

# Rethinking Contract Remedies

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*This Article offers a theoretical framework for thinking about contract remedies. The argument starts from the distinction between rights and remedies in contract law. The distinction is consistent with the doctrinal structure of contract law in Western legal systems and with the available empirical evidence regarding contractual parties' expectations. An adequate theory of contract remedies must start by taking this distinction seriously. The Article illustrates this point through an analysis of two influential views in the American law of contract remedies: Shiffrin's analysis of the divergence between contract and promise, and Markovits and Schwartz's defense of expectation damages. On the basis of the right-remedy distinction, the Article argues that contract remedies have two central roles: protecting both the integrity of the practice of contracting and the individuals who engage in it. Because of these roles, there is a pro tanto reason for a certain resemblance or proportionality between remedies and the primary contractual rights they enforce. But this reason is only one of the relevant considerations in the design and evaluation of contract remedies. Once we bear in mind the distinction between rights and remedies, remedial analysis can also incorporate other morally relevant considerations beyond the central function of remedies. In order to show this, the Article offers a defense of money damages that incorporates those additional considerations. The Article, thus, offers a novel integrated framework for remedial analysis that can clarify some of the debates that have perplexed contract theorists writing about contract remedies.*

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## INTRODUCTION

How should we understand, design, and evaluate contract remedies? While a great deal has been written on the optimal design of contract remedies from an economic standpoint<sup>1</sup> and on their evaluation from a moral perspective,<sup>2</sup> we still lack an answer. We also lack a general theory of contract remedies which can incorporate these different types of considerations into a unified framework.

Part of the explanation for this lack of a general theory is that scholars disagree, at a fundamental level, about the purpose of contract remedies. Many commentators and theorists—we could call them “instrumentalists”—believe that remedies should incentivize optimal behavior by the parties.<sup>3</sup> Others—we could call them “moralists”<sup>4</sup>—think that remedies should

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1. See, e.g., Ronen Avraham & Zhiyong Liu, *Incomplete Contracts with Asymmetric Information: Exclusive Versus Optional Remedies*, 8 AM. L. ECON. REV. 523 (2006) [hereinafter Avraham & Liu, *Incomplete Contracts*]; Ronen Avraham & Zhiyong Liu, *Private Information and the Option to Not Sue: A Reevaluation of Contract Remedies*, 28 J.L. ECON. & ORG. 77 (2012); Richard R.W. Brooks, *The Efficient Performance Hypothesis*, 116 YALE L.J. 568 (2006); Richard R.W. Brooks & Alexander Stremitzer, *Remedies on and off Contract*, 120 YALE L.J. 690 (2011); Richard Craswell, *Contract Remedies, Renegotiation, and the Theory of Efficient Breach*, 61 S. CAL. L. REV. 629 (1988); Aaron S. Edlin & Stefan Reichelstein, *Holdups, Standard Breach Remedies, and Optimal Investment*, 86 AM. ECON. REV. 478 (1996); Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554 (1977); Gregory Klass, *Efficient Breach*, in PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 362 (Gregory Klass et al. eds., 2014); Lewis A. Kornhauser, *An Introduction to the Economic Analysis of Contract Remedies*, 57 U. COLO. L. REV. 683 (1986); Anthony T. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351 (1978); Daphna Lewinsohn-Zamir, *The Questionable Efficiency of the Efficient-Breach Doctrine*, 168 J. INSTITUTIONAL & THEORETICAL ECON. 5 (2012); Paul G. Mahoney, *Contract Remedies: General*, in 3 ENCYCLOPEDIA OF LAW AND ECONOMICS 117 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000); Francesco Parisi, Barbara Luppi & Vincy Fon, *Optimal Remedies for Bilateral Contracts*, 40 J. LEGAL STUD. 245 (2011); Ariel Porat, *Economics of Remedies*, in 2 THE OXFORD HANDBOOK OF LAW AND ECONOMICS 308 (Francesco Parisi ed., 2017); Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271 (1979); Steven Shavell, *Specific Performance Versus Damages for Breach of Contract: An Economic Analysis*, 84 TEX. L. REV. 831 (2006); Thomas S. Ulen, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies*, 83 MICH. L. REV. 341 (1984).

2. See, e.g., Brian H. Bix, *Contract Rights and Remedies, and the Divergence between Law and Morality*, 21 RATIO JURIS 194 (2008); Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. LEGAL STUD. 1 (1989); Dori Kimel, *Remedial Rights and Substantive Rights in Contract Law*, 8 LEGAL THEORY 313 (2002); Peter Linzer, *On the Amoralism of Contract Remedies—Efficiency, Equity, and the Second Restatement*, 81 COLUM. L. REV. 111 (1981); Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708 (2007); Ernest J. Weinrib, *Punishment and Disgorgement as Contract Remedies*, 78 CHI.-KENT L. REV. 55 (2003).

3. See, e.g., Kornhauser, *supra* note 1, at 692.

4. Of course, instrumentalist views are also ultimately based on moral reasons, so there is a sense in which both views are, in a way, moralistic. But what’s distinctive about moralism in

vindicate the parties' rights to performance.<sup>5</sup> I will offer, in substance, an intermediate position.<sup>6</sup> The motivation underlying that position is basically pluralistic: we care about efficiency, the maximization of wealth, and the facilitation of market interaction, but we also care about individuals' rights and their legitimate expectations.<sup>7</sup> Contract remedies reflect a similar diversity of concerns.

Questions about the purpose of contract remedies are entangled with questions about the relationship between rights and remedies. For instance, many instrumentalist views are coupled with a view according to which the content of primary rights ultimately depends on the remedies enforcing them.<sup>8</sup> And moralist views seem to suggest that remedies ought to be the servants of primary rights.<sup>9</sup> So not only do we lack a general view about the purpose of contract remedies—we also lack a generally accepted view about the precise relationship between rights and remedies. The theoretical framework for remedies that I will offer clarifies their relationship with primary rights and, on the basis of that clarification, articulates the function of contract remedies. The framework moves from form to substance.

The account will not be purely normative. It will not attempt to devise an ideal regime of contract remedies or to offer prescriptions for reform. Yet it will not be purely descriptive either. It will not simply offer a neutral picture of the structure of contract law. Instead, the account is interpretive: it starts from our existing legal practices and tries to unearth their underlying structure and justification.<sup>10</sup> The account does not try to change the law—but it does not leave, to use Wittgenstein's phrase, "everything as it is."<sup>11</sup>

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this context is that it sees the point of remedies as—at least partly—enforcing moral obligation. See Liam Murphy, *The Practice of Promise and Contract*, in *PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW*, *supra* note 1, at 153–54.

5. See, e.g., Shiffrin, *supra* note 2.

6. See *infra* Parts III–IV.

7. On pluralism in private law theory, see Hanoch Dagan, *Pluralism and Perfectionism in Private Law*, 112 *COLUM. L. REV.* 1409 (2012); Melvin A. Eisenberg, *The Theory of Contracts*, in *THE THEORY OF CONTRACT LAW* 206 (Peter Benson ed., 2001); Felipe Jiménez, *The Pluralism of Contract: A Theory of Contract Law* (2018) (J.S.D. dissertation, New York University) (on file with author); Roy Kreitner, *On the New Pluralism in Contract Theory*, 45 *SUFFOLK U. L. REV.* 915 (2012); Nathan Oman, *Unity and Pluralism in Contract Law*, 103 *MICH. L. REV.* 1483 (2005).

8. The classical claim is made in Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 *HARV. L. REV.* 457, 462 (1897).

9. Shiffrin, *supra* note 2, at 722–24.

10. On the distinction between normative, descriptive, and interpretive theories, see STEPHEN A. SMITH, *CONTRACT THEORY* 4–6 (Peter Birks ed., 2004).

11. LUDWIG WITTGENSTEIN, *PHILOSOPHISCHE UNTERSUCHUNGEN* [PHILOSOPHICAL INVESTIGATIONS] § I.124 (P.M.S. Hacker & Joachim Schulte eds., G.E.M. Anscombe et al. trans., Wiley-Blackwell rev. 4th ed. 2009) (1953).

I start, in Part I, by disentangling remedies from primary rights. More specifically, I argue against the “rubber-stamp view” of contract remedies, according to which there is no distinction between rights and remedies. Against that view, I will restate and offer support for the traditional common law distinction between primary substantive rights and secondary remedies.<sup>12</sup> Under that distinction, rights do not fully determine the structure of remedies. Neither do remedies define the content of primary rights.<sup>13</sup> The distinction between rights and remedies fits the structure of contract law. It also fits, as I will argue, the actual expectations of contractual parties. An adequate interpretive theory should start from that distinction.<sup>14</sup>

In order to show how the distinction can illuminate the analysis of contract remedies, in Part II I will discuss two of the most important contributions to the literature on contract remedies in the past decade: Seana Shiffrin’s argument that contract law diverges problematically from promissory morality,<sup>15</sup> and Markovits and Schwartz’s defense of expectation damages.<sup>16</sup> In different ways, both arguments question or lose sight of the distinction between primary rights and remedies, and therefore of the distinctiveness of contract remedies.

Part III of the Article offers an interpretive theory about the role of contract remedies. Contract remedies have two central functions: protecting the practice of contractual exchange and protecting the individuals involved in it. Because of these functions, we have a *pro tanto* reason for a certain proportionality between remedies and the primary contractual rights they enforce. However, because that reason is not conclusive, it can coexist with further considerations that can have an impact on contract remedies—and that should be incorporated within the theoretical analysis of contract remedies.

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12. Peter Birks, *Rights, Wrongs, and Remedies*, 20 OXFORD J. LEGAL STUD. 1, 4–6 (2000); Paul B. Miller, *Justifying Fiduciary Remedies*, 63 U. TORONTO L.J. 570, 573 (2013).

13. As Hohfeld wrote, “[T]he intrinsic nature of substantive primary rights—whether they be rights in rem or rights in personam—is not dependent on the character of the proceedings by which they may be vindicated.” Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 766 (1917) (emphasis omitted).

14. In this Article, I also engage with normative arguments about contract remedies. There is no reason why normative arguments ought to fit the deep structure of law; they could argue for changing that structure. However, if there are good reasons for the deep structure of legal rights and remedies (particularly reasons that apply also for moral rights and remedies), then the plausibility of normative arguments about rights and remedies that are inconsistent with that deep structure becomes, at least, fragile. *See infra* Section II.A.

15. Shiffrin, *supra* note 2.

16. Daniel Markovits & Alan Schwartz, *The Myth of Efficient Breach: New Defenses of the Expectation Interest*, 97 VA. L. REV. 1939 (2011) [hereinafter Markovits & Schwartz, *The Myth of Efficient Breach*]; Daniel Markovits & Alan Schwartz, *The Expectation Remedy Revisited*, 98 VA. L. REV. 1093 (2012) [hereinafter Markovits & Schwartz, *The Expectation Remedy*].

In Part IV, I offer some examples of those considerations and explain how they fit within the framework of the Article. Those considerations, as I explain, can contribute to offer a justification of the doctrinal prevalence of money damages—and expectation damages specifically—in American contract law.<sup>17</sup> This section of the Article is not exhaustive. There is only so much that can be said about contract remedies at a general and abstract level. And much of the details in the design of contract remedies will depend on the need to determine the reasons I allude to, as well as on empirical facts about the social world that are beyond our current knowledge. That is why I only offer an inconclusive justification.

An inconclusive justification might seem somewhat underwhelming. However, as I argue in the Conclusion, an inconclusive justification is all we should expect from a theory of contract remedies. The domain of contract remedies is a domain of second-best, non-ideal solutions and of limited certainty. An attractive theory of contract remedies should reflect, rather than hide, this fact. The best we can hope for is an interpretive theory that shows that we are not radically mistaken—that we are, so to speak, in the vicinity of what is right.

The purpose of this Article, in synthesis, is not to offer a template for the optimal design of contract remedies or to articulate a full evaluation of the legal rules of any specific jurisdiction. Instead, the purpose is to formulate a theoretical framework for thinking about contract remedies, their relationship to primary rights, their function, and the interaction of that function with other relevant considerations. The framework takes as its starting point the actual remedial regime of the law of contracts. In the process, the argument identifies certain common problems in some of the most clearly articulated views about contract remedies in contemporary contract theory. The hope, therefore, is not to exhaust the interpretive or normative analysis of contract remedies, but rather to present an interpretive framework within which that analysis—whether philosophical, economic, or institutional in nature—might take place.

#### I. THE INDEPENDENCE OF RIGHTS AND REMEDIES

The starting point for an adequate theory of contract remedies is the distinction between them and primary contractual rights. Remedies are the

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17. While my focus in this Article is on arguments made mostly in the American context, and regarding American contract law, my argument is based on a more general analytical distinction, and on features of the structure of contract law that, as I argue below, exist across different jurisdictions. Thus, my argument can also operate at a greater level of generality.

law's response to the breach of primary rights,<sup>18</sup> the mechanism by which law enforces the behavioral directives of primary contractual rights. Before remedies play this role, primary contractual rights and duties tell promisors and promisees how they ought to act. Remedies are the legal system's response to the infringement of those behavioral standards. They are judicial orders that actualize those standards in each specific instance, by compelling breaching promisors to take different types of actions, and—in case of recalcitrant noncompliance—leading to coercion against the breaching promisor.<sup>19</sup>

The formal distinction between rights and remedies has a long history, which goes from Robert Pothier to William Blackstone to John Austin.<sup>20</sup> The distinction goes against a fairly extended view in contemporary contract theory, which Stephen Smith has aptly called the “rubber-stamp view” of remedies.<sup>21</sup> Under that view, remedies ordered by courts merely confirm whatever primary rights the parties have. Remedies are simply judicial orders to perform primary duties.<sup>22</sup> The rubber-stamp view can go both ways: either from rights to remedies or from remedies to rights. According to the first, “formalist” conception, the structure of remedies is (or ought to be) fully determined by the rights they enforce.<sup>23</sup> According to the second, “realist” conception, remedies entirely determine the content of primary rights.<sup>24</sup>

### A. *The Surface of Legal Systems*

As a purely descriptive matter, the rubber-stamp view faces an immediate difficulty. At least superficially, the view does not seem to fit the structure of most legal systems, which sometimes establish primary rights that do not give

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18. See Stephen A. Smith, *Duties, Liabilities, and Damages*, 125 HARV. L. REV. 1727, 1751 (2012).

19. See Birks, *supra* note 12, at 13.

20. See generally Birks, *supra* note 12.

21. Stephen A. Smith, *Rights and Remedies: A Complex Relationship*, in TAKING REMEDIES SERIOUSLY 31, 43 (Robert J. Sharpe & Kent Roach eds., 2010).

22. *Id.*

23. *Id.* at 38.

24. *Id.* at 39; see also P.S. Atiyah, *Holmes and the Theory of Contract*, in ESSAYS ON CONTRACT 57, 62 (1990). These are more or less arbitrary labels, and others (such as “the primacy of the remedy” and “the primacy of the right” models, as suggested by Friedmann) could be used. For Friedmann's taxonomy, see Daniel Friedmann, *Rights and Remedies*, in COMPARATIVE REMEDIES FOR BREACH OF CONTRACT 3, 3 (Nili Cohen & Ewan McKendrick eds., 2005). Because the labels are somewhat arbitrary, they can also be misleading. Weinrib considers himself a formalist, yet his approach is quite distinct from the 19th century formalism of Langdell and others. On the realism-formalism distinction in private law, see Emily Sherwin, *Formalism and Realism in Private Law*, in THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW 465 (Andrew S. Gold et al. eds., 2020).

rise to remedies.<sup>25</sup> In many legal systems, when the limitation period has passed, the right holder no longer has a remedy, but she does have a primary right.<sup>26</sup> The case of natural obligations in civil law systems (such as obligations arising out of contracts lacking an applicable legal formality), which do not confer a cause of action in case of non-performance, but authorize the creditor to retain performance if it has occurred, is similar.<sup>27</sup> In contract law, specifically, the duty of good faith and fair dealing is an implied obligation in every contract; but the duty is evidently underenforced by courts.<sup>28</sup> In public law, underenforced constitutional norms offer a similar case of primary rights without remedies.<sup>29</sup>

Even when legal systems do provide remedies, those remedies sometimes diverge from the structure of the primary rights they enforce.<sup>30</sup> There are examples of this beyond private law—for instance, principles of eminent domain that protect property rights through liability rules.<sup>31</sup> In contract law, courts typically enforce contracts through diverse money damage measures

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25. More generally, as Stephen Smith writes, “Although legal rules are typically backed by sanctions, the behaviour required by legal rules often differs from the behaviour encouraged by legal sanctions.” Stephen Smith, *The Normativity of Private Law*, 31 OXFORD J. LEGAL STUD. 215, 216 (2011); see also Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335, 1347 n.17 (1986).

26. Smith, *supra* note 22, at 55. This explains, in my view, why promises to pay a debt that can no longer be claimed because of the statute of limitations are enforceable without consideration. See RESTATEMENT (SECOND) OF CONTS. § 82 (AM. L. INST. 1981). Admittedly, when there is an explicit promise, one could argue that the new promise is generating a new right. E. ALLAN FARNSWORTH, *CONTRACTS* 57–58 (4<sup>th</sup> ed. 2004). But why does the law treat a voluntary acknowledgment of the indebtedness or voluntary payment as such a promise? The answer has to be, in my view, that the promisor is simply removing a “procedural” bar to the enforcement of the pre-existing debt. See R.W.M. Dias, *Acknowledgment of Statute-Barred Debt—Waiver of Procedural Bar*, 20 CAMBRIDGE L.J. 160, 161 (1962).

27. David V. Snyder, *The Case of Natural Obligations*, 56 LA. L. REV. 423, 432 (1995).

28. See Paul MacMahon, *Good Faith and Fair Dealing as an Underenforced Legal Norm*, 99 MINN. L. REV. 2051, 2052, 2058 (2015).

29. See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978).

30. See sources cited *supra* note 25.

31. Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 757–58 n.143 (1996). Property and liability rules are two distinct remedial mechanisms for the protection of primary rights. Under property rule protection, any individual who wishes to remove the primary right from its holder must contract with her, since otherwise the removal will be reversed. Think, for instance, of specific performance in contractual rights or *vindicatio* in property rights. Under liability rule protection, any individual may remove the primary right from its holder by simply paying an objectively determined amount *ex post*, since the removal gets sanctioned through a judicially determined monetary compensation. In this case, think of expectation damages in contractual rights or of compensation for destruction or damage to property. The original formulation of the distinction is in Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106–10 (1972).

rather than through specific performance, and sometimes impose exemplary and nominal damages.<sup>32</sup> Something similar happens in corporate law, where standards of conduct and standards of judicial review typically diverge.<sup>33</sup> And equitable remedies and equitable defenses introduce a considerable degree of remedial flexibility.<sup>34</sup>

Thus, at least at the surface level of legal systems, remedies do not follow directly from the content of the rights they enforce,<sup>35</sup> and the structure of the latter is distinct from their form of remedial protection.<sup>36</sup>

I will come back later to explain how this issue presents itself specifically in the case of contract remedies.<sup>37</sup> For now, I should acknowledge that lack of fit with the surface structure of legal systems is not a fatal problem for the rubber-stamp view. The proponent of the rubber-stamp view could argue that the conception's virtue is that, by ignoring this surface appearance, it offers a more parsimonious and simple theory of rights and remedies than a theory that takes the surface appearance at face value.<sup>38</sup> The problem with this potential reply is that simplicity is not all that matters, and it is unclear whether it is worth the price of distortion. And distortion is what we get when we assume the rubber-stamp view. The traditional distinction between rights and remedies is consistent with the fact that the legal structure of remedies is relatively flexible and open-ended.<sup>39</sup> There are several ways in which remedies diverge from the primary rights they protect.<sup>40</sup> By attempting to provide a flattened, simpler account of the structure of private law, the rubber-stamp view ends up hiding that structure and its complexity. I turn to the justification for this claim in the two following sections.

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32. STEPHEN A. SMITH, *RIGHTS, WRONGS, AND INJUSTICES: THE STRUCTURE OF REMEDIAL LAW* 79–80 (2019).

33. See Melvin Aron Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 *FORDHAM L. REV.* 437, 438 (1993); Julian Velasco, *The Role of Aspiration in Corporate Fiduciary Duties*, 54 *WM. & MARY L. REV.* 519, 521 (2012).

34. See Samuel L. Bray, *Remedies*, in *THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW* 563 (Andrew Gold et al. eds., 2020); Sherwin, *supra* note 24, at 473–77.

35. Richard Craswell, *Against Fuller and Perdue*, 67 *U. CHI. L. REV.* 99, 123, 126 (2000).

36. See Kit Barker, *Rescuing Remedialism in Unjust Enrichment Law: Why Remedies Are Right*, 57 *CAMBRIDGE L.J.* 301, 319–20 (1998).

37. See *infra* Section I.C, Part II.

38. On simplicity as a theoretical demand, see Paul R. Thagard, *The Best Explanation: Criteria for Theory Choice*, 75 *J. PHIL.* 76, 86–89 (1978).

39. For an overview of some of the choices this flexibility may entail for contract remedies, see E. Allan Farnsworth, *Legal Remedies for Breach of Contract*, 70 *COLUM. L. REV.* 1145 (1970).

40. Emily L. Sherwin, *What Civil Remedies Do* 6–12 (Oct. 21, 2013) (unpublished manuscript) (on file with author).



*B. A Formalist Response*

Recall, again, that there are two forms of the rubber-stamp view: the realist (who sees the content of primary rights as fully defined by the remedies that enforce them) and the formalist (who sees primary rights as fully determining the shape of remedies).<sup>41</sup> When faced with the divergence I have alluded to, those who hold the formalist version of the rubber-stamp view might claim that, to the extent that the law's remedies diverge from the rights they enforce, this is a problem that should lead to legal reform. Another possibility for the formalist would be to argue that—contrary to appearances—the remedial scheme *does* correspond to primary rights. The first is a normative claim—a claim about how the law ought to be. The second claim is interpretive—a claim about what the structure of the law, when correctly interpreted, is.

Because lack of fit is not a problem for prescriptive arguments, I want to focus on the interpretive claim, and particularly on a group of formalists who, purporting to offer an internal account of private law as it exists, argue that the content of primary private law rights determines the structure of contract remedies. From this perspective, the remedial scheme generally is required by, or derived from, the nature of the enforced primary rights. These formalists, in contrast to those who make a normative critique of the remedial regime, do not claim at the outset that the law is problematic because remedies do not replicate primary rights, and that it should therefore be reformed. Instead, they claim that the law of contract remedies, rightly interpreted, generally *does* already establish a fundamental logical connection between rights and remedies—and that whenever it doesn't, as arguably in the case of disgorgement of profits and punitive damages, the law fails to be internally coherent.<sup>42</sup>

Ernest Weinrib, for instance, has defended what he calls the “intimate connection” between primary contractual rights and remedies.<sup>43</sup> Under this view, remedies undo the defendant's violation of the plaintiff's right, which therefore “determines the nature of the remedy.”<sup>44</sup> The remedy “follow[s] in the tracks” of the injustice that made it necessary,<sup>45</sup> and any other external consideration for structuring remedies is off the table.<sup>46</sup> Under this

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41. *See supra* Part I.

42. Weinrib, *supra* note 2, at 57.

43. *Id.*

44. *Id.*

45. *Id.* at 59.

46. “From the standpoint of corrective justice the remedial issue never involves inquiring into the prospective disadvantage to be imposed on the defendant in order to achieve a desirable social goal . . . [I]nstead, corrective justice requires only that one ask what remedy would undo the injustice to the extent that the law can.” *Id.* at 61.

conception, legal wrongs—such as breach of contract—are the reason for having the remedy. As a consequence, according to Weinrib, the nature of the infringed right defines the nature of the remedy, the only point of which is to undo the injustice of breach.<sup>47</sup> Contract remedies restore to the plaintiff what is rightfully hers: the performance or its value.<sup>48</sup> Weinrib contrasts this view with a more flexible conception, which sees legal wrongs as merely the condition that allows for the application of the remedy.<sup>49</sup> Under this latter conception, everything is up for grabs at the stage of remedial design, and there is no substantive connection between rights and remedies.<sup>50</sup>

A first point about this dichotomy is that there are plausible intermediate positions between the two extremes. The central question of how remedies ought to be structured in response to the infringement of primary rights, and what bearing primary rights might have on such structure, is hard to answer if one assumes that these two extremes are the only alternatives. Weinrib is right when he argues that primary rights provide a reason for remedies—I will come back to the way in which this is true below. However, the claim that the primary right is a reason for the remedy is only the beginning of the inquiry: accepting the claim that some consideration X counts as a reason for Y does not settle the weight of reason X.<sup>51</sup> So, even if we accept that the reason for the remedy is the primary right, we still need to ask exactly what the structure and operation of the remedy should look like.

Now this might seem like a tendentious response. After all, a key premise in the argument offered by Weinrib, as well as others who share his views on remedies, like Arthur Ripstein, is that wrongs do not make the rightholder's right disappear.<sup>52</sup> The right survives in a remedial form,<sup>53</sup> and remedies simply give effect to the underlying breached rights.<sup>54</sup> When a wrong occurs, in synthesis, “[I]f someone interferes with a right that you have, the right does not thereby cease to exist.”<sup>55</sup> If this premise is right, Weinrib could argue that there is actually no specifically remedial question to answer: the right subsists and therefore it continues to exert a fully determinative normative force that

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47. Ernest J. Weinrib, *Two Conceptions of Remedies*, in JUSTIFYING PRIVATE LAW REMEDIES 3, 14 (Charles E.F. Rickett ed., 2008).

48. Weinrib, *supra* note 2, at 68.

49. *Id.* at 73–83.

50. *Id.*

51. On reasons and weighing, see Errol Lord & Barry Maguire, *An Opinionated Guide to the Weight of Reasons*, in WEIGHING REASONS (Errol Lord & Barry Maguire eds., 2016).

52. Arthur Ripstein, *As If It Had Never Happened*, 48 WM. & MARY L. REV. 1957, 1978–79 (2007).

53. Weinrib, *supra* note 2, at 60.

54. Ripstein, *supra* note 52, at 1981.

55. Arthur Ripstein, *Civil Recourse and Separation of Wrongs and Remedies*, 39 FLA. ST. U. L. REV. 163, 177 (2011).

legal remedies merely acknowledge. There is nothing to be weighed because the subsisting right is the *only* normative consideration that bears on the remedy. The right fills out, as it were, all of the normative space. This, the argument goes, is the structure of most contract remedies—which order performance or compensation—and, to the extent that it is not, this counts as a reason to modify the law so that it better aligns with its deep, juridical structure.

The problem is that even if rights persist after breach, and the legal system therefore ought to provide remedies that reflect the structure of those rights, the question about legal enforcement after breach remains relatively open-ended. True, if the right subsists, then there is reason to think that something needs to be done about breach, and some remedial mechanism that is responsive to the normative force of the right ought to be provided. But even if the right persists, nothing suggests that the now-impossible performance should determine the exact contours of the legal remedy, particularly since the primary right cannot be enforced *as such*.<sup>56</sup> The notion that rights survive their violation, and that rights provide a reason for the legal system's reaction to that violation, does not ground the conclusion that remedies are determined by primary rights. Remedies are the mechanisms by which the legal system, among other things, redresses rights infringements.<sup>57</sup> This redress might take different shapes, even if rights subsist and provide the reason for redress.

This does not mean that, when it comes to the design and operation of remedies, *anything goes*. Perhaps primary rights impose limits on the legitimacy of the state's remedial response: the state can only correct the infringement of the right.<sup>58</sup> Yet this claim—and the associated notion that primary rights are the reason for remedies, limiting the legitimate structure of the latter<sup>59</sup>—can at best act as a placeholder for a fully articulated theory of remedies. Assuming that rights are the reason for remedies—say, because rights survive their violation—and *therefore* determine remedies obscures the need to articulate such a theory. Moreover, as we have seen, rights and remedies at least sometimes diverge, and any theory with a minimal degree of fit with our actual practices—as the one both Ripstein and Weinrib seem to want to offer—should be able to give an adequate account of that divergence.

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56. Even if specific performance is granted, at least one element of the contractual duty (the time by which performance should have occurred) cannot be fulfilled. See Mindy Chen-Wishart, *Contractual Remedies: Beyond Enforcing Contractual Duties*, 85 GEO. WASH. L. REV. 1617, 1620–21 (2017); JOHN GARDNER, FROM PERSONAL LIFE TO PRIVATE LAW 101 (2018).

57. DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 1 (2018); RAFAL ZAKRZEWSKI, REMEDIES RECLASSIFIED 11 (2005).

58. Ripstein, *supra* note 52, at 1964.

59. Weinrib, *supra* note 2, at 57.

*C. The Realist Answer*

The realist version of the rubber-stamp view is, in many ways, the opposite of the formalist version. The realist usually has an instrumentalist view of remedies, while the formalist usually has a moralistic view. Yet the realist version of the rubber-stamp view faces its own issues when explaining—or rather, explaining away—the divergence between rights and remedies. The realist rubber-stamp view basically holds that we should ignore primary rights as independent objects of analysis. In the case of contract law, the claim goes like this: because the common law of contracts typically provides expectation damages as the standard remedy for breach of contract, the primary right is not a right to performance, but rather to performance or damages—whatever the promisor chooses.<sup>60</sup> For those who hold this view, remedies for breach of contract tell us what the content of the primary contractual right is.<sup>61</sup> Since contractual rights are protected by the expectation remedy, contractual rights are not *really* rights to performance. The view, then, turns Weinrib’s concern on its head: given that remedies sometimes diverge from the structure of the primary rights they enforce, we should just ignore primary rights as epiphenomenal. Because the view has been so influential, the articulation of this view by Holmes should be quoted in full:

The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, and nothing else. If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference.<sup>62</sup>

But the claim, influential as it has been, is somewhat puzzling.<sup>63</sup> Remedies are mechanisms to enforce primary rights.<sup>64</sup> When parties want to know how contractual rights will “cash out” in cases of breach, they will want to look at the bottom line of enforcement. The “bad man,” the agent only interested in figuring out what the sanctions for a certain behavior are, will be particularly

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60. Holmes, *supra* note 8.

61. See Kimel, *supra* note 2, at 316–17 (“[T]he rights of a contracting party are in practice determined by the differing kinds of damages that he may recover.”).

62. Holmes, *supra* note 8, at 462.

63. Goldberg and Zipursky have characterized Holmes’s point as “[t]he beginning of confusion about legal rights and duties in American jurisprudence.” JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, *RECOGNIZING WRONGS* 83 (2020).

64. Liam Murphy, Response, *Contract and Promise*, 120 HARV. L. REV. F. 10, 17–18 (2009).

interested in this question.<sup>65</sup> But it is unclear why this should lead the contract theorist to a specific set of conclusions about the content of primary rights.

The first reason for this is that, as a matter of fact, most people understand their contractual rights as rights to performance *despite* the remedial regime that routinely provides money damages. Studies such as Bernstein's analysis of the cotton industry,<sup>66</sup> Baumer and Marschall's analysis of North Carolina businesses' reactions to willful breach,<sup>67</sup> and Wilkinson-Ryan's experiments on the moral intuitions of individuals when contracting<sup>68</sup> suggest that a strong expectation of performance is robust against the backdrop of the American law of contract remedies.<sup>69</sup>

It could be the case that these intuitions about primary rights are just caused by individuals' intuitions about the morality of promise or extra-legal social norms about promising.<sup>70</sup> These intuitions and social norms might be creeping into individuals' understanding of the legal norms. In fact, evidence in non-contractual settings suggests that promisors are inclined to perform because they promised to do so; and that their inclination to perform increases when their counterparties have an expectation that performance will occur.<sup>71</sup> At least some people perform because they promised to do so.<sup>72</sup> Moreover, they respond to the expectations created by those promises.<sup>73</sup> It could very well be the case that, when they think contracts impose obligations of

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65. See generally Fred Rodell, *Justice Holmes and His Hecklers*, 60 YALE L.J. 620, 623 (1951) (“[A]ll that law really amounts to is what a bad man cannot get away with—that is, what an utterly lawless and immoral person cannot do without being legally punished for it.”).

66. Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001); see also Murphy, *supra* note 1, at 168.

67. These authors report that out of 119 business persons surveyed, 105 of them responded that “if a trading partner deliberately breaches a contract because a better deal can be had elsewhere,” such a behavior would be unethical. Moreover, 118 of the interviewed individuals considered that, after willful breach, they would tend to refrain from entering into new contracts with the breaching party. See David Baumer & Patricia Marschall, *Willful Breach of Contract for the Sale of Goods: Can the Bane of Business Be an Economic Bonanza?*, 65 TEMPLE L. REV. 159, 164–66 (1992).

68. Tess Wilkinson-Ryan, *Legal Promise and Psychological Contract*, 47 WAKE FOREST L. REV. 843 (2012).

69. Tess Wilkinson-Ryan & David A. Hoffman, *Breach Is for Suckers*, 63 VAND. L. REV. 1003, 1034–35 (2010).

70. I thank Scott Altman for pressing me on this point.

71. Dorothee Mischkowski, Rebecca Stone & Alexander Stremitzer, *Promises, Expectations, and Social Cooperation*, 62 J.L. & ECON. 687, 689–90 (2019).

72. Christoph Vanberg, *Why Do People Keep Their Promises? An Experimental Test of Two Explanations*, 76 ECONOMETRICA 1467 (2008).

73. Florian Ederer & Alexander Stremitzer, *Promises and Expectations*, 106 GAMES & ECON. BEHAV. 161, 162–63 (2017).

performance, individuals are projecting their moral intuitions onto the legal setting—precisely the move that Holmes wanted legal analysts to avoid.

Figuring out the relationship between agents' beliefs about their legal rights and the moral practices legal institutions overlap with is, of course, a complicated task. In any event, going down Holmes's path in this case would mean arguing that people are simply mistaken. The claim would be that ordinary people have brought into the legal world their moral intuitions generated by practices and norms of promise-keeping. The legal analyst should come in with some "cynical acid"<sup>74</sup> and relieve them from their mistaken moralizing attitudes. One problem with this potential response is that we are talking about individuals' expectations.<sup>75</sup> The expectations might not be aligned with what the Holmesian theorist thinks is the correct interpretation of the legal system, and they might be causally explained by the misapplication of perceived moral norms to the legal sphere—but they are still the expectations that individuals actually have. The response acknowledges the misalignment between its account of legal rights and individuals' expectations—those expectations appear as a mistake or a myth to be dispelled.

Perhaps the Holmesian is right, and individuals' expectations of performance are based on, or at least causally explained by, a mistaken projection of moral norms onto legal rights. In fact, the proponent of the Holmesian view could bolster her argument by arguing that we should distinguish two levels: individuals' understanding of their own contractual obligations at the retail level and their understanding of the legal system's characterization of contractual obligations at the wholesale level. While the first level should be responsive to individuals' actual expectations—and therefore, when figuring out the content of a specific contractual obligation, we should be attentive to the parties' understandings—the second level is a matter of legal interpretation—and on this aspect, individuals have no authority whatsoever. At this wholesale level, the Holmesian account offers a more accurate picture of the structure of contractual rights, and if individuals are simply mistaken, we should correct the mistake instead of replicating it.

I am sympathetic to the general spirit of this potential reply. The problem is that, at the wholesale level, the actual structure of law contradicts the Holmesian conception.<sup>76</sup> From this perspective, it is difficult to see why people's perceptions about contractual rights would be mistaken or an

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74. Holmes, *supra* note 8, at 462.

75. On the relevance of empirical data for the determination of the content of contractual obligations, see Brooks, *supra* note 1, at 590.

76. SMITH, *supra* note 32, at 100.

unwarranted extension of extra-legal moral norms. Ordinary individuals' beliefs about the law are, in fact, aligned with this structure. Individuals are not mistakenly projecting their moral commitments onto legal rights; in fact, they are taking the legal discourse about those rights at face value. Not just individuals' expectations, but the structure of contract law itself, are hard to square with the Holmesian view.

According to the rules of contract law in most (if not all) Western jurisdictions, the promisor is under a legal duty to perform.<sup>77</sup> If she does not perform, the promisee has a cause of action for breach of contract.<sup>78</sup> Only then do remedies enter the stage, as “the law’s response to a wrong,”<sup>79</sup> i.e. as the legal system’s reaction after the recognition that the defendant has committed a wrong against the plaintiff.<sup>80</sup> For there to be wrongs at all, private law cannot limit itself to the establishment of remedies, sanctions, fines, etc. Prior to that, it must direct behavior by telling individuals how to act through primary rules of conduct.<sup>81</sup> As H.L.A. Hart suggests, even in the absence of remedial protection, primary norms can establish intelligible standards of behavior.<sup>82</sup> The realist version of the rubber-stamp view loses sight of these two distinct ways in which private law governs social interaction,<sup>83</sup> one that is primarily directed at citizens in their behavior towards each other and the other primarily directed at courts in their decisions when citizens come before them asking for resolution of their disputes.<sup>84</sup> Moreover, and as a consequence of this, the view is unable to account for individuals' expectations, treating them instead as mistakes even though they align with the structure of private law doctrine.

The realist could again argue that the surface structure that claims that there is such a thing as a right to performance is nothing but *legalese* or

77. See, e.g., United Nations Convention on Contracts for the International Sale of Goods arts. 28, 45, 46, Apr. 11, 1980, 1489 U.N.T.S. 25567; Civil Code of Québec, S.Q. 1991, c 64, art. 1590 (Can.); Art. 3:296 BW (OUD); C.c. art. 1452 (It.); Bürgerliches Gesetzbuch [BGB] [Civil Code], § 241 (Ger.). On American contract law, claiming that “[m]uch detail in the law of contract is understandable only with reference to this principle that a party’s fair expectation of return performance deserves protection,” see E. ALLAN FARNSWORTH ET AL., CONTRACTS: CASES AND MATERIALS 691 (7th ed. 2008). On English contract law, see JACK BEATSON, ANSON’S LAW OF CONTRACT 499 (28th ed. 2002).

78. ANDREW BURROWS, REMEDIES FOR TORTS AND BREACH OF CONTRACT 4 (3d ed. 2004). Regarding private law in general, see Miller, *supra* note 12, at 578.

79. Att’y Gen. v. Blake [2000] UKHL 45, [2000] 1 AC 268.

80. Smith, *supra* note 18, at 1728.

81. *Id.* at 1732. Keating makes much of this point in his criticism of corrective justice theories of the law of torts. See Gregory C. Keating, *The Priority of Respect over Repair*, 18 LEGAL THEORY 293 (2012).

82. H.L.A. HART, THE CONCEPT OF LAW 35 (2d ed. 1994).

83. *Id.* at 82–91; see also MacMahon, *supra* note 28, at 2099.

84. SMITH, *supra* note 32, at 7.

*highfalutin*. This is, after all, what underlies Holmes's "bad man" perspective.<sup>85</sup> If people follow the legal system's primary norms of conduct instead of focusing their attention on their remedial protection, they do so at their peril.

The "bad man" perspective may sometimes be a useful analytic device to understand the behavior of a subset of the population (i.e. those individuals who act as wholly self-interested rational calculators of costs and benefits). But not everyone is a bad man.<sup>86</sup> The failure to notice that the "bad man" perspective is at best a partial explanation of human behavior with regard to law is what underlies the realist's inability to account for contractual expectations of performance, as well as for promisors' willingness to perform independently of remedies. A too narrow focus on the "bad man" obscures the fact that, at least in reasonably well-ordered societies, many citizens might assume an internal point of view towards contract law,<sup>87</sup> and see their legal rights and obligations as guiding standards of conduct, rather than as epiphenomena fully determined by judicial remedies.<sup>88</sup> The same might be true of individuals who, even acting self-interestedly, sometimes take legal rules as an adequate guide for action because of epistemic reasons.<sup>89</sup> At least some individual agents "sometimes do what legal rules stipulate simply because they are legal rules and not because of the incentives that the law offers for compliance."<sup>90</sup> An adequate analysis and evaluation of legal rules and institutions requires taking these different sets of the population as relevant.<sup>91</sup> A purely remedial or sanction-based conception is unable to provide this analysis or explain why law would use primary rules of conduct at all.<sup>92</sup>

From this perspective, individuals' views about contractual duties as duties of performance do not appear as an unwarranted extension of moral norms into the legal arena. Instead, they seem to be consistent with the structure of the legal system. This matters for legal analysis. Legal systems

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85. "If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience." Holmes, *supra* note 8, at 993.

86. See Rebecca Stone, *Legal Design for the "Good Man,"* 102 VA. L. REV. 1767 (2016).

87. See Rebecca Stone, *Economic Analysis of Contract Law from the Internal Point of View*, 116 COLUM. L. REV. 2005 (2016).

88. See Dale A. Nance, *Guidance Rules and Enforcement Rules: A Better View of the Cathedral*, 83 VA. L. REV. 837, 859–60 (1997).

89. Stone, *supra* note 86, at 1784.

90. Smith, *supra* note 25, at 216; see also Yuval Feldman & Henry E. Smith, *Behavioral Equity*, 170 J. INSTITUTIONAL & THEORETICAL ECON. 137 (2014).

91. GOLDBERG & ZIPURSKY, *supra* note 63, at 107.

92. Smith, *supra* note 25, at 222–23.



promote forms of behavior not only through rules that tell officials to impose sanctions and penalties, but also by enacting legal rules telling citizens how they ought to act.<sup>93</sup> The realist perspective loses sight of the set of tools available to a legal system for guiding behavior.<sup>94</sup> Statements about legal duties are distinct from statements about the legal consequences of non-compliance.<sup>95</sup> These different types of statements perform different functions.

This does not mean that individuals ignore remedies, that they do not have expectations regarding them, or that remedies do not have behavioral implications. Besides their primary expectations regarding other individuals' behavior—which, as I have argued, can be dictated by primary rights—people might also have secondary expectations regarding the legal system's response when those primary expectations are disappointed.<sup>96</sup> Those expectations will also be relevant in shaping behavior. But the purely remedial perspective of the realist simply ignores the primary expectations, which can also have an important impact on agents' behavior.

Ignoring primary expectations is problematic, as well, because it leads us to an infinite regress. If ignoring primary contractual rights to get to the “bottom line” of the legal system makes sense, why stop at the duty to pay damages? Why not say, in Holmesian fashion, that the duty to pay damages is actually an alternative obligation—to pay damages or to have your goods seized by a legal official?<sup>97</sup> Moreover, if the Holmesian analysis makes sense, why not use it for other areas of law as well? Why not say that the prohibition of murder is actually an option to refrain from killing or else to kill and go to jail?<sup>98</sup> If the realist rubber-stamp view clarifies things and gives us a better picture of legal systems, as its proponents argue, then we are owed an argument as to why we should stop using it at the level of monetary remedies or restrict its application to private law.

There is another way in which the realist version of the rubber-stamp view generates distortions. The view ignores that different types of rules have behavioral impacts for different subsets of the population. In other words, the

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93. Smith, *supra* note 18, at 1733; *see also* Friedmann, *supra* note 24, at 14–15; LAYCOCK & HASEN, *supra* note 57, at 7.

94. SMITH, *supra* note 32, at 7.

95. *See* GOLDBERG & ZIPURSKY, *supra* note 63, at 96.

96. As Murphy puts it, “[U]nless the unfortunate idea of efficient breach is in the air, there is no reason why contracting parties cannot regard themselves as obliged to perform while fully aware that if they do not perform, all that will happen to them is that they will have to pay damages which may be less than the gains from breach.” Murphy, *supra* note 4, at 168.

97. *See* Arthur L. Corbin, *Does a Pre-Existing Duty Defeat Consideration?—Recent Noteworthy Decisions*, 27 YALE L.J. 362, 363 (1918).

98. *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 326 (Paul Craig ed., 2d ed. 2011).

distinction between rights and remedies is also grounded in its application to different institutional audiences. While primary rights are mostly conduct rules for citizens, remedial rights are mostly decision rules for adjudicative institutions (as well as individuals engaged in, or facing the prospects of, litigation).<sup>99</sup> The point should not be overstated. Decision rules might be taken into account by private citizens, and conduct rules by judges.<sup>100</sup> (In fact, judges can themselves shape conduct rules while they are in the otherwise seemingly different business of exercising their decisional powers.<sup>101</sup>) Remedies can have an impact on the behavior of individuals, and rights can have an impact on judicial decisions concerning remedies. So, the point is not so much that there is a complete separation between rules internalized by individuals and rules applied by judges. Rather, the point is that legal systems rely on different tools that impact the behavior of different institutional audiences in different ways. The realist rubber-stamp view ignores this.

Thus, both the formalist and the realist versions of the rubber-stamp view seem implausible. Despite this implausibility, the distinction between rights and remedies is sometimes obscured or downplayed in contract theory. In the next Section, I analyze two influential views to show how the distinction illuminates the theory of contract remedies. This will give a more concrete character to the argument so far and will also pave the way for the interpretive argument about the role of contract remedies I offer in Part III.

## II. TWO VIEWS ABOUT EXPECTATION DAMAGES

This Part of the Article engages with two influential views about contract remedies: Seana Shiffrin's argument that contract law diverges problematically from promissory morality, and Markovits and Schwartz's recent defense of expectation damages. Both arguments are insightful and have been influential. They also offer an opportunity to clarify the distinction between rights and remedies, and to illustrate some of the difficulties that arise when the distinction is not at the center of the theory of contract remedies.

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99. See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 626 (1984); Emily L. Sherwin, *Law and Equity in Contract Enforcement*, 50 MD. L. REV. 253, 306–07 (1991).

100. Emily L. Sherwin, *An Essay on Private Remedies*, 6 CAN. J.L. & JURIS. 89, 108–09 (1993).

101. See Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1016–17 (1997).

*A. The Divergence of Contract and Promise*

The standard remedy in American contract doctrine is expectation damages.<sup>102</sup> While primary contractual rights are rights to performance (at least at the superficial level), expectation damages do not enforce the primary right as such: they only give the promisee the rough monetary equivalent of the value of the promised performance. Moreover, expectation damages are typically undercompensatory.<sup>103</sup> Some scholars have claimed that this remedial regime, which makes specific performance generally unavailable, might be morally problematic<sup>104</sup> or at least in need of a special justification.<sup>105</sup> According to these scholars, the remedial scheme does not enforce contractual obligations *as such*, and thus the legal system does not use its distinctive tools to express the judgment that breach of contract is wrong.<sup>106</sup>

My argument so far suggests that, contrary to these critics, enforcing primary contractual rights to performance does not obviously require a particular remedy, such as specific performance.<sup>107</sup> Nor does recognizing a certain breach of duty as a wrong require a particular response replicating the duty. Partly, this is because various considerations, apart from the wrongness of breach, may be morally relevant in designing the adequate remedial scheme.<sup>108</sup> Even if promisors are under a moral duty to perform their contracts and breach of contract is a serious wrong, this does not entail that specific

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102. RESTATEMENT (SECOND) OF CONTS. § 347 (AM. L. INST. 1981). To be precise about this, the claim that expectation damages are the standard remedy in American contract doctrine is distinct from empirical claims about what remedy is sought the most by litigants or granted the most by courts. My claim is a claim about the structure of contract doctrine. It is about law in the books as opposed to law in action. Questions about the law of contract remedies “in action” are, of course, perfectly legitimate—but that is a different project from the one I pursue here. For an important account of contract remedies in action, see Theresa Arnold et al., “*Lipstick on a Pig*”: *Specific Performance Clauses in Action*, 2021 WIS. L. REV. 359.

103. Damages can be undercompensatory because they are normally set below the promisee’s actual expectation losses. Michael D. Knobler, *A Dual Approach to Contract Remedies*, 30 YALE L. & POL’Y REV. 415, 426 (2012). Note that undercompensation is not just produced by factual, evidentiary, or epistemic reasons (i.e. because the actual amount of the losses is difficult to prove or to calculate accurately), but by contract doctrine itself (for instance, through the application of doctrines of mitigation, certainty, and foreseeability). *See id.* This means that, under American contract law, even a perfect judiciary with unlimited resources would produce undercompensatory damage awards. *See id.*

104. Shiffrin, *supra* note 2, at 722.

105. *See* Kimel, *supra* note 2.

106. Shiffrin, *supra* note 2, at 724.

107. DORI KIMEL, FROM PROMISE TO CONTRACT: TOWARDS A LIBERAL THEORY OF CONTRACT 100–115 (2003); Shiffrin, *supra* note 2, at 722–26. *But see* Richard Craswell, *Two Economic Theories of Enforcing Promises*, in THE THEORY OF CONTRACT LAW 19, 27 (Peter Benson ed., 2001).

108. *See* James W. Nickel, *Justice in Compensation*, 18 WM. & MARY L. REV. 379, 379 (1976).

performance is the morally optimal remedy. The role of contract remedies is not necessarily to directly enforce the primary right by requiring its performance. Remedies, as I will argue below, ought to enforce contractual rights by whatever means are most adequate for protecting the practice and the individuals engaged in it and are also consistent with other relevant considerations. In principle, different remedies might be equally legitimate if they fulfil their role and are consistent with all the relevant considerations. Specific performance is not necessarily required or *a priori* preferable.

Not everyone agrees. As I anticipated, many scholars have thought that the prevalence of expectation damages could be morally problematic, or at least that there is something that stands in need of justification if the legal regime enforces contracts through expectation damages.<sup>109</sup> Seana Shiffrin has provided a clear and nuanced articulation of this critique.<sup>110</sup> Shiffrin claims that, at least at the level of remedies, promissory morality and contract law diverge, and that we should be concerned about this divergence because of its potential impact on moral agency.<sup>111</sup> Shiffrin correctly notes that, at the moral level, promisors are expected to keep their promises by performing.<sup>112</sup> This requirement is not satisfied if they merely compensate, absent consent of the promisor or some circumstance excusing performance.<sup>113</sup> Deliberate or negligent non-performance deserves moral criticism even if accompanied by compensation.<sup>114</sup> This is a relatively straightforward feature of promissory norms. Because of this, if contract law “ran parallel to morality,” Shiffrin argues, it would require performance.<sup>115</sup> And since American contract law’s standard remedy is expectation damages, American contract law diverges in this aspect from morality.<sup>116</sup>

Shiffrin accepts that, even if there is a divergence between contract law and promissory morality in this regard, the divergence might be justified.<sup>117</sup> But the divergence still raises a doubt: why doesn’t the law of contracts—like, for instance, the law of torts regarding negligent or intentional injuries

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109. See, e.g., Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603, 1606 (2009) (“[T]he objection to the expectation damages rule is not merely that it falls short of enforcing the promisor’s corresponding moral duty, but that it affirmatively undermines it.”).

110. Shiffrin, *supra* note 2, at 722–27.

111. *Id.* at 717–27.

112. *Id.* at 722.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 722–23.

117. *Id.* at 733 (exploring a justification of the divergence on the basis of “distinctively legal” arguments).

to personal interests—use remedial mechanisms that express its disapproval of the wrong of breach?

Shiffrin's starting point—that the law should facilitate moral agency and make it easy for people to navigate their moral lives as they overlap with legal institutions<sup>118</sup>—seems to me quite plausible. And I, like her, think we should seriously consider the interaction between legal and moral norms, as well as the potential negative impact that legal institutions—including the rules and doctrines of contract law—and their justifications might have on individuals' moral lives.

Still, there is reason to doubt the claim that contract law fails to use its remedial mechanisms to convey the judgment that breach of contract is morally wrong. First, at the surface level of legal doctrine, there is no divergence between contract and promise. Contractual rights are rights to performance, just like promissory rights are. Indeed, courts typically affirm such rights,<sup>119</sup> and many institutions of the American law of contracts—such as nominal damages,<sup>120</sup> tortious interference with contract,<sup>121</sup> and the duty to perform in good faith<sup>122</sup>—are unintelligible without such an assumption.<sup>123</sup>

Shiffrin is perfectly aware of this, but she would resist the implication that there is no problematic divergence. According to her argument, while the surface of legal doctrine might recognize the right to performance, in the final analysis, when it is time to enforce the right, contract law does not generally enforce it as such.<sup>124</sup> Instead, contract law typically enforces the primary right through a monetary equivalent.<sup>125</sup> As Shiffrin writes, in doing this,

The law . . . fails to use its distinctive powers and modes of expression to mark the judgment that breach is impermissible as opposed to merely subject to a price. For this reason, I find unpersuasive the possible rejoinder that contract and promise deliver the same primary judgments—namely, that breach of promise is wrong—but that they diverge only with respect to legal and moral remedies. There are standard legal remedies (as well as legal terms) that signify that a wrong has been done. In other areas of private law, remedies such as punitive damages and specific

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118. *Id.* at 713–19.

119. *See, e.g.,* *Armstrong v. Stiffler*, 56 A.2d 808, 810 (Md. 1948).

120. *See* Stephen A. Smith, *Performance, Punishment and the Nature of Contractual Obligation*, 60 MOD. L. REV. 360, 377 n.65 (1997).

121. *See* RANDY E. BARNETT & NATHAN B. OMAN, *CONTRACTS: CASES AND DOCTRINE* 226–40 (6th ed. 2017).

122. *See* Steven J. Burton, *Breach of Contract and the Common Law Duty To Perform in Good Faith*, 94 HARV. L. REV. 369 (1980).

123. FARNSWORTH ET AL., *supra* note 77, at 691; Friedmann, *supra* note 2, at 18–21.

124. Shiffrin, *supra* note 2, at 722–23.

125. *Id.*

performance are more commonly invoked. Contract has a distinctive remedial regime that not only diverges from its moral counterpart, but also reflects an underlying view that promissory breach is not a wrong, or at least not a serious one.<sup>126</sup>

There is still a difficulty with this view. Promises might generate duties to perform, and the breach of those duties might be morally objectionable. Yet there are at least two reasons to doubt that this has specific implications for contract remedies. First, it could perfectly be the case that this is just one of the many situations where there is a moral reason for a certain legal rule or institution, or moral considerations that have an impact on the legitimate structure of that institution, without those reasons or considerations fully determining the exact contours of the rule or institution.<sup>127</sup> I will come back to this first reason below.<sup>128</sup>

There is a second reason to doubt Shiffrin's argument, which is connected to the first. Even if we are under a moral obligation to perform our promises, it is unclear whether this obligation says anything of general significance—or anything relevant for legal design—about the remedies courts ought to impose when such duties are not satisfied.<sup>129</sup> When we breach a promise, morality says *something* about our obligations to repair, apologize, compensate, or undo our wrong, of course. But that *something* might just not be enough to ground a specific, fully determinate view about the general structure of the legal remedy. There is a distinction here between the moral obligations that arise from breach for promisors—a purely private and bilateral question, which we could call the question of *moral remedial duties*—and the legal remedies that courts ought to impose after a breach of contract—a public question that involves state institutions, which we would normally identify as the question of legal remedies for breach.<sup>130</sup>

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126. *Id.* at 724.

127. This is, basically, the natural law idea of *determinatio*. See FINNIS, *supra* note 98, at 284–89; Tony Honoré, *The Dependence of Morality on Law*, 13 OXFORD J. LEGAL STUD. 1, 2–4 (1993).

128. See *infra* Section III.D.

129. This is a more moderate version of the arguments made by Richard Craswell and Liam Murphy. Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489 (1989); Murphy, *supra* note 4, at 169; see also Kraus, *supra* note 109, at 1627–28.

130. The distinction between the parties' agreement and courts' exercise of remedial powers is one that Shiffrin herself has emphasized in her work on remedial clauses. See Seana Shiffrin, *Remedial Clauses: The Over-Privatization of Private Law*, 67 HASTINGS L.J. 407 (2016).

Let me use an example—similar to others found in the literature on promissory morality.<sup>131</sup> It seems relatively clear that, when I promise my wife that I will walk our dog on Saturday morning, I have assumed an obligation to do so. But it is unclear what promissory morality says about what I ought to do if I breach my promise. Yes, I could perform later and walk our dog on Saturday afternoon. But I could also apologize, which at least to me seems a much more obvious remedial action. Or, if because of my failure to walk the dog, she messed up my wife's favorite rug, I can go and buy a new identical rug. Or I can say I am sorry and walk our dog in the afternoon. Or say I am sorry, and perform some other type of canine chore. What form of remedial response a breach of a promise demands as a matter of morality depends on the interpretation of the promissory duty as well as on several context-dependent considerations, including the type of relationship between promisor and promisee, the type of performance promised, and the reason for non-performance.<sup>132</sup> Without further argument, it is not evident that the best response in every case is (late) performance. On the contrary, this seems extremely unlikely. Morality demands some response to the wrong of breaking a promise but does not give us any general answer about the way in which that response should be structured for promises in general.<sup>133</sup> As Scanlon puts it, "The central concern of the morality of promises is . . . the obligation to perform."<sup>134</sup> The appropriate response in case of breach is not. The remedy, in other words, is underdetermined by the moral duty to perform.

Of course, certain promises might have clearer implications about the proper responses in cases of breach. But this is a matter of highly contextual interpretation and will turn on contingent specificities of each specific promise. And, again, while moral rights might generate "remedial" obligations when breached, these remedial obligations owed by one party to the other are distinct from the *legal* remedies that courts ought to be authorized to issue after breach. Thus, a legal system that reflected the judgment that contractual promises impose moral obligations—as Shiffrin argues it should<sup>135</sup>—could legitimately provide a variety of responses as the standard remedy. Shiffrin's argument highlights something important: if we

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131. See, for example, Oman's example of a promise to pick up his spouse from the airport in NATHAN B. OMAN, *THE DIGNITY OF COMMERCE: MARKETS AND THE MORAL FOUNDATIONS OF CONTRACT LAW* 117 (2016).

132. See Prince Saprai, *Balfour v. Balfour and the Separation of Contract and Promise*, 37 *LEGAL STUD.* 468, 488 (2017).

133. See *id.*

134. Thomas M. Scanlon, *Promises and Contracts*, in *THE THEORY OF CONTRACT LAW* 86, 92 (Peter Benson ed., 2001).

135. Shiffrin, *supra* note 2, at 710.

think that contracts are promises and promises impose genuine moral obligations, this ought to be recognized in the institutions of the law of contracts.<sup>136</sup> But, as I suggest with the example above, this consideration has very little determinate bite when it comes to the details of the law of contract remedies. This should be unsurprising given that the remedial obligations imposed on a breaching promisor are sometimes underdetermined, and in any case their structure and justification differ from the structure and justification of the legal remedies that courts provide.

A caveat. Shiffrin's argument is a normative claim about the proper shape of contract law's remedial response. My own approach in this Article is interpretive. I am more interested in uncovering the structure of the contract law we have than in prescribing how it should be. In this sense, the fact that Shiffrin's argument is inconsistent with the structure of law does not count as a reason against her view. Yet as a normative argument, the claim still faces a problem. Shiffrin is right to point out that the remedial regime should be sensitive to the primary moral obligation.<sup>137</sup> The argument, however, moves too quickly from the judgment that promises impose moral obligations to perform to the conclusion that the remedial regime should not be one of predominantly money damages along with doctrines limiting the extent of recovery.<sup>138</sup> The crucial point here is that judgments about promissory obligation leave things relatively open for answering the question about the proper remedy for breach of contract. Even accepting that agents ought to perform their promises and the legal system should reflect this in order to support their ability to lead morally decent lives, we need much more normative legwork before we can conclude what specific structure the remedial regime should have.

In fairness, Shiffrin's work on remedial clauses<sup>139</sup> suggests that she is perfectly happy to accept that there is a potentially legitimate gap between primary rights and legal remedies. But the gap, according to Shiffrin, needs to be justified. In fact, her argument is not just an argument regarding contract law's remedial structure. It is also, and perhaps most fundamentally, an argument regarding the economic, instrumentalist justification for it—the idea of “efficient breach.”<sup>140</sup> From this perspective, Shiffrin's complaint is not necessarily directed at expectation damages as such. In her view, it seems, the specific performance remedy is the most obvious candidate for a morally adequate remedy because it is structurally identical to the moral right to

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136. *Id.* at 750–53.

137. *Id.* at 750.

138. *Id.* at 750–53.

139. Shiffrin, *supra* note 130.

140. Shiffrin, *supra* note 2, at 730–33.



performance. A compensatory remedy might be morally adequate, but whether that is the case also depends on the reasons that legal participants endorse as the rationale for the remedy. Because of its less obvious relationship with the moral duty to perform, the moral adequacy of the expectation remedy is more sensitive to the reasons that the legal system communicates as providing its justification.

This is a plausible claim, but it is one that assumes that specific performance has a certain lexical priority. Shiffrin, then, does not just assume that remedies must be identical with primary rights, or that there is a logical connection between the structure of those rights and the remedies that enforce them. But the relatively direct way in which the argument moves from conclusions about primary moral rights to conclusions about legal remedies and their potential susceptibility to their justifications seems to suggest that something like the rubber-stamp picture is operating in the background. Indeed, if the content of primary rights gives us a conclusive reason for the remedy's structure, then it could seem that a remedial scheme that does not replicate promissory rights is in some sense problematic, or in need of a specially compelling justification. However, there is no clear implication from primary rights to the physiognomy of legal remedies. And the best example of this is provided, as I have suggested, by promissory morality and promissory rights. The adequate response to breach of a promise is not clearly determined by the structure of the primary moral entitlement. Something even stronger happens when we move from morally adequate interpersonal responses to breach to morally adequate legal remedies.

### *B. Dual Performance*

#### 1. Efficient Breach and Efficient Non-Performance

Perhaps the most visible contribution of the economic analysis of contract law has been the theory of efficient breach. According to the most basic version of the theory (which, following Gregory Klass, we could call "simple" efficient breach<sup>141</sup>), the expectation remedy is justified because, and insofar as, it facilitates the optimal allocation of goods and services. The remedy deters breach as long as performance is socially optimal but incentivizes breach when the latter is a more efficient alternative.<sup>142</sup> In this second situation, the expectation remedy allows for a Pareto improvement:

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141. Klass, *supra* note 1, at 363.

142. See Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273, 292 (1970).

the promisee is left as good as in the case of performance, and the promisor is better off.<sup>143</sup> Thus, the theory, starting from the reasonable premise that performance is not always socially desirable,<sup>144</sup> claims that contract law should sometimes encourage breach of contract.

A somewhat different version of the theory, “efficient non-performance,” claims that efficient “breaches” are not really breaches.<sup>145</sup> This version of the theory starts from the perspective of an ideal, complete contingent claims contract—a contract establishing a course of conduct for any possible state of the world.<sup>146</sup> Because of transaction costs, parties never draft these ideally complete contracts.<sup>147</sup> In circumstances that have not been foreseen by the parties, the question is whether they would have agreed to performance or non-performance *ex ante*. The issue is thus merely one of interpreting or filling a gap in an incomplete contract.<sup>148</sup> In order to interpret or complete the contract, and assuming that parties contract to increase their welfare, promisors should only perform if performance increases the parties’ joint surplus.<sup>149</sup> In all other cases, promisees should not perform. In these situations, non-performance is not breach, because it is in fact what the parties would have agreed to if they had foreseen the relevant circumstances. All contractual duties are, as in Holmes’s view,<sup>150</sup> duties to perform or pay. However, while Holmes saw contractual duties as options to perform or pay because of the remedial regime,<sup>151</sup> on the efficient non-performance account,

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

144. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 150 (2011).

145. See generally Porat, *supra* note 1, at 314 (explaining why efficient breaches of contract are not true breaches, but instead are default rules within incomplete contracts).

146. See Lewis A. Kornhauser, *Reliance, Reputation, and Breach of Contract*, 26 J.L. & ECON. 691, 691 (1983); Steven Shavell, *Damage Measures for Breach of Contract*, 11 BELL J. ECON. 466, 466–67 (1980).

147. For analysis of these costs applied to long-term contracts, see Oliver Hart & Bengt Holmstrom, *The Theory of Contracts*, in *ADVANCES IN ECONOMIC THEORY* 71, 131–34 (Truman F. Bewley ed., 1987).

148. See Kornhauser, *supra* note 1, at 691–92; Shavell, *supra* note 1, at 839; Steven Shavell, *Why Breach of Contract May Not Be Immoral Given the Incompleteness of Contracts*, 107 MICH. L. REV. 1569, 1569–70 (2009). Interestingly, Shavell sometimes alternates between the two views.

149. LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 156 (2006).

150. Holmes, *supra* note 8.

151. In this aspect, Holmes assumed that liability rule protection must mean that the primary entitlement to performance can be ‘taken’ without the consent of the promisee. However, even if remedies determine the content of primary entitlements, this does not follow. As Coleman and Kraus argue, “[L]iability rules are employed sometimes to generate a claim to repair in the event

contractual duties are duties to perform or pay because the remedy is an implied term. The remedy simply comes in to fill a gap, and as long as it fills it out adequately (by maximizing the parties' joint welfare) it is justified. Holmes reached his conclusion about the dual nature of contractual rights based on the remedial regime. The efficient non-performance view reaches it based on an economic analysis of contract drafting, which then justifies the remedial regime.<sup>152</sup>

If persuasive, the argument for efficient non-performance would show that, in the right circumstances, non-performance (along with payment of damages) is actually performance of the contract.<sup>153</sup> Under this view, the expectation remedy is, if efficient, the enforcement of the primary right—which is reinterpreted as a right to performance or payment of damages. When the promisor does not perform because performance is no longer efficient, and pays damages, the promisee is getting exactly what she bargained for.

Now a first problem with this argument is that it claims to derive the structure and justification of remedies from the contractual instrument executed by the parties. However, as a matter of fact, in many instances the parties have not reached any explicit agreement regarding remedies. In those circumstances, it seems somewhat artificial to call the remedy an implied term or a “hidden” remedial clause<sup>154</sup> that needs to be interpreted. Even if we decide to call the remedy an implied term, the legal regime must make a choice about the form of enforcement—a choice that might be sensitive to the parties' actual or hypothetical preferences, but that is not necessarily

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the conduct of a non-entitled party is wrongful, that is, in the event it fails to respect the conditions of transfer under a property rule; whereas, on other occasions, liability rules are employed to generate a claim to repair as part of the conditions of legitimate transfer.” Coleman & Kraus, *supra* note 25, at 1351.

152. This means that there are three distinct views that might lead one to conclude that contractual duties are alternative obligations to perform or pay. One view sees breach as sometimes desirable and projects this view onto the design or justification of legal remedies for breach (*simple efficient breach*). Another sees breach as permitted, as long as compensation is paid, on the basis of the already existing regime of legal remedies (*Holmes's view*). The third view rejects that non-performance, if efficient, constitutes breach, because rational parties would have agreed to non-performance as the appropriate course of action in such cases, and projects this view of contractual rights into the design and justification of remedies (*efficient non-performance*). Arguing for the logical distinction between the Holmesian account and efficient breach, see Jules Coleman, *Some Reflections on Richard Brooks's "Efficient Performance Hypothesis"*, 116 YALE L.J. POCKET PART (2007).

153. Avery Katz, *Virtue Ethics and Efficient Breach*, 45 SUFFOLK U. L. REV. 777, 779 (2012).

154. I take the term “remedial clause” from Seana Shiffrin, who defines remedial clauses as “subsidiary private agreements within contracts about what remedies should be enforced when the primary contractual agreement is breached.” Shiffrin, *supra* note 130, at 408.

dictated by the contractual instrument itself. I will come back to this problem below.

The second issue is that, even in cases in which the parties have reached an explicit agreement or formed an intention about the remedy, both our existing remedial practices and normative considerations seem to reject the immediate derivation of the remedy from such an agreement. Remedial clauses do not automatically translate into enforceable remedies in most legal systems (including American contract law).<sup>155</sup> Normatively, this seems sensible. When the law gives parties the legal power to make binding contracts, the law is also implicated in the moral quality of the agreements they enforce,<sup>156</sup> as well as in the way in which they do so.<sup>157</sup> There is simply no *a priori* reason for assuming that what is best for the parties' interests is best for society as a whole. The remedies that the parties have chosen, or would choose in an ideal contract, are not necessarily the remedies that the law ought to provide.<sup>158</sup>

## 2. Markovits and Schwartz on Dual Performance

Daniel Markovits and Alan Schwartz have offered a compelling version of the efficient non-performance argument: the *dual performance hypothesis*.<sup>159</sup> According to this hypothesis, contracts between rational, sophisticated parties always impose alternative obligations on promisors: either to supply the promised good or service for a certain price, or to transfer to the promisee the gains she would have made in case of supply.<sup>160</sup> Because of this, a promisor who does not supply the good or service, but transfers the gain to the promisee, is still *performing*.<sup>161</sup> No true breach is efficient, because (economically rational) promisees expect promisors to breach and pay damages when this would be optimal.<sup>162</sup> There is a breach only if the promisor neither delivers nor pays.<sup>163</sup> An award of expectation damages, from this

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155. Gregory Klass, *To Perform or Pay Damages*, 98 VA. L. REV. 143, 158 (2012).

156. Dori Kimel, *The Morality of Contract and Moral Culpability in Breach*, 21 KING'S L.J. 213, 230 (2010).

157. Shiffrin, *supra* note 130.

158. Murphy, *supra* note 1, at 168.

159. Markovits & Schwartz, *The Myth of Efficient Breach*, *supra* note 16, at 1948; Markovits & Schwartz, *The Expectation Remedy*, *supra* note 16, at 1093–95.

160. Markovits & Schwartz, *The Myth of Efficient Breach*, *supra* note 16, at 1948.

161. *Id.*

162. *Id.* at 1948–49.

163. *Id.* at 1948.

perspective, constitutes the enforcement of the primary right under the contract that rational parties have agreed—or, at least, would agree—to.<sup>164</sup>

The economic side of Markovits and Schwartz's argument is that, as a general matter, liability rule protection would generate at least as great, or greater, surplus for the promisee than property rule protection.<sup>165</sup> Because of this, a rational promisee, focused on maximizing her net contractual gain, would choose to have her contract enforced through a monetary remedy rather than through specific performance.<sup>166</sup> If this economic claim is true,<sup>167</sup> Markovits and Schwartz argue, the expectation remedy is not morally problematic, because it actually enforces the content of the contractual entitlement rightly understood.<sup>168</sup> The reason for this is that, in Markovits and Schwartz's argument, an economic account of the optimal economic contract is also an analysis of the content of contractual rights. All primary contractual rights are, when correctly understood, rights to obtain performance *or* the economically optimal alternative (expectation damages): non-performance followed by payment of the adequate measure of damages does not constitute breach.<sup>169</sup> In other words, the expectation remedy is part of the typical contract within the domain of the theory. The account deliberately erases the distinctiveness of remedial clauses.

### 3. From Economic Justification to Contract Interpretation

The economic claim is only the first step in Markovits and Schwartz's argument. The second step is the claim that, because of this economic rationale for expectation damages as the remedial term that would be chosen by rational parties, contractual duties are in fact alternative obligations to perform or pay.<sup>170</sup> This is an upshot of the fact that, according to Markovits and Schwartz, if the economic justification is correct, rational promisees would want their contractual rights to include payment of damages as an alternative to performance.<sup>171</sup> Finally, the third step of Markovits and

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164. *Id.* at 1948 n.22.

165. *Id.* at 1950. On property and liability rules, see Calabresi & Melamed, *supra* note 31, at 1106–10.

166. Markovits & Schwartz, *The Myth of Efficient Breach*, *supra* note 16, at 1976.

167. It is unclear whether the economic claim is actually true. There is at least some empirical evidence that many commercial parties (such as parties to M&A contracts) seem to prefer specific performance over expectation damages. See Arnold et al., *supra* note 102, at 363. Assuming these parties are rational and are pursuing the maximization of their gains, then this empirical evidence suggests that the economic optimality of monetary damages is at least contestable.

168. Markovits & Schwartz, *The Myth of Efficient Breach*, *supra* note 16, at 1987.

169. *Id.* at 1977.

170. *Id.* at 1976–77.

171. *Id.*

Schwartz's argument is that, since it simply enforces contractual duties as they actually are, the remedial regime in American contract doctrine, which provides expectation damages, is morally justified.<sup>172</sup>

The crucial step is the second one. That step sees contractual rights as defined by rational parties' (actual or hypothetical) preferences for what ought to happen if performance is less efficient than nonperformance.<sup>173</sup> These preferences extend to both what the promisor should do about the promised performance and to the alternative course of action.<sup>174</sup> The preferences of the economically rational party determine what actual contractual parties promise to do and the amount of money they can pay to get out of the promise.<sup>175</sup> This seems to suggest that something like the realist rubber-stamp view underlies the argument. Recall that the realist rubber-stamp view defines the content of primary rights by reference to remedies. Markovits and Schwartz, similarly, make an interpretive argument about contractual rights that sees all contractual promises as incorporating optimal remedies within their content.<sup>176</sup>

In fairness, Markovits and Schwartz would resist the characterization of their argument as one about contractual promises incorporating optimal remedies. In their argument, remedies are not understood as something separate from contractual rights that could or could not be incorporated *within them*. The remedy of expectation damages does not come in as a mechanism to enforce a primary right the content of which we have already determined; it is part of the content of the primary right.<sup>177</sup> The implication of this is that, as long as the standard legal remedy is the economically optimal one, it *is* the enforcement of the primary right. The optimal remedy is always the specific performance of contractual rights.<sup>178</sup> So while it is true that the two views—the realist rubber-stamp view and Markovits and Schwartz's argument—conflate questions about the interpretation of contractual rights and questions about remedies, in the case of the latter this conflation is deliberate. More precisely, the conflation derives from a substantive interpretive view about primary rights. So, Markovits and Schwartz offer their argument as an interpretive argument—a reconstruction of what parties would have wanted

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172. *Id.* at 1987. One issue that might be problematic for this account, but which I ignore here, is that the actual remedy in contract law—given the mitigation, foreseeability, and certainty doctrines—is less-than-fully-compensatory expectation damages.

173. *See id.* at 1976.

174. *See id.* at 1977–88.

175. *See id.*

176. *See id.*

177. *See id.* at 1977.

178. As Markovits and Schwartz claim explicitly. Markovits & Schwartz, *The Myth of Efficient Breach*, *supra* note 16, at 1953.

if they had carefully considered the content of their agreement *ex ante*.<sup>179</sup> Their argument, seen in this light, is not at all about remedies. It is about the content of the parties' primary rights being, in general, an alternative obligation. The upshot is that an expectation damages award is typically the enforcement of parties' primary rights and is therefore adequate as the legal remedy.

If that is right, then addressing Markovits and Schwartz's argument on their own terms requires asking whether their interpretation of the content of contractual rights is plausible. Of course, if any specific contract explicitly includes a clause establishing payment of money as an alternative to performance (in Markovits and Schwartz's language, if the contract includes a "transfer term"<sup>180</sup>), then the parties have in fact agreed to an alternative obligation. In those types of situations, non-performance accompanied by payment is an authorized course of action that complies with the parties' agreement. However, when a contract does not include an explicit transfer term, then the issue is what remedy should be provided in case of breach of the primary obligation. According to Markovits and Schwartz, the answer follows straightforwardly from the economic analysis of optimal remedies: if a liability rule is justified as the optimal remedy, this immediately transforms all contracts within the domain of the theory into "liability rule contracts" (unless otherwise agreed), and all contractual rights within that domain into rights to performance or payment of damages.<sup>181</sup>

One problem with this line of argument is that it is at odds with the perspective of the legal regime Markovits and Schwartz attempt to justify. Procedurally, paying damages does not count as a defense against a claim for breach of contract.<sup>182</sup> Nor does the plaintiff need to allege a failure by the defendant to pay damages in order to establish her cause of action.<sup>183</sup> Liability rules do not define the content of contractual entitlements, but are instead one of the forms in which those entitlements are protected.<sup>184</sup> Just as, against moralist critics, primary entitlements do not immediately tell us how remedies ought to be designed, the analysis of the optimal remedy does not tell us what the content of the entitlements protected by them is. As an interpretation or justification of the existing legal regime, Markovits and

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179. *See id.* at 1976.

180. *Id.* at 1959.

181. *See id.* at 1977–78.

182. *See* Stephen A. Smith, *The Significance of a Civil Wrong*, in *CIVIL WRONGS AND JUSTICE IN PRIVATE LAW* 157, 163–64 (Paul B. Miller & John Oberdiek eds., 2020).

183. Nathan B. Oman, *Why There Is No Duty To Pay Damages: Powers, Duties, and Private Law*, 39 *FLA. ST. U. L. REV.* 137, 149 (2011).

184. *See* Brooks, *supra* note 1, at 575–76.

Schwartz's argument fails because it flattens a distinction that is at the center of that regime.

#### 4. Circularity

There is a potential reply. Markovits and Schwartz could argue that their argument explains why the law is justified, even though the argument does not track or replicate the linguistic and conceptual structure of the law. More specifically, instead of simply replicating the primary right-remedy distinction, Markovits and Schwartz are trying to show a significant dimension of remedies that the distinction can make us oblivious to.<sup>185</sup>

In order to assess this potential response, let me now go to the third step in Markovits's and Schwartz's argument. That step is the claim that, since the expectation remedy simply enforces contractual duties (interpreted as duties to perform or pay), it is morally justified.<sup>186</sup> This step shows that Markovits and Schwartz are not concerned with providing an account that fits the surface language of the legal system, but rather with showing us why the remedial regime might be justified—and how we can see that the remedial regime is justified only if we ignore the surface distinction between rights and remedies.

One problem here is that this third step reveals a certain circularity. According to Markovits and Schwartz, the expectation remedy is morally acceptable because it simply enforces the contractual right, given that the content of the primary right turns, in part, on the optimal course of action in cases where nonperformance is more efficient than performance.<sup>187</sup> This premise does not fit the legal regime, but—again—this might not be an ultimately successful argument against their view. Yet the premise also makes it difficult to justify the expectation remedy. One cannot claim that the economically optimal remedy is morally justified because it enforces the primary right, if the content of the primary right is determined by the optimal remedy. If the optimal enforcement mechanism determines, as a matter of interpretation, the content of primary contractual rights, *by definition* there will be no divergence between the latter and the optimal remedy.

Thus, Markovits and Schwartz cannot conclude that the expectation remedy is morally adequate because it enforces the primary right, because

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185. This line of argument would basically entail a rejection of a theoretical requirement of transparency. On transparency, see SMITH, *supra* note 10, at 24–25. For what it's worth, I think they would be right in rejecting at least a strong (or “reflective”) version of that requirement. See Felipe Jiménez, *Two Questions for Private Law Theory*, 12 JURISPRUDENCE 391, 410–11 (2021).

186. Markovits & Schwartz, *The Myth of Efficient Breach*, *supra* note 16, at 1987.

187. *Id.*



their own argument has collapsed the distinction between rights and remedies. The argument is based on the view that a normative case for a certain enforcement mechanism also determines the content of primary rights. If we define the content of the right in terms of the economically optimal remedy, of course the optimal remedy will enforce the right. That is tautologically true but does not count as an argument in favor of the moral acceptability of the remedy.

Note that, if expectation damages are indeed the optimal measure of damages from an economic standpoint, this is a good argument in favor of expectation damages. And from the perspective of a utilitarian or welfarist, the argument is not just good but perhaps decisive. But, if that is the case, the argument is straightforwardly one about the economic optimality of remedies. The argument does not require collapsing rights and remedies in a way that, at least at face value, is inconsistent with the structure of contract doctrine. Markovits and Schwartz make a good case that expectation damages are an optimal remedy at least for a subset of contractual parties; and what would be economically good for contractors should carry weight in the design and evaluation of remedies. Yet, instead of opposing the moralist critique head on, and claiming that there is no moral reason why remedies ought to replicate primary rights in order to be morally acceptable, Markovits and Schwartz have taken the strange path of accepting this mistaken premise, claiming that, nevertheless, the expectation remedy *does* replicate primary contractual rights.

This path is also hard to square with what actual contractual parties say and plausibly expect. Contractual parties say—or, more typically, write—“John should do *X*.” Why would parties understand their promises in terms which are inconsistent with the ones they expressly chose? Why, that is, would I agree on “I ought to do *X*,” if what I mean is “I ought to do *X* or *Y*?”<sup>188</sup> Why would sophisticated parties with legal counsel—the parties the model has in mind—leave their actual preferences out of the contract’s text, implicit and open to interpretive disagreement? According to Markovits and Schwartz, this is the case because the promise to perform or pay

is memorialized in the liability rule contract through the price term, which fixes the gain to buyers both of trade and of transfer . . . . We are tempted by the view that the transfer promise is express—that given the parties’ negotiations, the price term just *is* another type of

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188. Klass, *supra* note 155, at 147; Seana Shiffrin, *Must I Mean What You Think I Should Have Said?*, 98 VA. L. REV. 159, 166 (2012).

liquidated damages clause, which fixes transfers by reference to the named price.<sup>189</sup>

But, again, here we can see the assumption that a justification of the remedial scheme is the same as the determination of the content of primary rights. Of course, Markovits and Schwartz are right when they say that remedies have an impact on contractual prices. But this does not ground the conclusion that the remedy is constitutive of the primary right—especially if the parties do not define the primary right in terms of the remedies. The parties could perfectly establish an alternative obligation; if they do not, why is it admissible to claim that nevertheless they did establish such an obligation? If the parties do not understand their obligation in these terms, can we go against their own understanding in interpreting the contractual obligation?<sup>190</sup> Markovits and Schwartz note at one point, correctly, that principles of contractual fidelity are not principles of contract interpretation.<sup>191</sup> A similar critique can be made of their argument: principles of remedial design are not principles of contract interpretation.

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Remedies cannot be morally vindicated by a framework that collapses their distinction with rights. Moreover, as I argued above, they cannot be morally criticized because they fail to replicate primary rights. This raises a question. If remedies are not in the business of simply replicating primary rights or determining their content, what do they do? I turn to the answer in the next section.

### III. THE FUNCTION OF REMEDIES

I start my account of the function of contract remedies by looking at actual legal practices. At a very broad level, there is an important degree of similarity across the law of contracts of different jurisdictions and legal systems,<sup>192</sup> and this is particularly true for contract remedies.<sup>193</sup> From a

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189. Markovits & Schwartz, *The Myth of Efficient Breach*, *supra* note 16, at 1978.

190. Brooks, *supra* note 1, at 588–90.

191. Markovits & Schwartz, *The Myth of Efficient Breach*, *supra* note 16, at 1987.

192. Peter Benson, *The Expectation and Reliance Interests in Contract Theory: A Reply to Fuller and Perdue*, 1 *ISSUES LEGAL SCHOLARSHIP*, Article 5, at 1, 1 (2001); Felipe Jiménez, *Against Parochialism in Contract Theory: A Response to Brian Bix*, 32 *RATIO JURIS* 233, 244–45 (2019).

193. See E. Allan Farnsworth, *Comparative Contract Law*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 900, 928–32 (Mathias Reimann & Reinhard Zimmermann eds., 2008); Jiménez, *supra* note 192, at 243–44. On American law, see *RESTATEMENT (SECOND) OF CONTS.* § 359(1) (AM. L. INST. 1981). On the common law in general, see JAMES GORDLEY, *FOUNDATIONS*

comparative perspective, remedial schemes, while undoubtedly divergent in the details,<sup>194</sup> generally aim to give the promisee what she contracted for (specific performance) or something just as good (money damages).<sup>195</sup>

Perhaps this significant degree of convergence<sup>196</sup> finds its historical explanation in mutual influences between legal systems, legal transplants, and so on. But explaining why a certain legal system came to have a certain trait is different from explaining why that trait subsists.<sup>197</sup> One plausible theoretical explanation for the subsistence of this convergence might be of a functional character: convergence could be explained by the function performed by contract remedies, which might be constant across jurisdictions. As I will argue, from the perspective of contract law, the function of contract remedies is twofold. First, remedies vindicate the promisee's primary expectation of performance, protecting her from harm. Second, remedies protect the integrity of the practice of contractual exchange.<sup>198</sup>

This role helps to explain, in my view, remedial convergence across jurisdictions.<sup>199</sup> Given these functions, it is no coincidence that most legal systems provide basically the same remedies: generally, expectation damages, and, sometimes, specific performance.<sup>200</sup> As Liam Murphy puts it, “[t]he most obvious way to support the practice of making and keeping

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OF PRIVATE LAW 390–91 (2006). On German law, see REINHARD ZIMMERMANN, *THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION* 776 (1996); KONRAD ZWIEGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* 472 (Tony Weir trans., 3rd ed. 1998).

194. For a comparison of remedies in English civil law and the French civil code, see SOLÈNE ROWAN, *REMEDIES FOR BREACH OF CONTRACT: A COMPARATIVE ANALYSIS OF THE PROTECTION OF PERFORMANCE* (2012). In my view, Rowan's monograph is remarkable in its attention to doctrinal details and the differences that emerge from those details—but those details, in my view, are consistent with the broad convergence I start from here.

195. See Murphy, *supra* note 1, at 168 (noting this trait of contract law as a supportive mechanism). The convergence also extends to other less studied remedies, such as rescission. See Richard R. W. Brooks & Alexander Stremitzer, *On and Off Contract Remedies Inducing Cooperative Investments*, 14 *AM. L. & ECON. REV.* 488, 488–89 (2012).

196. Not everyone agrees with this claim of convergence. See, e.g., Bix, *supra* note 2, at 195.

197. See Philip Pettit, *Functional Explanation and Virtual Selection*, 47 *BRIT. J. FOR PHIL. SCI.* 291, 295 (1996).

198. Here I follow Kimel, *supra* note 2, at 316; see also Joseph Raz, *Promises in Morality and Law*, 95 *HARV. L. REV.* 916, 933 (1982) (book review). This argument also parallels my account of the reasons why breach of contract might be morally wrong. See Felipe Jiménez, Presentation at USC Gould School of Law: Is Breach of Contract a Moral Wrong? (Jan. 10, 2019).

199. Of course, this functional explanation is entirely compatible with a historical or causal explanation about how different jurisdictions in fact came to have the remedies they have.

200. See GORDLEY, *supra* note 193, at 388–95. But see Craswell, *supra* note 35, at 107 (asserting basic contract remedies are similar only by coincidence “if they happen to match whatever remedy best serves [certain policy] goals”).

agreements is to enforce them—by ordering performance or something just as good.”<sup>201</sup> And one can easily see why this is also applicable to the way in which the promisee’s primary expectation should be vindicated. I turn to a more detailed analysis of these two roles of contract remedies below.

Before turning to that analysis, however, I should address a potential concern about my use of the notion of a “function.” It could seem that by talking about the function of contract remedies I am already tilting the scales in favor of an instrumentalist account of remedies—an account under which remedies are understood as an instrument for “policy” goals that are, in some sense, external to the law of contracts.<sup>202</sup> By itself, however, “function” is a relatively neutral term, compatible with different specifications in different settings.<sup>203</sup> At least in principle, there is no reason why we could not understand the function of a certain institution or set of legal rules and doctrines in non-instrumental terms.<sup>204</sup> The notion of function can be explanatory without being instrumental—and here I use it precisely in such broad terms. The function of contract remedies, then, is simply the reason why we have contract remedies.<sup>205</sup> Importantly, we should separate this wholesale question about the role performed by contract remedies in general from retail questions about what specific “interests” particular remedies protect—as in Fuller and Perdue’s taxonomy of the expectation, reliance, and restitution interests.<sup>206</sup> To put my perspective in dialogue with Fuller and Perdue’s taxonomy, one could say that the function of remedies is what we try to do when we protect the expectation, reliance, and restitution interests.

#### A. From Primary Norms to Remedies

In *The Concept of Law*, H.L.A. Hart introduced the idea of secondary rules as a solution to the problems that an imaginary primitive legal system with

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201. Murphy, *supra* note 1, at 168.

202. See John Gardner, *What Is Tort Law For? Part 1. The Place of Corrective Justice*, 30 *LAW & PHIL.* 1, 1–2 (2011).

203. For an illuminating analysis in law, see KENNETH M. EHRENBERG, *THE FUNCTIONS OF LAW* 20–29 (2016). See also Ralf Michaels, *The Functional Method of Comparative Law*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 343–45 (Mathias Reimann & Reinhard Zimmermann eds., 2005).

204. John Gardner, *The Functions and Justifications of Criminal Law and Punishment*, in *OFFENCES AND DEFENCES* 201, 201 (2007); see also Joshua Kleinfeld, *Enforcement and the Concept of Law*, 121 *YALE L.J. ONLINE* 293, 295 (2011).

205. Cf. Gardner, *supra* note 204, at 202 (“In the case of social practices . . . the functions of each practice supply the reasons for that practice to be nurtured and maintained . . .”).

206. Lon Fuller & William R. Perdue, *The Reliance Interest in Contract Damages: 1*, 46 *YALE L.J.* 52, 53–57 (1936).

only primary norms of conduct would face.<sup>207</sup> According to Hart, a legal system that only had primary rules—rules prescribing or prohibiting certain behaviors—would run into a series of practical problems.<sup>208</sup> The first problem faced by this primitive legal system is that people would find it hard to know what rules they are to follow and how they ought to be understood. This is the problem of *uncertainty*.<sup>209</sup> The second problem faced by this imagined primitive society would be the difficulty adapting to changing circumstances by deliberately modifying the rules. This is what Hart termed the problem of the *static* character of a system comprised exclusively of primary rules.<sup>210</sup>

There is a third problem that Hart identified would arise in a system comprised exclusively of primary rules, and this is the problem I wish to focus on here. Hart wrote:

The third defect of this simple form of social life is the inefficiency of the diffuse social pressure by which the rules are maintained. Disputes as to whether an admitted rule has or has not been violated will always occur and will, in any but the smallest societies, continue interminably, if there is no agency specially empowered to ascertain finally, and authoritatively, the fact of violation. Lack of such final and authoritative determinations is to be distinguished from another weakness associated with it. This is the fact that punishments for violations of the rules, and other forms of social pressure involving physical effort or the use of force, are not administered by a special agency but are left to the individuals affected or to the group at large. It is obvious that the waste of time involved in the group's unorganized efforts to catch and punish offenders, and the smouldering vendettas which may result from self-help in the absence of an official monopoly of 'sanctions', may be serious.<sup>211</sup>

In this particular case of inefficiency—generated by having only primary rules without authoritative enforcement—Hart thought that adjudicative rules centralizing enforcement, both to determine when a violation had occurred and responding to that violation through a sanction, were the standard solution of legal systems.<sup>212</sup> The transition from a primitive order of primary norms to a sophisticated legal system requires (along with rules of recognition to identify the applicable primary rules and rules of change to allow for their deliberate modification) the use of centralized enforcement

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207. HART, *supra* note 82, at 94.

208. *Id.* at 92–94.

209. *Id.*

210. *Id.* at 92–93.

211. *Id.* at 93 (emphasis omitted).

212. *Id.* at 96–98.

mechanisms regarding the primary norms of conduct. These “rules of enforcement” include both rules governing adjudication and rules governing the policing, monitoring, and punishment of violations.<sup>213</sup> Through these rules, the legal system aims to make its primary norms actual: it “make[s] those norms obtain in the world.”<sup>214</sup>

This shows that a relatively sophisticated legal system will have to couple primary private conduct rules about contractual behavior with some form of enforcement.<sup>215</sup> The enforcement will have to include both speech acts, by adjudicative institutions, which specify and give actuality to law’s primary obligations by directing the losing party to do something, and actual physical sanctions in case of non-compliance. At this very abstract level, however, it is hard to capture what is specific about contract remedies as an enforcement mechanism. Sure, like any other area of law, contract law’s efficacy requires enforcement through speech acts and eventual sanctions. But what should those enforcement mechanisms look like? Why not jail? Why not orders to apologize? The next two sections explore the function of contract remedies—in other terms, the functional explanation of their physiognomy—by looking precisely at the way in which contract law’s primary rights and duties require contract remedies and impact their structure.

### B. *Protecting Individuals*

Breach of contract primarily affects promisees. This might seem quite evident when promisees have relied on the contract and, as a consequence of

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213. Lewis Kornhauser, *Governance Structures, Legal Systems, and the Concept of Law*, 79 CHI.-KENT L. REV. 355, 359 (2004).

214. Kleinfeld, *supra* note 204, at 296.

215. I am ignoring, for the purposes of my argument, a potential difficulty. Remedies are not, in the most immediate sense, sanctions. They do enforce primary obligations, but the way in which they enforce them is by reaffirming them, after their breach, through a specific judicial order that directs a party to do something. The judicial order is not itself a sanction—the order might simply say “defendant must pay \$1,000”—and in fact it could itself be breached, which would then trigger a physical sanction. *See* SMITH, *supra* note 32, at 1, 6–7, 66, 106. Stephen Smith makes much of these distinctions to clarify the nature of remedies, but I think his view is ultimately compatible with my argument that sees remedies as enforcement mechanisms. He would probably disagree, but I think that disagreement is inconsequential: it derives from a different understanding of what enforcement means. Under Smith’s narrow interpretation, “enforcement” must refer to physical sanctions. *See id.* at 106 Under my wider interpretation, enforcement can also include speech acts and utterances that specify and give actuality to law’s primary obligations, by directing the losing party to do something—this, in itself, is a form of enforcing those primary obligations.

that reliance coupled with breach of the promise, they have suffered a material harm by changing their position.<sup>216</sup>

In their classic article, Fuller and Perdue doubted whether the case is as straightforward in the case of a contract that has not been relied upon and has not led to a conferral of a benefit.<sup>217</sup> And even when there has been reliance, Fuller and Perdue argue, the most natural thought is to protect individuals by compensating them exclusively for their reliance losses—as opposed to their lost expectation.<sup>218</sup> Because of this, in Fuller and Perdue’s view, the transition from reliance to expectation damages is the transition from corrective justice to distributive justice: expectation damages give the promisee something she never had.<sup>219</sup> The argument, which echoes an argument made much earlier by the Medieval theologian Cajetan, is that before the promisee has changed her position she has lost nothing, even if the promisor breaches.<sup>220</sup> The promisee might *expect* to receive something; but not getting something you expect to receive is not the same as being deprived of it. In fact, if the promisee has not relied there seems to be no harm to repair, and providing a remedy begins to look like a morally suspect behavior by the State.<sup>221</sup>

The underlying assumption here is that a contract that has not been relied upon leaves the normative situation exactly as it was before the contract was made. More specifically, the assumption seems to be that a contract does not give the promisee an enforceable right. But contract law does give the promisee a legally enforceable right that she acquires as a consequence of the contract.<sup>222</sup>

Now Fuller and Perdue were, of course, perfectly aware of this. They were not interested in describing the legal system but rather in justifying it—particularly, its enforcement of contracts through expectation damages. From that perspective, Fuller and Perdue were right about one very important thing. If one wants to provide a moral justification for a legal regime that enforces contracts through expectation damages, pointing to the expectation of performance is a non-starter, unless one can also justify the expectation as

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216. It might also seem evident in cases where promisees have conferred a benefit to the promisor, who has breached her own promise, yet I do not focus on this aspect here.

217. Fuller & Perdue, *supra* note 206, at 54.

218. *Id.* at 56–57; *see also* P. S. ATIYAH, PROMISES, MORALS, AND LAW 177–215 (1983).

219. Fuller & Perdue, *supra* note 206, at 56.

220. *See* James Gordley, *A Perennial Misstep: From Cajetan to Fuller and Perdue to “Efficient Breach”*, 1 ISSUES LEGAL SCHOLARSHIP, Article 4, at 1, 3–4 (2001).

221. *See* Raz, *supra* note 198, at 933–34, 937.

222. *See* PETER BENSON, JUSTICE IN TRANSACTIONS: A THEORY OF CONTRACT LAW 315–25 (2019).

the relevant baseline.<sup>223</sup> After all, the expectation itself is partially, if not fully, constructed by the very legal regime that stands in need of justification.<sup>224</sup>

One path to explain the relevance of the expectation measure would be, precisely, to justify the expectation as measured by the value of performance as the relevant baseline because that expectation reflects a genuine transactional entitlement.<sup>225</sup> But there is also a potentially less demanding explanation for why expectation damages might make sense as the remedy for breach of contract. Once the system is up and running, *because* we have established a legal regime that gives individuals a right to performance, not obtaining the performance is itself a deprivation of the right from the perspective of that legal regime.<sup>226</sup> If we want to provide a moral justification of the right, then the task becomes providing a justification of the legal regime globally considered, including its establishment of a right to performance. But, from the perspective of the legal system itself, there is nothing mysterious about a remedy determined by the value of the expected performance. *If* the promisee has a primary right to performance provided by the legal regime, she has a right to the remedy.<sup>227</sup> This is not, of course, a moral justification for the remedy. It is just an explanation for why it is plausible for the legal system to see the expectation of performance as a relevant baseline. Again, if we wanted to morally justify the remedy, at least *prima facie*, we would have to provide a moral justification of the legal regime.

My concern here, however, is not that of providing a justification of expectation damages as part of the overall institution of contract law. I am concerned here with the function, as opposed to the moral justification, of contract remedies. The point of this detour regarding Fuller and Perdue's argument is that it shows that, once we have a legal regime that grants promisees a primary right to obtain performance, then, from the perspective of the legal system, not getting the performance itself counts as a wrong that stands in need of correction and produces a loss. We need to compensate promisees for their losses and harms. The losses and harms might themselves be the upshot of the legal system. They might be losses that only exist because

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223. To be clear, I do not think Fuller and Perdue's different treatment of expectation and reliance losses makes much sense in any event: both reliance losses and expectation losses are normatively constructed losses. We need an argument for justifying reliance damages just as we need one for expectation damages.

224. See Murphy, *supra* note 1, at 160.

225. See BENSON, *supra* note 222, at 8–9, 315–25.

226. See *supra* Parts I and II.

227. While different in substance, my account here agrees with Goldberg and Zipusky's claim, made in the context of tort law, that individuals "have a right to a remedy." GOLDBERG & ZIPURSKY, *supra* note 63, at 146.



of a legal regime that counts them as such.<sup>228</sup> They might be, to follow Fuller and Perdue's argument, normative rather than purely factual losses. But they are still losses—and should be treated as such by the legal system. Again, if the legal system is morally legitimate and the conditions under which its norms can alter our moral rights and obligations are satisfied, then the losses will be rightfully treated as such, and the promisee will, in fact, be entitled to compensation. But even if the legal system is not legitimate and the conditions under which it can alter the moral profile<sup>229</sup> are not satisfied, the primary norms of conduct established by contract law will give grounds to behavioral expectations and breach will disappoint them. The enforcement mechanism of these norms, thus, will have as one of its functions the protection and redress of the victims of such disappointment.

Another way of saying this is that, once the legal system provides that contracts ought to be performed, citizens have an expectation that that will happen—and that, if contracts are breached, they will be protected,<sup>230</sup> and the legal system will provide a “civil recourse” mechanism.<sup>231</sup> A full moral justification of the remedial reaction would need to show why the specific remedy is justified, why the primary right that it enforces gives rise to legitimate expectations, why it is legitimate for the promisor to bear the burden of compensating, and so on and so forth.<sup>232</sup> But once the legal system is up and running and it establishes a primary right to performance, then not receiving performance counts—at least from the perspective of the legal system—as a loss. In other words, being deprived of what you are legally entitled to obtain amounts, from a legal perspective, to a loss.. The fact that these legally structured expectations will typically lead to detrimental reliance and thus to material harms is relevant—and gives even more weight to the idea that enforcing primary rights is a means for protecting individuals.

As I have argued above, the expectations of promisees are determined and structured by primary rights. The loss that we are trying to compensate promisees for is precisely the loss of those disappointed expectations. Therefore, compensating promisees for the harm derived from the

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228. See Liam Murphy, *Purely Formal Wrongs*, in *CIVIL WRONGS AND JUSTICE IN PRIVATE LAW* 19 (Paul B. Miller & John Oberdiek eds., 2020).

229. I take the notion of the “moral profile” from Mark Greenberg, *The Moral Impact Theory of Law*, 123 *YALE L.J.* 1288, 1308–09 (2014).

230. See Hanoch Sheinman, *Contractual Liability and Voluntary Undertakings*, 20 *OXFORD J. LEGAL STUD.* 205, 217–19 (2000).

231. On contract remedies as civil recourse, see John C. P. Goldberg & Benjamin C. Zipursky, *Civil Recourse Revisited*, 39 *FLA. ST. U. L. REV.* 341, 351–53 (2011); Nathan B. Oman, *Consent to Retaliation: A Civil Recourse Theory of Contractual Liability*, 96 *IOWA L. REV.* 529 (2011).

232. See Jiménez, *supra* note 198.

disappointment of those expectations requires a certain proportionality between the structure of the primary right and that of the remedy. The breach of the primary right is a reason why we want to compensate the promisee. Thus, there needs to be some proportionality between the disappointed right and the remedial reaction. This, in my view, is a reasonable way in which we can understand the standard view that the goal of contract remedies is to compensate the promisee for her losses<sup>233</sup> and that remedies aim to restore the promisee to her rightful position.<sup>234</sup> It is also, in my view, the best interpretation of the motivations underlying the arguments offered by Ripstein, Shiffrin, and Weinrib.<sup>235</sup> Remedies aim to provide the promisee a compensation mechanism, a mechanism that compensates her for the loss generated by breach and, therefore, the disappointment of her legally structured expectation. From this perspective, Shiffrin is entirely right when she argues that the remedial mechanisms of the law of contracts ought to reflect and vindicate the promisee's right to performance. The difference between the argument offered here and Shiffrin's, though, is that I do not think this raises any questions about the adequacy of a remedial regime of monetary compensation.

Not everyone agrees that compensation is a relevant concern. Scott and Triantis, for instance, have argued that compensation has little justification in history or economics and that it "plays little role in the contracts actually negotiated by commercial parties and agreed to by consumers."<sup>236</sup> In this latter aspect, Scott and Triantis argue that noncompensatory termination fees, rights of return, and free cancellation mechanisms<sup>237</sup> are contractual devices that show that parties do not actually want compensation. Instead, they want risk-management devices, which can perform their risk-management role precisely when they diverge from compensation.<sup>238</sup> Parties' preferences are for these risk-management devices that diverge from compensation.

Scott and Triantis use their criticism of the "compensation principle" as a first step to criticize the common law's unwillingness to enforce all liquidated damages provisions.<sup>239</sup> But there is nothing in the idea that contract remedies should compensate the promisee that entails that contract remedies should *only* compensate the promisee or that the amount of expectation damages should fix the upper bound of enforceable liquidated damages. In other

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233. BENSON, *supra* note 222, at 255.

234. Emily Sherwin, *Compensation and Revenge*, 40 SAN DIEGO L. REV. 1387, 1388 (2003).

235. *See supra* Parts I.B and II.A.

236. Robert E. Scott & George G. Triantis, *Embedded Options and the Case Against Compensation in Contract Law*, 104 COLUM. L. REV. 1428, 1429 (2004).

237. *Id.* at 1431.

238. *Id.* at 1432.

239. *Id.* at 1436–37.

words, one of the main reasons for contract remedies might be the vindication of the promisee's primary expectation without this excluding other considerations that might alter the *quantum* of compensation—including parties' own explicit preferences.

More importantly, there is a crucial distinction between the state's contract-enforcement mechanisms and the risk-management devices that parties put into their contracts. The problem here is closely connected to Markovits and Scwhartz's assumption that whatever remedy rational parties (in the sense of neoclassical economics) would agree to ought to dictate the legal structure of contract remedies. It is also connected to the infinite regress problem of the *perform or pay* interpretation of contractual rights. The issue is that, even if parties agree to a certain enforcement mechanism, to an alternative obligation, or to a certain risk-management device, there is *always* an ulterior question that the legal system needs to answer: are we going to enforce the parties' choice, and if so, how?<sup>240</sup> This is a question for which the reduction of rights to remedies, as we have seen, cannot provide an answer. This is a consequence of a more general problem, which is that the purely economic approach to remedies cannot account for law treating breach as a wrong that might require a public response and can only treat remedies as just one more device in the contractual package aimed at social welfare.<sup>241</sup> Even if the parties establish risk-management devices in their contracts, those devices can be breached—for instance, an airplane carrier may refuse to honor a free-cancellation right. In that case, the inescapable question appears again: How should law respond to this breach? That is a question that can, of course, be answered by saying: just enforce the parties' agreement, literally. But this is just one possible answer, and we are owed an explanation as to why the question of how we should use our collective enforcement apparatus should be answered by only looking at the parties' interest. The response might be: because that maximizes social welfare. Yet if that is the case, we are then owed an argument as to why maximizing social welfare ought to trump all other normative concerns. That argument might be made.<sup>242</sup> But this shows that the question of how the State reacts when a contractual right has been breached is inescapable.<sup>243</sup> One cannot simply assume that whatever private parties want in terms of enforcement determines what legal institutions ought to do, all things considered.

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240. See Michael Pressman, *The Two-Contract Approach to Liquidated Damages: A New Framework for Exploring the Penalty Clause Debate*, 7 VA. L. & BUS. REV. 651 (2013).

241. See EYAL ZAMIR & BARAK MEDINA, *LAW, ECONOMICS, AND MORALITY* 297 (2010); see also Brooks, *supra* note 1, at 591–92.

242. See, e.g., KAPLOW & SHAVELL, *supra* note 149.

243. See Pressman, *supra* note 240, at 689; Shiffrin, *supra* note 130.

Now, because breach of contract is primarily a wrong against promisees and quantifying damages presents important epistemic difficulties, perhaps we should be attentive to contractual parties' own explicit preferences and assessments. Moreover, one of the central functions of remedies is protecting promisees. Thus, private standing—the fact that the remedial mechanism is activated by the plaintiff's initiative—is a reasonable feature of contract remedies.<sup>244</sup> This feature, in my view, responds to the fact that remedies' function is, first, that of protecting individual promisees.<sup>245</sup>

However, the fact that breach of contract does not *exclusively* involve promisees but might also impact the stability of the practice of contractual exchange<sup>246</sup> explains why even though the promisee has the authority to activate the State's remedial response, she does not have total authority over the shape of that response. I turn to the second function of remedies, which is connected to their practice-protecting role, in the following section.

### C. Protecting the Practice

By imposing a coercive sanction, remedial rules reinforce the prescriptive content of primary rights; they reaffirm the existence of a legal duty and mark the legal system's judgment that breach of contract is, absent an excuse or defense, impermissible. Because they reaffirm the existence of the legal duty, the structure of that duty has a certain bearing on the law's response. However, and since this second reason is concerned with protecting the practice rather than individuals, systemic considerations—linked to the performance of contract law's functions—are also relevant in the specific structure of the remedial regime.

Remedies, like enforcement more generally, attempt to make the primary norms of behavior established by law actual<sup>247</sup>—even in the face of non-conforming behavior. By ordering the breaching promisor to do something, the legal system aims at “the restoration of a violated normative order.”<sup>248</sup> The judicial order can, in cases of non-compliance, lead to the use of actual physical coercion.

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244. See OMAN, *supra* note 131, at 113.

245. Similarly, the fact that breach is a wrong committed by the promisor and that primarily affects the interest of the promisee explains why it's the promisor, and not some state institution or a third-party, that must pay compensation.

246. See Jiménez, *supra* note 198.

247. Kleinfeld, *supra* note 204, at 296.

248. I take the expression from Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1516 (2016).

That enforcement mechanisms reinforce the legal system's primary norms is true in general. But in the case of contract law this plays a particularly relevant role. Whatever we might want to say about contract law's moral foundations and purposes, its value depends on its ability to enable people to enter into valuable contractual agreements. The values and moral goals served by contract law are served because, and to the extent that, contract law facilitates and increases contracting. Thus, the first question that contract law must answer, from this perspective, is how it can enable and incentivize individuals to make contracts.<sup>249</sup> Of course, not all contracts are valuable, and a crucial aspect of contract law is that it sets out which sorts of agreements ought to be enforced. But, within the limits of legitimate enforcement, the first role of contract law, and therefore of contract remedies, is to support the practice of contracting, by making more agreements possible.<sup>250</sup> That supportive role requires upholding the rules that establish primary rights, since without such upholding the legal practice and the expectations it fosters would become unstable. Promisees would not be able to rely on the legal institution. This would diminish the institution's value and would make promisors believe that they could breach their duties and "get away with it," which would also undermine the primary duties the rules of contract law impose.<sup>251</sup>

This gives us a systemic or institutional reason for protecting the primary expectations of promisees.<sup>252</sup> Since in relatively complex and anonymous societies individuals need assurance in order to enter into contracts, they need to be able to rely on the enforcement of their primary expectations in ways which are consistent with those expectations (and thus the remedy cannot diverge too much from the primary one). Promisees need to know, for contract law to operate smoothly, that their expectations will be duly protected. In this sense, Greg Keating is right when he calls remedies "the servants of rights."<sup>253</sup> Note that, at this system-wide level, we are concerned with protecting promisees' expectations, but not for promisees' sake. We want to protect their expectations because we want potential contractual parties to trust that their expectations will be upheld, and we want them to do so because this has beneficial effects on the system of contractual exchange and its ability to produce social benefits. By reinforcing contractual duties—by communicating that breach of those duties is unacceptable—contract remedies fulfil this practice-stabilizing role.

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249. KAPLOW & SHAVELL, *supra* note 149, at 155; *see also* Klass, *supra* note 1, at 373.

250. Murphy, *supra* note 64, at 18.

251. Kimel, *supra* note 2, at 316.

252. *Id.*

253. Keating, *supra* note 81, at 311.

Thus, remedies attempt to vindicate promisee's rights and to sustain the health of the practice of contractual exchange. In both of these aspects, promisee's primary rights have an important bearing on remedies.

#### D. Pro Tanto Reasons

I have argued that remedies have the double function of compensating those who have been wronged and protecting the stability of the practice of contracting. This does not lead, by itself, to perfectly determinate or concrete conclusions about what the remedial response should be in specific cases.<sup>254</sup> More generally, legal systems don't exhibit a perfect fit between primary rights and the detailed regulation of remedies.<sup>255</sup> Still, because of remedies' double function, primary rights have an important bearing on the structure of remedies, and this provides a functional explanation for the standard remedial mechanisms in Western legal systems.

Some theorists have thought that the breaching promisor is, as a consequence of the breach, under a duty of repair—"a duty to mitigate, so far as possible, one's non-performance of one's original duty."<sup>256</sup> For these scholars, there is a *continuity* between the primary obligation to perform and the secondary remedial obligation.<sup>257</sup> Under this view, when someone breaches a contract she fails to conform to certain reasons and those reasons are still awaiting conformity after breach.<sup>258</sup> Thus, remedial duties are second-best approximations to those reasons,<sup>259</sup> and legal institutions just acknowledge those remedial moral duties and give them a certain structure.

Others, like Stephen Smith, disagree. Under Smith's account, after the wrong, there is nothing left. Remedial obligations arise anew as a consequence of a judicial order.<sup>260</sup>

Resolving this debate is unnecessary for my purposes. Indeed, even if we assume that the continuity thesis is correct, figuring out the next best alternative to having complied with one's duty is not easy,<sup>261</sup> and the shape and structure of the remedial response needs to be determined and configured by legal institutions. In other words, even assuming a continuity between the reasons that underlie the primary contractual obligation and the remedy, the

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254. Richard Craswell, *Instrumental Theories of Compensation: A Survey*, 40 SAN DIEGO L. REV. 1135, 1136–37 (2003).

255. Sherwin, *supra* note 234, at 1388.

256. GARDNER, *supra* note 56, at 100.

257. *Id.* at 102.

258. *Id.*

259. *See id.* at 102.

260. *See* Smith, *supra* note 21; Smith, *supra* note 18.

261. GARDNER, *supra* note 56, at 100.

latter is underdetermined by the reasons that underlie the primary obligation. As John Gardner noted, “[A] reparative step that is called for according to the continuity thesis is not necessarily called for, all things considered.”<sup>262</sup> Even if the remedy is dictated by the same reasons that underlie the primary right, it is not fully dictated by those reasons. There are other considerations that might be relevant in designing that remedy.

If Smith is right, and remedies are just judicial orders responding to (among other events) breaches of contract, then the conclusion is even stronger: the right does not subsist, and its violation provides only the reason for the judicial order. The rules regulating these judicial orders ought to take into account all other relevant considerations bearing on that order.

Given the role of remedies in protecting the stability of the practice and the individuals who participate in it, rights have a bearing on the structure of remedies and might constrain, in different ways, remedial flexibility. Both the stability of the institutional practice and the compensation of disappointed promisees seem to suggest that, in principle, it is a good idea for the legal system to react to breaches in ways that are consistent with the primary rights structured by the legal institution and relied on by individuals. Technically speaking, thus, the role of remedies gives us a *pro tanto* reason in favor of a certain resemblance between the structure of remedies and primary rights; but not perfect or conclusive reasons for an identification or necessary connection between them.<sup>263</sup>

Thus, there are also other considerations (other *pro tanto* reasons) that ought to be relevant in the design of remedies, and which might lead to potential divergence between them and primary rights—even if there is, as Gardner and others have argued, a continuity between the reasons underlying primary rights and the reasons underlying remedial responses.

#### IV. OTHER REASONS

I have argued that primary rights and remedies are independent, although the former do have a bearing on the latter given the functions performed by contract remedies: protecting the individuals who engage in contracting and protecting the integrity of the legal practice. From the perspective of those two functions, we have a *pro tanto* reason for remedies to resemble primary rights. In this way, it is possible to argue that something like an ideal of

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262. *Id.* at 104.

263. On these distinctions between types of reasons, see John Broome, *Reasons, in REASON AND VALUE* 28, 55 (R. Jay Wallace et al. eds., 2004); JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 27 (1999).

compensation, of vindicating the promisee's primary right and enforcing the promisor's correlative duty,<sup>264</sup> is the starting point for remedies.

But this is only a starting point. We need to take into account other potentially relevant considerations. The double role of remedies provides a *pro tanto* reason, but only a *pro tanto* reason, in favor of a remedial design that resembles the structure of primary rights. Because of this *pro tanto* reason, money damages can be a perfectly acceptable remedy.

Given the limitations of actual courts, burdens of proof, doctrines of mitigation, certainty, foreseeability, and other rules limiting recovery, money damages generally, and expectation damages in particular, are systematically undercompensatory.<sup>265</sup> Because of this, specific performance, which simply enforces the primary right, might seem to be a preferable alternative.<sup>266</sup> Specific performance, after all, is the closest we can get to full consistency with the structure of the breached right. This is the concern that underlies the moralist critique of the current remedial regime in American contract law.

In order to resist the moralist critique, many legal economists deny that there is any moral reason to think that the promisee is entitled to performance.<sup>267</sup> Markovits and Schwartz, as we have seen, similarly suggest that the primary right is not, actually, a right to performance. However, because we only have a *pro tanto* reason for resemblance between rights and remedies, we do not need to follow any of these strategies. We can perfectly say, instead, that there might be other relevant considerations which can tilt the scale in favor of money damages—considerations that might make money damages an appropriate remedy despite its divergence from the primary right to performance.<sup>268</sup> Since expectation damages are, doctrinally, the most common measure of money damages across jurisdictions,<sup>269</sup> most of the reasons I consider below have been offered particularly regarding that measure; but the reasons can perhaps be extended to other money damages measures. I will suggest three plausible and familiar sets of reasons in favor of money damages, which can suggest why money damages might be a perfectly legitimate remedy even though they might diverge from the expected performance or its full monetary value.

Importantly, I do not attempt to build a complete and exhaustive taxonomy of the considerations that might be relevant in the design and evaluation of

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264. As argued by BENSON, *supra* note 222, at 256.

265. Klass, *supra* note 1, at 369; Wilkinson-Ryan & Hoffman, *supra* note 69, at 1006.

266. See Schwartz, *supra* note 1.

267. See, e.g., Shavell, *supra* note 148.

268. This is, to some extent, a general trait of private law remedies, where “[t]here are many limiting principles that give reasons to stop short of the rightful position” to which the plaintiff should be restored. Bray, *supra* note 34, at 14.

269. ZAMIR & MEDINA, *supra* note 241, at 292.



contract remedies. Instead, the purpose of this section is to show how the framework offered so far is able to incorporate familiar and important clusters of reasons that go beyond the function that, as I have argued in the previous section, contract remedies fulfill. The framework provides a scheme within which the relevant considerations for remedial design and analysis can be assessed and can further determine the structure of contract remedies.

*A. Considerations of Political Morality: Freedom, Personal Autonomy, and the Ethics of the Market*

The first set of reasons that one should consider is connected to political morality. Remedies are state enforcement mechanisms, which can lead to actual state coercion. Considerations of political morality are, therefore, part of the domain of reasons that might be relevant in determining the exact shape and structure of contract remedies.

Perhaps the most evident among such considerations is personal autonomy. As several theorists have argued, specific performance is considerably more intrusive in individuals' sphere of personal autonomy than money damages.<sup>270</sup> In some cases—like the sale of unique goods, such as land—money damages cannot be an adequate means to vindicate the promisee's expectation. In these cases, most Western legal systems, although coming from different starting points, provide specific performance.<sup>271</sup> Outside of those exceptional cases, however, money damages could work just as well (in theory) in protecting the stability of the practice and the promisee's expectation. And a remedy that does not coercively impose positive behavior on the promisor and allows her to change her mind and avoid performance, while still protecting the promisee's expectation, seems to further autonomy.<sup>272</sup> This gives us a reason for establishing money damages as the generally available remedy for breach.

Again, the actual practice surrounding the standard measure of money damages, expectation damages, makes them undercompensatory. However, it is unclear whether this is a troubling problem—perhaps, as long as we roughly approximate the promisee's loss and protect her interest and the

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270. Hanoch Dagan & Michael Heller, *Specific Performance* (Dec. 18, 2020) (unpublished manuscript), <https://papers.ssrn.com/abstract=3647336> [<https://perma.cc/574R-UUHU>]; KIMEL, *supra* note 107, at 100–09; SMITH, *supra* note 10, at 400–01. Note, however, that while Kimel sees this argument as plausible he also claims it is “invariably incomplete.” Kimel, *supra* note 2, at 322.

271. GORDLEY, *supra* note 193, at 390–91.

272. Dori Kimel, *Personal Autonomy and Change of Mind in Promise and in Contract*, in *PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW* 96, 114 (Gregory Klass et al. eds., 2014).

practice of exchange, there is simply no issue. Moreover, even assuming undercompensation is problematic, resorting back to specific performance is not necessarily the optimal answer.<sup>273</sup> The costs of undercompensation might be justified if the payoff is protecting individual autonomy. In no case is this more evident than in contracts for personal services. In other cases, of course, the balance of considerations might point in the other direction (as I have suggested, for instance, in the sale of unique goods). This, again, shows that the question of the appropriate design cannot be answered by assuming a necessary identity between rights and remedies.

Finally, contractual behavior usually takes place in open and pluralist economic contexts.<sup>274</sup> From this perspective, a monetary remedy seems to fit easily with a view of contract law as governing the commercial transactions of mutually disinterested parties in arms-length relationships within the context of anonymous, competitive market economies.<sup>275</sup> Moreover, a monetary remedy is consistent with the anonymity of market transactions, and the personal detachment that contract, rightly, has been seen as facilitating.<sup>276</sup> The political philosophy of the market supports, then, a monetary remedy.

### *B. Institutional Considerations: Enforcement Costs*

Granting remedies and overseeing the breaching party's compliance with them costs money. And different remedies have different costs of implementation. The received wisdom is that expectation damages, and generally all money remedies, require significantly less judicial monitoring after being granted than specific performance.<sup>277</sup> Damages are simpler to enforce than orders of specific performance.<sup>278</sup> And although this might seem like a platitude, it is useful to recall that courts are public institutions, funded by taxes. Their operation is costly and those costs, typically, are at least partially assumed by all taxpayers.<sup>279</sup> As Smith puts it, "Justice is a public

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273. Particularly because, in practice, specific performance might also be undercompensatory. See Yonathan A. Arbel, *Contract Remedies in Action: Specific Performance*, 118 W. VA. L. REV. 369, 404–05 (2015).

274. Markovits & Schwartz, *The Myth of Efficient Breach*, *supra* note 16, at 2003.

275. *Id.* at 1954. See also Aditi Bagchi, *Separating Contract and Promise*, 38 FLA. ST. U. L. REV. 709, 746 (2011); KIMEL, *supra* note 107.

276. Kimel, *supra* note 2, at 327.

277. As recognized by the RESTATEMENT (SECOND) OF CONTRACTS § 366 (AM. L. INST. 1981).

278. Smith, *supra* note 21, at 51.

279. *Id.* at 44.

good, but so are roads, education, health care, and so on.”<sup>280</sup> Legal justice is, moreover, a scarce public good that needs to be rationally administered: every dollar spent in enforcing contractual rights is a dollar not spent in enforcing other areas of the law.

Assuming this received wisdom is correct, then there is a trade-off between perfect compensation and the achievement of other extra-legal public goals, as well as of the enforcement of other areas of the law. We might have good reason to prefer an acceptably suboptimal remedy, such as (sometimes) under-compensatory money damages, because of the resources this allows us to save and use in other morally important public pursuits.<sup>281</sup>

### C. Economic Considerations: Efficiency and Contract Prices

A third cluster of considerations is connected to economic concerns. Think, first, about contract prices. Remedies affect prices, and individuals care about them. Because of this, and all else being equal, it is a good idea to assign at least some weight to what parties seeking to increase their contractual gains would prefer as an enforcement mechanism for their primary rights.<sup>282</sup> Indeed, the plausible purposes of contract law include increasing personal autonomy as well as maximizing economic efficiency. If most parties contract to maximize their gains, then—given the fact that remedies affect prices—the purposes of contract law might be served by a remedial regime that takes into account efficiency considerations.<sup>283</sup> Thus, if it is the case that the expectation remedy produces the right incentives for self-interested, utility-maximizing rational agents (though it is doubtful whether this can be settled without considering the specific transaction costs generated by each remedial scheme,<sup>284</sup> the incentives each scheme generates

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280. *Id.* at 45.

281. Note that I have only referred to the costs of court supervision. This is admittedly a simplification, since there are other costs which might be relevant for the determination of the right remedy, such as the costs of valuation or determination costs. On this, see Richard R. W. Brooks, *The Relative Burden of Determining Property Rules and Liability Rules: Broken Elevators in the Cathedral*, 97 NW. U. L. REV. 267, 274 (2002). Particularly, for the reasons why liability rule or property rule protection might be preferable from the perspective of these costs, see *id.* at 300–03.

282. Klass, *supra* note 1, at 382.

283. Similarly, *id.* at 383.

284. On this point, see Ian R. Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947, 951–52 (1982).

during litigation,<sup>285</sup> etc.), this provides a good reason for establishing this remedy.

This is just one concrete example of the way in which economic analysis can provide a method for evaluating the impact of different remedies.<sup>286</sup> Because, however, contract remedies can produce incentive effects at different moments in the contractual relationship and regarding different decisions,<sup>287</sup> reaching a conclusion about the economically optimal, all-things-considered remedy seems quite hard. But economics can provide important insights about the impact of remedies on specific decisions.<sup>288</sup> The impact of remedies on prices is just one relevant, but generalizable, example.

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These three types of considerations suggest that a regime of money damages might perfectly be, all things considered, preferable to one of specific performance. Of course, after this short overview of arguments you might still think that specific performance is preferable. But, precisely, what this survey of sets of arguments for money damages has attempted to show is that the correct remedial regime for breach of contract is not determined by the content of primary rights. The correct scheme depends on its ability to protect contractual parties and the integrity of the practice, as well as on several important considerations that also have a bearing on remedies, as the ones mentioned above. Such considerations might point towards expectation damages, as many early legal economists suggested. They might also point towards other alternatives, such as disgorgement of profits.<sup>289</sup>

Yet figuring out the exact structure of the optimal remedial regime is not my concern here. I have only attempted to show how the framework proposed in this Article can make space for all the types of relevant considerations—as well as how hard getting the balance of considerations right turns out to be. The failure to distinguish between rights and remedies is not only incorrect, as I have argued. It also has the unfortunate consequence of obscuring this complexity.

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285. See Richard R.W. Brooks, Simple Rules for Simple Courts: Specific Performance, Expectation Damages and Hybrid Mechanisms 1 (Aug. 9, 2002) (unpublished manuscript), <http://papers.ssrn.com/abstract=304187> [<https://perma.cc/88YD-2TVE>].

286. Craswell, *supra* note 254, at 1137.

287. See, e.g., Eric A. Posner, *Contract Remedies: Foreseeability, Precaution, Causation and Mitigation*, in 3 *ENCYCLOPEDIA OF LAW AND ECONOMICS* 162, 162 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000).

288. Craswell, *supra* note 254, at 1137–38. See also Douglas G. Baird, *Economics of Contract Law*, in 2 *THE OXFORD HANDBOOK OF LAW AND ECONOMICS* 3, 5 (Francesco Parisi ed., 2017).

289. See, e.g., Steve Thel & Peter Siegelman, *You Do Have To Keep Your Promises: A Disgorgement Theory of Contract Remedies*, 52 *WM. & MARY L. REV.* 1181, 1181 (2011).

## CONCLUSION

If everything went well, if we all complied with our duties and acted in good faith, there would be few, if any, breaches of contract. There would, of course, be instances of non-performance. But this would either be excused under the legal regime, allowed by the parties' contract, or bargained for as a modification by the parties given a change in the circumstances. However, we do not live in a world where everything goes well. Many things go wrong—including contractual relationships—and we need to respond to them.

That is where remedies kick in, under the framework I have offered. The framework is just that: a structure under which we can think about, evaluate, and redesign contract remedies. It does not provide ultimate, specific conclusions about optimal remedies. But this is a virtue, not a deficit. We should abandon any illusion that we can get the optimal package of legal remedies for breach. We should dispel the assumption that *if* we possessed all the relevant information, *if* we could know what the parties' preferences are, and so on, we could design an optimal system of contract remedies.<sup>290</sup> Instead, we should accept that remedies are just a rough approximation of the double role of protecting contracting parties and the stability of the system of exchange, influenced as well by other relevant considerations. In order to see this, as I have argued, we need to start from a clear distinction between contractual rights and remedies.

A too radical separation between rights and remedies generates reasonable worries. If rights and remedies are independent, as I have argued, they could in principle diverge to a significant degree. Too much divergence might diminish the perceived legitimacy of law by making individuals feel, rightly, that the legal system refuses to uphold the expectations it fosters. The divergence might itself be problematic for moral agents who are trying to do the right thing.<sup>291</sup> Divergence might also generate functional distortion, whether by directing behavior in inconsistent ways, or by directing different audiences (such as private individuals and firms as opposed to judges) in inconsistent ways. Moreover, we might think that primary rights impose substantive limits on what the state can legitimately do as a response to their breach.<sup>292</sup> The structure of rights might be particularly important as a limit on judges' remedial discretion.<sup>293</sup>

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290. Here, I paraphrase F. A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 519 (1945).

291. Shiffrin, *supra* note 2, at 709–11.

292. See Ripstein, *supra* note 52, at 1964.

293. See, for example, Weinrib's detailed analysis of *Spur Industries v. Del E. Webb Development Co.*, 494 P.2d 700 (Ariz. 1972), in Weinrib, *supra* note 47, at 15–19.

Yet, as I have hopefully shown, we can say everything we want to say in these aspects and give these concerns their due without assuming a necessary implication from the structure of rights to the structure of remedies. That explains why, as I have argued, the logical distinction is entirely consistent with the proposition that primary rights have an important bearing on the structure of contract remedies. The relevance of the distinction between rights and remedies is consistent with the sensible view that primary rights have an important impact on the proper structure of contract remedies. The dual function of remedies—protecting the practice and the individuals who participate in it—gives us a *pro tanto* reason for structural resemblance between primary rights and remedies. This *pro tanto* character explains why the design and evaluation of contract remedies can—and should—incorporate other relevant considerations beyond their function.

In all of this, we should remind ourselves that the real world poses constraints that should lead us to depart from ideal assumptions in theoretical models<sup>294</sup> and to acknowledge that the complexity of the real world will always pose hurdles for those models. Relatedly, asking courts to fine-tune damages to produce the optimal combination of incentives is also absurd.<sup>295</sup> The world of legal remedies for breach of contract is always second-best,<sup>296</sup> a rough approximation through which legal systems vindicate contractual rights in ways that are sensitive to a multiplicity of relevant considerations.

Because whatever remedial regime we design will only be second-best, there is a temptation to think that remedies should be default rules<sup>297</sup> and give options to parties.<sup>298</sup> This temptation should be resisted, however, and for familiar reasons. In contracts of adhesion, extreme deference to parties' preferences is just extreme deference to drafting parties' preferences. And even in contracts between sophisticated parties, legal remedies do not just look at private interest. Still, there is something to be said for some degree of flexibility—and perhaps for a relaxation of limiting standards like the penalty doctrine.

However, the framework offered here also provides an answer as to why liquidated damages clauses can be legitimately singled-out by the common

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294. R. G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11, 11 (1956).

295. Baird, *supra* note 288, at 6.

296. Avery W. Katz, *Remedies for Breach of Contract Under the CISG*, 25 INT'L REV. L. & ECON. 378, 384 (2005).

297. *Id.* at 384–86.

298. Avraham & Liu, *Incomplete Contracts*, *supra* note 1.

law of contracts for special scrutiny<sup>299</sup> and why the law of liquidated damages is not, against what some commentators argue, an unjustified judicial intrusion into freedom of contract.<sup>300</sup> Remedies do not just look at the parties' interest. They protect promisees' rights, but they also protect the stability of the practice. In performing these two functions, remedies are also influenced by many other relevant considerations—which must always be balanced and incorporated in the operation of the enforcement institutions over which we have a collective say.

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299. Larry A. DiMatteo, *A Theory of Efficient Penalty: Eliminating the Law of Liquidated Damages*, 38 AM. BUS. L.J. 633, 635 (2001); Robert A. Hillman, *The Limits of Behavioral Decision Theory in Legal Analysis: The Case of Liquidated Damages*, 85 CORNELL L. REV. 717, 719 (2000).

300. DiMatteo, *supra* note 299, at 637; Richard A. Epstein, *Beyond Foreseeability: Consequential Damages in the Law of Contract*, 18 J. LEGAL STUD. 105, 108 (1989).