1500 (1998).

<sup>113</sup> See Arthur Allen Leff, *Injury, Ignorance and Spite—The Dynamics of Coercive Collection*, 80 YALE L.J. 1 (1970). Korobkin and Ulen argue that a general bias towards fair outcomes will generally facilitate renegotiations. Korobkin & Ulen, *supra* note 112, at 1137–38. But if litigation leads to spite, this may skew this tendency in the opposite direction.

motivated by financial calculations and did not care about the contract. Therefore, the plaintiffs refused to answer and the negotiations broke down.<sup>114</sup>

In the case of specific performance, animosity has conflicting effects; on the one hand, it makes it harder to reach an agreement, for the parties may mistrust and dislike each other. On the other hand, it makes both parties want to successfully negotiate, because failure in negotiation means that they both have to contend with each other for a longer period, during the implementation of the decree. The direction of the combined effect of these factors is hard to predict, but in some cases, this may make parties reluctant to negotiate even when it is in their best financial and emotional interests to do so.

Now consider the endowment effect. This is the name given to the experimental result that subjects report higher value for things they own just by virtue of owning them. The so-called endowment of a subject with an object, changes none of the characteristics of this object, yet people often report that they will require a high payment to trade it, higher than the maximum amount they would be willing to pay for it. The problem, noted by legal behaviorists, is that litigation seems to instill a sense of endowment in the litigants. Jolls, Sunstein, and Thaler explain:

[T]he process of going through litigation may strengthen the endowment effect. Experimental evidence suggests that there is an especially strong endowment effect when a party believes that he has earned the entitlement or that he particularly deserves it. Of course someone who has received a court judgment in his favor will believe that he has earned it. Such a person may also believe strongly that this outcome is fair.<sup>115</sup>

This is expected to be of special relevance in the specific performance context, as the judgment often represents an actual good or service (unlike money damages in an ordinary judgment), to which the plaintiff may feel entitled or otherwise connected. And while a study of this kind cannot prove the existence of such bias, the impression from parties' rhetoric is that some sense of ownership underlies their reluctance to renegotiate. Parties often spoke of their judgments as things "belonging to them," which is in line with past

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<sup>114</sup> Interview with Ms. Tsipi Katz, Private Residence (Dec. 24, 2008) [hereinafter Katz, Interview].

<sup>115</sup> See Jolls, Sunstein & Thaler, *supra* note 112; see also George Loewenstein & Samuel Issacharoff, *Source Dependence in the Valuation of Objects*, 7 J. BEHAV. DECISION MAKING 157, 159–61 (1994).

scholarship.<sup>116</sup> Endowment effects have the potential for limiting the range of possible settlements, thus leading to potential PJR failure.<sup>117</sup>

A final issue is what I term the *incommensurability bias*. All throughout the interviews, parties' responses indicated that they avoid thinking of their judgment in terms of its monetary value. More precisely, they exhibit an aversion to reducing the judgment to its monetary value, and attach symbolic meaning to it. They tend to think of specific performance as qualitatively different from damages. This finding also emerges in other qualitative empirical works in other areas of law.<sup>118</sup> As parties seem to perceive it, specific performance is entitling the party to the fulfillment of the promise, whereas damages only suggest entitlement to lost profits.<sup>119</sup>

When asked about their motivations, a recurring comment was that "one wants a specific apartment, a specific type of a building."<sup>120</sup> And while parties claimed that they wanted the specific good in question,<sup>121</sup> when asked whether they would have sold their right for a very large amount of money, these plaintiffs all said that they would have; however, none of them actively tried to negotiate such a high sum, and all relevant interviewees seemed to think of the monetary aspect as qualitatively different from their contractual entitlement. On the other hand, lawyers representing large firms all reported that their clients had no problem renegotiating their judgments and reducing them to their monetary value was "natural." Since corporations are major players in specific performance litigation,<sup>122</sup> the implications of the irreducibility problem are somewhat limited.

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<sup>116</sup> See Korobkin & Ulen, *supra* note 112, at 1107–12 (discussing the endowment effect and its consequences for the ability of parties to renegotiate injunctions and judgments).

<sup>117</sup> A subtle theoretical question is whether negotiation breakdown due to endowment effects represent an efficiency loss or whether the effect actually creates subjective value. *Id.* at 1111.

<sup>118</sup> See Farnsworth, *supra* note 9, at 392–94 (arguing that parties exhibit a refusal to "commodify" injunctions in torts despite a financial incentive to do so).

<sup>119</sup> Various psychological experiments seem to support the lay understanding of conceiving of specific performance as being qualitatively different from expectation damages. See, e.g., Tess Wilkinson-Ryan & David A. Hoffman, *Breach Is for Suckers*, 63 VAND. L. REV. 1003, 1016 (2010) ("Psychological evidence suggests that when individuals consider themselves to be in certain kinds of reciprocal transactions, they are offended at a perceived downgrading or commoditizing of the relationship."); Wilkinson-Ryan & Baron, *supra* note 7, at 420–21 (finding that the majority of participants in an experiment believed the promisor should perform rather than pay damages, that the court should order specific performance and not damages, and that even super-compensatory damages were inferior to performance).

<sup>120</sup> Interview with David Zailer, Esq., Partner, Herzog, Fox, Neeman Law Firm (Jan. 29, 2008) [hereinafter Zailer, Interview].

<sup>121</sup> Benichou, Interview, *supra* note 111; Katz, Interview, *supra* note 114.

<sup>122</sup> I found corporations to be the plaintiffs in 35–40% of all contract litigation. This is based on a random sample of 102 cases in Israel and on a survey made by the United States Department of Justice in 2005. This survey encompasses a representative sample of bench and jury trials concluded in 156 counties. For a discussion of the methodology, see *supra* note 82.

## VII. IMPLEMENTING SPECIFIC PERFORMANCE: PITFALLS AND OBSTACLES

What happens *after* a specific performance judgment is entered? Surprisingly, we do not have systematic research data to answer this question. Instead, reading the literature, one may get the impression that specific performance judgments lead to more or less the same kind of result as was promised in the original contract (i.e., performance), and issues relating to implementation are only relevant in exceptional cases. This leads to the view that the value to the promisee from a specific performance decree should be greater than the value of expectation damages, given the known limitations on the scope of these damages and how they systematically undercompensate relative to actual profit expectations.<sup>123</sup>

Indeed, the law itself takes the view that specific performance has a comparative advantage in terms of compensation. Under the Uniform Commercial Code, specific performance is to be awarded “where the goods are unique or in other proper circumstances.”<sup>124</sup> The reason is that, in all non-unique goods cases, damages are seen as providing “adequate” compensation, and it is only in cases of unique goods or special circumstances that damages are inadequate and specific performance is called for, under the theory that it would provide a more adequate compensation.<sup>125</sup> The Restatement echoes this position.<sup>126</sup>

The findings challenge this view because the implementation of specific performance decrees is fraught with difficulties that decrease their

<sup>123</sup> See, e.g., Daniel Markovits & Alan Schwartz, *The Myth of Efficient Breach: New Defenses of the Expectation Interest*, 97 VA. L. REV. 1939, 1964 (2011) (“[A] promisee with a property right [i.e., specific performance] has as much power as a promisee who can enforce a very large transfer term [i.e., money damages]. In both cases, the promisee can impose heavy costs on a promisor who refuses to trade or to pay.”); Melvin A. Eisenberg, *Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law*, 93 CALIF. L. REV. 975, 1018 (2005) (“In contrast [to expectation damages], specific performance comes closer to giving the promisee just what he contracted for.”). Rarely the opposite option is entertained; for example, Steven Shavell adumbrates the point. See Shavell, *supra* note 11, at 846 (“[P]roblems of administrability may be encountered under specific performance that would not be experienced under the expectation measure.”).

<sup>124</sup> U.C.C. § 2-716 (AM. LAW INST. & UNIF. LAW COMM’N 1977).

<sup>125</sup> Laycock, *supra* note 54, at 689 (“The irreparable injury rule says that equitable remedies are unavailable if legal remedies will adequately repair the harm. Frequent repetition of the rule implies that legal remedies are generally adequate.”); Charles M. Thatcher, *Specific Performance as a Seller Remedy for Buyer’s Breach of a Sales Contract—The Availability of Judicial Purchase Orders*, 57 S.D. L. REV. 218, 233 (2012) (“Courts have traditionally insisted that the claimant must establish the inadequacy of any award of damages to protect the claimant’s expectation interest in order to make a prima facie showing of entitlement to specific performance.”).

<sup>126</sup> RESTATEMENT (SECOND) OF CONTRACTS § 359 (AM. LAW INST. 1981) (“[S]pecific performance . . . will not be ordered if damages would be adequate.”).

value. In general, most interviewees held negative opinions about the effectiveness of specific performance awards. Only a few interviewees responded positively and said that their experiences with specific performances resulted in a timely and quality implementation.<sup>127</sup> The majority, however, faced difficulties in enforcing their judgment and, in some cases, it was never fully implemented.<sup>128</sup> The difficulties, presently described, suggest that in many cases, specific performance would tend to be under-compensatory, relative to both performance and expectation damages, thus making it not in the best interests of the promisee in all cases.

Before describing these difficulties, let us first make explicit an oft-neglected issue. It is well known that ordinary contracts are sometimes under-performed (e.g., a plumber installs sub-standard pipes in the hope the homeowner will not notice).<sup>129</sup> Therefore, when we want to measure the value of specific performance versus the ordinary performance of the contract, our expectation should not be full and complete performance of the contract, for the same powers and incentives that operate in the absence of judicial intervention are likely to persist when a court steps in. What may reduce the value of specific performance is, potentially, the cost of performance (the fact of breach indicates that performance became more costly than anticipated, making the promisor more likely to “cut corners”), and animosity between the parties following litigation, which may make the promisor spiteful towards the promisee. Importantly, the value of expectation damages, while under-compensatory in many regards, is overly compensatory in that it assumes full and complete performance, thus making it more likely to offer higher compensation to the promisee than specific performance.<sup>130</sup>

<sup>127</sup> Katz, Interview, *supra* note 114; Interview with Nili Madar, Private Residence (Jan. 1, 2009) [hereinafter Madar, Interview]; Telephone Interview with Yiftach Naor, CEO, Carmelton (Dec. 26, 2008) [hereinafter Naor, Interview]; Negev, Interview, *supra* note 96; Shchar, Interview, *supra* note 104; York-Reed, Interview, *supra* note 96; Zan, Interview, *supra* note 100.

<sup>128</sup> York-Reed, Interview, *supra* note 96. For the case, see CA 4018/03 Isodor Sharvit v. Ben Aharon 49(4) PD 343 (2005) (Isr.); CC 1788/94 Beer-Tovia v. Omri Negev, (not reported) (2001) (Isr.) (petition approved for specific performance of a sale of house to offset prior debts); Negev, Interview, *supra* note 96; *see also* LCA 7478/04 Beer-Tovia Ltd. v. Omri Negev, (not reported) (2005) (Isr.) (discussing a settlement agreement between the parties); CC (Rishon-Lezion) 4616/02 Eshel Col v. Hahevra Hamerkazit (not reported) (2007) (Isr.) (this case did not involve specific performance per se, but dealt with the collection of a bond which required the construction of a building); Benichou, Interview, *supra* note 111; Zan, Interview, *supra* note 100.

<sup>129</sup> As in the famous case of *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889 (N.Y. 1921).

<sup>130</sup> The other reasons for why expectation damages tend to be under are calculation errors (coupled with a bias against punitive damages), refusal to compensate for “unforeseen” (but nonetheless real) damages; and the costs of litigation, especially the costs of proving the extent of damages. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 351–53 (AM. LAW INST. 1981) (excluding damages that are unforeseen, cannot be established with reasonable certainty, or only reflect emotional “disturbance”); Eisenberg, *supra* note 123, at 989–96; Schwartz, *supra* note 39, at 276.

The rest of this Part details the reasons that affect the implementation of specific performance decrees in cases where the promisor sought to breach the contract, because presumably performance was costly or difficult.

### A. *Animosity*

As just noted, a primary reason for why we would expect a specific performance judgment to be of lower value than actual performance is animosity of the parties, which could lead to spite.<sup>131</sup> But some of the findings contradict either the existence of animosity or its practical importance.

In one of the cases, there was a dispute concerning the implementation of a multi-million dollar finance agreement. The plaintiff sued and demanded that the defendant, a bank, specifically perform it. The bank responded that the deterioration of the parties' relationships had made it impossible to continue with the agreement, which required frequent interactions and adjustments. In litigation the plaintiff prevailed, and in the interview the CEO of the plaintiff was surprised when asked about the animosity with the bank. The CEO said that he "knows a different bank than the one described in the judgment" and that "de-facto, the relationship with the bank is excellent." When pressed about the cooperation with the bank and asked about its good will in case of need, he said that on a daily basis consensual modifications to the agreements took place, and that the cooperation with the bank is strong.<sup>132</sup> A similar finding was noted with respect to a consumer who ordered a custom-made entrance door to her house from a small company that manufactures such doors. The company delivered a door that opens in the opposite direction to what was ordered, and refused to offer a replacement. The plaintiff sued, won a specific performance judgment, and the door was eventually delivered and installed—to the letter of the judgment.<sup>133</sup>

These findings suggest that the role of animosity and spite can be easily exaggerated, and in reality, the same drivers that would ensure performance in the ordinary run of things would continue to hold even in contexts where a judgment was rendered. Another potential characterization of these findings is that, in cases of parties which are businesses or firms, spite and animosity are of lesser concern.<sup>134</sup>

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<sup>131</sup> See Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 783 (1983) ("If . . . the promisor is required to perform as he had originally agreed . . . his feelings of regret are likely to be intensified, particularly when performance entails some ongoing personal cooperation with the other party or subjection to his personal supervision.").

<sup>132</sup> Naor, Interview, *supra* note 127.

<sup>133</sup> Madar, Interview, *supra* note 127.

<sup>134</sup> The Restatement notes that "[e]xperience has shown that potential difficulties in enforcement or supervision are not always realized and the significance of this factor is

### B. Costly Supervision and Lack of Standards

The effectiveness of specific performance judgments depends, in part, on the ability to verify the quality of performance and to punish deviations. The common mechanism one finds in the literature is the on-going supervision of performance (e.g., having a court bailiff monitor the plumber). This mechanism is often criticized for its costliness. But an alternative approach is much cheaper—verifying the quality of the finished product.<sup>135</sup> If the promisor fails to meet a given quality standard, the court can either order a full remake or the modification of the non-conforming part.

The interviews provide an example of the effectiveness of this latter approach. In the “wrong way door” case mentioned above,<sup>136</sup> a lawsuit was brought against a seller of designer doors who failed to provide the buyer with a door that matched the buyer’s specifications. The specific performance decree was effectively enforced without need of judicial supervision, despite the door being non-standard, due to the existence of detailed product specification in the order form.<sup>137</sup>

However, both of these mechanisms are inadequate when it is both difficult to monitor performance and there is no clear standard for evaluating the quality of the completed good or service. The latter problem may arise when performance efforts are only weakly correlated with the quality of the finished good or when the good has no close substitutes against which it could be compared. This means that the uniqueness of the good—which is the initial motivation to abandon expectation damages in favor of specific performance—also provides a strong reason why specific performance may be ineffective and therefore under-compensatory.<sup>138</sup>

Besides these two potential means for enforcement, there is a third option that could overcome some of the problems just mentioned—the appointment of a receiver over the promisor’s business. This is a useful method even when the performance requires special expertise, since the receiver can (sometimes) effectively direct the employees to employ their know-how. One

peculiarly one for judicial discretion.” RESTATEMENT (SECOND) OF CONTRACTS § 366 cmt. a. (AM. LAW INST. 1981).

<sup>135</sup> See Shavell, *supra* note 11, at 845 (“To enforce specific performance, the court must ensure that the stipulated performance is accomplished, meaning that the court must be able to ascertain the quality of performance to guard against its being inadequate.”).

<sup>136</sup> See *supra* note 133 and accompanying text.

<sup>137</sup> Madar, Interview, *supra* note 127.

<sup>138</sup> Melvin Eisenberg proposes that difficulty in the verification of quality may actually give the promisee too much, as he could “opportunistically insist on a gold-plated performance, threatening that if the performance is anything less, he will go back to the court for an order of contempt.” See Eisenberg, *supra* note 123, at 1026.



case analyzed involved this mechanism and it proved highly effective.<sup>139</sup> There are costs to this mechanism, but at least part of the appeal is that the receiver's salary is paid for by the defendant. Further analysis of this mechanism is required.

### C. *Post-Judgment Costs and Liquidity*

The law and parts of the legal literature recognize that there may be *ex-post* costs of implementing the judgment and that these costs may be substantial, but they focus on the burden to the court and the public purse.<sup>140</sup> In practice, however, the plaintiff is expected to bear costs after the judgment relating to the enforcement of the judgment, and these are often higher under specific performance than under expectation damages.

The interviews revealed that all successful collection attempts were preceded by a plaintiff's active approach to the defendant; and in the one case where no action was taken by the plaintiff, the order was not performed.<sup>141</sup> Indeed, formally, the plaintiff is not obligated to take any action after a judgment is issued and the defendant will not be excused from her obligation to perform just because the plaintiff failed to take action. However, in practice, if the plaintiff is passive, the prospects of performance appear to be low.

Taking the requisite actions is costly for the plaintiff: coordination of performance, and its administration and monitoring, requires time and money, and importantly, tend to be more costly than an award of damages. Note that while an extensive and broad industry exists for the enforcement of money judgments and debts, none exists for the enforcement of specific relief.<sup>142</sup> Given that the plaintiff's liquidity may be jeopardized following costly litigation, the costliness of enforcement can hamper the effectiveness of the judgment. Note that even a fully rational plaintiff may fail to predict the full costs of litigation and her financial solvency at the end of litigation, thus making it possible that the judgment will not be realized. One such example is a woman who filed a suit for specific performance of a promise to allot her a parking space next to her home. After the judgment was delivered, she became

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<sup>139</sup> Interview with A. Kahan, Esq. (Dec. 30, 2008). The relevant case is Bankruptcy Court (Haifa) 1053/01 Receiver of Ramat Shlomi v. Shlali David (2004) (Isr.).

<sup>140</sup> RESTATEMENT (SECOND) OF CONTRACTS § 366 (AM. LAW INST. 1981) ("A promise will not be specifically enforced if the character and magnitude of the performance would impose on the court burdens in enforcement or supervision that are disproportionate to the advantages to be gained from enforcement and to the harm to be suffered."); Linzer, *supra* note 54, at 131 ("[T]he court should then balance the cost to the promisee of receiving money damages in the place of performance against costs of judicial supervision.").

<sup>141</sup> See, e.g., Shachar, Interview, *supra* note 104.

<sup>142</sup> For a review of the industry, see FED. TRADE COMM'N, THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY (2013).

gravely ill and took no action to collect the judgment. Six years after the fact, the judgment had still not been performed.<sup>143</sup>

#### D. Capitalization and the Judgment-Proof Problem

When the defendant's wealth is low, theory has it that specific performance will have an advantage over expectation damages, for the defendant will be unable to repay the debt in full but could perform instead.<sup>144</sup>

The problem with this argument is that it does not fully consider the mechanisms of enforcement. The main mode of enforcement of a specific performance decree is through the threat of contempt of court.<sup>145</sup> With contempt, the court may impose either financial or criminal sanctions. But in practice, courts are highly reluctant to jail those who do not meet contractual obligations. This leaves only the threat of financial sanctions, but in cases of low capitalization, this threat is obviously of limited value. Consequently, one of the interviewees, a lawyer, called those defendants with low capitalization "outlaws" in the literal sense of the word—as they are outside the law's ambit.<sup>146</sup> In summary, the added value of specific performance over expectation damages in cases of low financial exposure is likely to be small, if any.

#### E. Defendant's Reputation

Besides financial capital, defendants may also have capital in the form of reputation, which can be leveraged to enforce specific performance judgments. This is useful because, as just noted, financial and criminal sanctions are likely to be ineffective in cases of low capitalization, thus making specific performance only marginally more enforceable than expectation damages. Moreover, just as reputation concerns reduce the need for costly

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<sup>143</sup> Interview with Hayman (Jan. 6, 2009). The case was CC (TA) 63723/99 Lota Hayman v. Moshe, (not reported) (2002) (Isr.).

<sup>144</sup> The Restatement takes this approach when it considers factors that would favor specific performance over expectation damages: "Even if damages are adequate in other respects, they will be inadequate if they cannot be collected by judgment and execution." RESTATEMENT (SECOND) OF CONTRACTS § 360 cmt. d. (AM. LAW INST. 1981); see also Timothy J. Muris, *Opportunistic Behavior and the Law of Contracts*, 65 MINN. L. REV. 521, 535 (1981) ("If, on the other hand, the promisor is faced with a judgment-proof promisee desiring to work elsewhere, the promisor may turn to other legal solutions, such as . . . specific performance of the original contract."); Shavell, *supra* note 11, at 855–56 (arguing that specific performance has an advantage over expectation damages in cases of a judgment proof defendant).

<sup>145</sup> See *supra* Part III.

<sup>146</sup> Zailer, Interview, *supra* note 120.

performance monitoring in ordinary contracts, they will mitigate the need for judicial supervision of the performance of the judgment.<sup>147</sup>

Many of the lawyers interviewed stressed this point, and indeed, instances of successful performance were typified by the debtor having a strong reputation.<sup>148</sup> Consistent with this point, it was noted that having low reputation concerns often leads to difficulty in enforcing decrees.<sup>149</sup>

These findings are consistent with similar findings in previous works that also asserted that businessmen are highly sensitive to considerations of reputation when choosing business partners,<sup>150</sup> and that the reputation mechanism may altogether substitute the need for the legal system in several areas.<sup>151</sup> Interestingly, in the cases analyzed, reputation did not have sufficient force to preclude the breach from taking place, but was strong enough to ensure obedience to the court order. This fact reinforces the notion that reputation is a complex and nuanced concept that cannot be simply reduced to whether it exists or not.<sup>152</sup>

#### F. *Social Norms and Social Pressures*

The final source of leverage is social pressure deriving from social norms. In some settings, the defendant operates in a social environment where norms may either encourage or discourage compliance with the judgment. As the following example illustrates, the effects of social powers are complex and context-dependent.

Mr. Negev was a member of a Moshav, an agricultural village cooperative, who entered into an agreement with the Moshav that would transfer his title in his house in exchange for debts owed to the Moshav.<sup>153</sup> Negev did not uphold his end of the bargain, and the cooperative brought suit for specific performance and prevailed. But Negev did not obey the judgment

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<sup>147</sup> See A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 HARV. L. REV. 1437, 1443–50 (2010) (listing evidence for how a vendor's reputation affects products' price and the vendor's market share).

<sup>148</sup> CA 148/77 Rot v. Yeshupa, 33(1) PD 617 (1979) (Isr.); Madar, Interview, *supra* note 128 (litigation against a well-reputed door company); Interview with Michael Shachor, Esq., Michael Shachor, Menes & Co. (Dec. 30, 2008) (large company operating bus stations).

<sup>149</sup> Zan, Interview, *supra* note 100.

<sup>150</sup> See Bernstein, *supra* note 71; Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2000); Macaulay, *supra* note 71.

<sup>151</sup> See Polinsky & Shavell, *supra* note 147 (arguing that legal regulation of defective goods may be unnecessary, if a robust market exists).

<sup>152</sup> For a comparative assessment of legal versus reputation enforcement, see W. Bentley MacLeod, *Reputations, Relationships, and Contract Enforcement*, 45 J. ECON. LITERATURE 595 (2007).

<sup>153</sup> Negev, Interview, *supra* note 96.

either. At first, social pressures were such that he said he felt shame and guilt. But as time passed, it turned out that he was not alone, and other Moshav members had joined his position after having accumulated debts to the cooperative. At this stage, “[t]he Cooperative was divided,” he explained, “between the good and the bad people.”<sup>154</sup> He added that, “When I was alone, I was ashamed, but when other members joined I drew strength.”<sup>155</sup> At this stage, Negev felt more secure in his position and held firm, until five years later when a settlement offer was made by the cooperative, and the parties settled for about half of the original debt.

This example suggests that social pressures can affect the likelihood of implementation, but that their effect is complex and may work in different directions, sometimes simultaneously. Therefore, social norms can be a valuable force but should not be blindly trusted to facilitate enforcement, even in those cases where social norms are of relevance.

## VII. IMPLICATIONS FOR LAW AND THEORY

The preceding Parts have shown some of the unintended and understudied functions of specific performance based on the experiences of parties to specific performance litigation. This Part explores the implications of these findings to prevailing contract theories, and explains how studying the phenomena described could challenge, enrich, and deepen different analytic approaches. As in the theoretical introduction in Part II, this Part divides the discussion into rights-based and consequentialist theories. It also includes a discussion of some of the potential legal ramifications for current American doctrine.

### A. Rights-Based Theories of Contract

The relationship between rights-based theories and any kind of empirical findings is not straightforward, given that many deontological claims are deduced from a-priori principles.<sup>156</sup> Having said that, when deontological theories are applied to the law, they seem to be at least somewhat concerned with the consequences of specific legal rules, even if these consequences are measured solely in terms that are not conventionally understood as consequentialist: enhancement (or reduction) of autonomy, self-determination, freedom, etc., as opposed to the more explicit standard of social welfare in economic analysis.<sup>157</sup>

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.* For the case, see CC (Ashdod) 1788/94 Beer-Tovia v. Omri Negev, (not reported) (2001) (Isr.).

<sup>156</sup> See generally Alexander & Moore, *supra* note 17.

<sup>157</sup> See *supra* note 28 and accompanying text.

The first implication of this study for rights-based theories is that instrumental use of specific performance decrees is a common motive, at least in the sample analyzed. That is, plaintiffs sue for specific performance not only because they perceive themselves as disappointed victims of a broken promise, but also employ more sophisticated and calculated approaches than implicitly assumed by these theories. Plaintiffs sometimes sue for specific performance because they seek to hold-up the promisor, to signal intentions to the court, or to accelerate the resolution of their case at a lower cost. And if promisees act instrumentally and not for performance's sake, it is no longer clear that the breach of a promise should entail a right to any of these things; if one was promised a table, then why would that imply that I have the right, in the case of default, to receive through hold-up more than the value of the table?

To this, the deontologist may have two responses that are worth noting. First, deontological analysis is justified in glossing over these instrumental uses because they are morally impressible (even the term "hold-up" suggests moral condemnation).<sup>158</sup> It would be wrong of the promisee to use the remedy in this fashion, and so, this impressible use should not affect the desirability of specific performance. The second response is that such instrumental uses are unavoidable by-products of an otherwise justified rule, and they are marginal enough to be dismissed.

These deontological responses are inadequate. The first argument misses the point that a legal right to specific performance is given precisely because we cannot trust all people to do the (arguably) morally required thing.<sup>159</sup> There is no right of action against hold-up by the plaintiff. The second response is only correct if one is determinedly indifferent to the consequences of legal rights. If, as most deontologist contend, consequences have some weight, then allowing these by-products can only be justified on the basis that their frequency is low. Such an assumption is empirical; the evidence gathered in this study, although partial, suggests that they are relatively frequent, but of course, further investigation is necessary.

The second implication concerns the under-compensatory nature of specific performance. As we have seen, some versions of rights-based arguments advocate specific performance because expectation damages may not fully compensate the victim due to evidentiary and doctrinal reasons.<sup>160</sup>

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<sup>158</sup> For stronger language, see Eisenberg, *supra* note 123, at 1025 ("[A] promisee may sue for specific performance opportunistically, because specific performance offers the potential for a kind of extortion.").

<sup>159</sup> As I mention in the text around note 26, accounts such as Shiffrin's are concerned with the environment that the law creates and whether it fosters virtuous choices by moral agents. See *supra* text accompanying note 38. The discussion here raises concerns that awarding specific performance may indeed foster unethical conditions.

<sup>160</sup> See *supra* note 130 and accompanying text.

These approaches assume that specific performance is indeed compensatory.<sup>161</sup> However, as this Article's analysis shows, this is often not the case: because enforcement is costly to police, promisors may be resistant to financial sanctions, and promisees may lack the necessary liquidity to enforce their claims. Even more important, specific performance will sometimes be under-compensatory even relative to expectation damages, so a promisee may find herself in a worse position with a specific performance judgment than with expectation damages.

From a theoretical perspective, this suggests that if full compensation is the goal, the promisee must at least be entitled to choose between expectation damages and specific performance. But this solution, as will now be explained, is far from being adequate. Alternatively, it may be that a combination of specific performance and damages should be awarded more routinely.<sup>162</sup> In any event, rights-based theories should carefully reconsider making specific performance categorically more available than expectation damages. Alternatively, if the main purpose of specific performance is not compensation but rather retribution for the moral wrong of breach, then the case for expectation damages becomes even stronger, as that remedy is likely to exact a higher punishment on the promisee.

The third implication concerns the question of whether specific performance should be optional or a sole remedy. Because specific performance is sometimes under-compensatory relative to expectation damages, offering a choice would best protect promisees. However, theories that hold that the goal of remedies is to hold promisors to their promises would have hard time justifying the grant of an option besides specific performance. And so these theories may make both promisees and promisors worse-off—an unappealing feature.

Even for the theories that seek to compensate promisees, the fact that introducing a choice leads to strategic effects should be of concern. If allowing promisees choice can make them worse off due to signaling, the existence of a choice can be sometimes detrimental.<sup>163</sup> Similarly, attorneys may abuse this choice to sway their clients to sue for expectation damages even if it reduces the client's expected recovery, because it better protects attorneys' interests.<sup>164</sup>

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<sup>161</sup> A prime example of this notion is the following: "Because the normative goal of contract remedies is compensation, specific performance should lie unless it can be shown that the costs of specific performance would exceed the gains." Schwartz, *supra* note 39, at 294; *see also* Linzer, *supra* note 54, at 137.

<sup>162</sup> The Restatement allows the judge to add damages to a specific performance decree. *See* RESTATEMENT (SECOND) OF CONTRACTS § 345 cmt. a. (AM. LAW INST. 1981) ("Nor are the remedies listed mutually exclusive, since a court may in the same action, for example, both require specific performance of a promise and award a sum of money as damages for delay in its performance.").

<sup>163</sup> *See* discussion *supra* Part V.B.1.

<sup>164</sup> *See* discussion *supra* Part V.B.2.

In conclusion, then, these implications suggest a necessary modification of rights-based theories, to account for the fact that a grant of a legal right to specific performance may produce unintended moral and economic consequences. Specific performance and actual performance diverge significantly, either because the promisee uses the judgment to obtain ends other than performance or because enforcement problems render the value of the judgment below that of performance. Rights-based theories should account explicitly for this divergence.<sup>165</sup>

### B. Economic Theories

For economic theories, the importance of empirical findings is much more salient than it is for rights-based theories. For the economist, and the consequentialist more generally, the success of a given policy prescription is to be judged solely by its consequences, so it is vital to match assumptions with actual practice. This Section focuses on the four major implications of the Article's finding for economic theories.

The first implication concerns the value of specific performance. Economic theory often proceeds under the assumption that specific performance would lead to a transfer of value equal to or greater than that of performance by the promisor to the promisee. Either the promisor performs or the deal is renegotiated under the threat of enforcement, in which case the promisee can extract high payments from the promisor (the fact of breach indicates high performance costs).<sup>166</sup>

The primary finding is the weakness of enforcement mechanisms that deal with specific relief. Ordering specific performance is not the same as actual performance. Nor does it result in compensation that is systematically higher than expectation damages. Unlike damages, the enforcement of specific relief requires expertise that is lacking in a system that is mostly geared towards the enforcement of pecuniary obligations. This problem is especially acute in cases when unique goods are involved, when either the plaintiff or defendant has low wealth, or when reputation and social norms are not strong motivators. Consequently, specific performance decrees would under-deter promisors from engaging in inefficient breaches.<sup>167</sup>

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<sup>165</sup> As noted, most theorists express some general awareness of the problems of enforcement, and a few mention in passing instrumental uses; however, the systematic divergence of performance and specific performance has not been fully accounted for.

<sup>166</sup> Richard A. Posner, *Let Us Never Blame a Contract Breaker*, 107 MICH. L. REV. 1349, 1353 (2009) ("In the usual case of breach of contract the cost of performance to the defendant would exceed the benefit to the plaintiff.").

<sup>167</sup> For the relationship between under-compensatory remedies and inefficient breach of contract, see Hermalin et al., *supra* note 42, at 102–04.

Theorists should be careful when they consider specific performance to be similar to money damages, due to the important differences in enforcement. Hence, one should approach with caution a statement such as “[s]pecific performance is analogous to a punitive sanction that seeks to deter breach absolutely,”<sup>168</sup> as it may well be the case that punitive (or even expectation) damages would be far more effective than specific performance.

Aside from deterrence, specific performance is also sometimes justified on the basis of providing insurance for the subjective value the promisee attaches to performance, and the same problem would be relevant here as well.<sup>169</sup> Therefore, both from deterrence and risk-aversion perspectives, the under-compensatory nature of specific performance should be a concern.

The second issue of concern is the unwillingness to negotiate, which was suggested to be partially motivated by animosity, endowment effects, and a “commensurability bias.” Theory supposes that trade will occur unless transaction costs are high. But in the contractual settings, negotiation costs are typically expected to be low, as the parties already know each other and have a history of negotiation. So we would expect very high rates of PJR. But these issues, and especially the commensurability bias, may prevent negotiations even in instances of low transaction costs. Specific performance decrees may be “stickier” than originally supposed and consequently, they may lead to inefficiencies if wrongly assigned. This suggests a greater role for expectation damages or greater attention by judges when they award specific performance.

The third implication relates to the effects of the choice between damages and specific performance on litigation dynamics.<sup>170</sup> As discussed, affording the plaintiff a choice among remedies has unintended consequences. Judges may be led to see promisors deviating from the default remedy of specific performance as signaling their lack of interest in the contract, which may bolster an excuse by the defendant that the plaintiff is acting opportunistically. Knowing that, plaintiffs may feel compelled to sue for specific performance even when expectation damages would be more valuable for them. Thus the introduction of the choice may be against the interest of plaintiffs and will lead to an overall excessive number of specific performance suits. In a different direction is the effect of this choice on lawyers, who may try to steer the plaintiff into suing for expectation damages to guarantee their

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<sup>168</sup> See Mahoney, *supra* note 15, at 125. This statement expresses a widespread assumption in the general literature on contract remedies.

<sup>169</sup> See Hermalin et al., *supra* note 42, at 114.

<sup>170</sup> There are other dimensions on which choice of remedies would affect parties' welfare as detailed in Ronen Avraham & Zhiyong Liu, *Incomplete Contracts with Asymmetric Information: Exclusive Versus Optional Remedies*, 8 AM. L. & ECON. REV. 523, 524–25 (2006) (showing how *ex-post* choice of remedies could improve parties' *ex-ante* welfare and therefore be part of their contractual design).



fees and simplify calculation. Overall, introducing a choice has complex effects, and its desirability should be analyzed within this more holistic view.

A fourth implication concerns the possible effects of routinely granting specific performance. One might worry that doing so will lead to a flood of litigation or to a rise in specific performance suits that would require substantial court supervision. However, as was discussed in Part V.A, even in a jurisdiction where specific performance is the default remedy, specific performance suits are not common. Given similar findings from other civil law countries,<sup>171</sup> such concerns should be qualified.

A final point is that the difficulties identified in the enforcement of specific performance decrees could be useful in further refining the domains in which specific performance is likely to be preferable to expectation damages. For example, specific performance could be granted or should be advocated only in cases where clear standards exist to evaluate performance.<sup>172</sup>

### C. Legal Implications

There are also a few potential implications that relate to legal policy and judicial decision-making. The first, and probably most important, is the appreciation of the frailty of enforcement of specific performance decrees. While it was expected in the theoretical literature that specific performance will be difficult to enforce, this Article demonstrates this claim empirically and highlights the importance of robust enforcement mechanisms. It follows from the difficulties identified here that enhancing the effectiveness of specific performance is going to be difficult, unless criminal sanctions will be allowed (with all the moral and economic costs involved, and especially the costs of legal errors that would inevitably ensue, leading to incarcerating the innocent). Another option is to adopt a more liberal approach towards financial sanctions and the appointing receivers. This will not solve the problem but might mitigate several instances of it.

A related point concerns the circumstances under which specific performance should be made available. Under current American law, specific performance is most commonly available when the subject matter of the contract is unique (e.g., custom made air pollution unit).<sup>173</sup> However, in exactly these circumstances, it will be harder to judge the quality of performance by comparing it with established standards. This challenges the idea that with unique goods, specific performance most adequately compensates the

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<sup>171</sup> See Lando & Rose, *supra* note 84, at 486.

<sup>172</sup> Steven Shavell has offered a first general refinement—a distinction between contracts to produce and contracts to convey property. See Shavell, *supra* note 11, at 846. This very general approach is useful but could potentially be narrowed down to allow for further categorization.

<sup>173</sup> Colorado-Ute Elec. Ass'n v. Envirotech Corp., 524 F. Supp. 1152 (D. Colo. 1981) (ordering specific performance).

promisee. A judge seeking to compensate the promisee to the extent of her lost value should comparatively assess the desirability of expectation damages and specific performance in light of the specific circumstances of the case, factoring in the ability to effectively discern sub-standard performance. Another issue is that specific performance judgments are not a silver bullet against a defendant's insolvency. While section 360 of the Restatement provides that specific performance would be adequate if "an award of damages could not be collected," it is unlikely that in the same circumstances specific performance would be effective.

And since both remedies are likely to result in some form of under-compensation in many cases, judges could correct for that by allowing deficiency judgments, passing the costs of enforcement to the promisor, and using other similar mechanisms that increase the promisee's payoff.<sup>174</sup> Another option to ensure that specific performance decrees are effective is to create a venue for the plaintiff to inexpensively complain about the low-quality performance of the decree and to set adequate sanctions for sub-standard performance. By creating such a venue, specific performance will become much more effective. Such a venue could be implemented by outsourcing the judicial work of supervision to an arbitrator or receiver, potentially at the promisor's expense.

Judges should also not trust plaintiffs to choose the best compensatory remedy, as was already noted—due to the lawyer's conflict of interest and signaling motives. These two reasons, it should be noted, push in opposing directions. Judges could correct for that, if it is believed necessary, by employing judicial discretion in the award of remedies, using the broad latitude provided by law.<sup>175</sup>

The change of preferences over time poses a difficult hurdle to plaintiffs, and policy makers should be aware of this difficulty. If the goal is to enhance the availability of specific performance, attention must be given to the length of resolution of such cases and their priority in the system.<sup>176</sup> This problem could be mitigated by the use of interim remedies, but these types of solutions should be examined in greater depth.

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<sup>174</sup> Judges have broad latitude in the design of the specific performance remedy. RESTATEMENT (SECOND) OF CONTRACTS § 358(1) (AM. LAW INST. 1981) ("An order of specific performance . . . will be so drawn as best to effectuate the purposes for which the contract was made and on such terms as justice requires. It need not be absolute in form and the performance that it requires need not be identical with that due under the contract.")

<sup>175</sup> For example, RESTATEMENT (SECOND) OF CONTRACTS § 360(a) and § 364(1) (AM. LAW INST. 1981), allow judges discretion to decide whether damages would be adequate based on "the difficulty of proving damages with reasonable certainty" and allow the judge to over-ride specific performance "if such relief would be unfair."

<sup>176</sup> This may lead to prolonging the time to resolve damage suits, but this problem can be solved by pegging the sum of damages to a relevant price index.

Finally, it is also important to recognize the lawyers' agency problem when they counsel their client on the choice of remedies. It should be understood that they face a conflict of interest in this situation because a damages suit will increase their remuneration potential. This agency problem should be addressed, possibly by rules of professional ethics, to sanction them for giving self-interested advice to their clients in this context.

#### X. CONCLUSION

This Article employs qualitative methodology to study contractual practices "from the inside," tracking the internal point of view of litigants and their lawyers. The engagement with litigants has shown that contracting practices are more complex and nuanced than conceptualized by prevailing theories. Parties act and respond to myriad background incentives and limitations, and the ways in which they employ and respond to various remedies have various unintended consequences.

This approach has illuminated theoretical oversights and suggests possibilities for future legal and theoretical revisions. However, this study is by no means conclusive or exhaustive. The limited sample of interviewees and the complexity of the issue require much more data before definitive measures could be prescribed. It is hoped that this Article's discussion paves the way for a more focused analysis of the many issues presented. Specifically, it would be useful for a larger sample to be gathered, potentially also including recipients of money damages, a greater number of parties who have lost in litigation, and both individuals and parties representing large and small corporations. It is also hoped that the third generation discourse on specific performance will be influenced by the empirical aspects of this issue and the findings discussed here. Without the empirical elements and the sensitivity to the context, the theoretical debate is bound to remain an intellectual exercise.