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REMEDIAL RIGHTS AND SUBSTANTIVE RIGHTS IN CONTRACT LAW

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I. INTRODUCTION: LEGAL RIGHTS AND MORAL RIGHTS

Having outlined two different ways of articulating the tort of negligence, John Gardner explains that: "the way we render the ingredients of the tort matters for the defensibility of the regime of liability that it brings in its wake. The reason is that to defend the incidence of the liability one must first defend the assertion of the duty." And defending the assertion of the duty—given that the law "stands or falls in its own moral legitimacy depending on whether it has the very moral authority that it claims"—involves the following:

> First, since we are addressed as moral agents only when we are not deceived or manipulated by the addressor, the law is constrained to defend itself in a way that doesn't lend the lie to its own assertions. If it asserts that uing is a duty, breach of which grounds liability, then for the sake of its own legitimacy it had better be able to mount some kind of independent defence of there being a duty to u . . . Secondly, . . . the defence needs to be a defence of the duty to u *as a moral duty*, for the law asserts that this is what it is simply by asserting its own moral authority to create or recognise the existence of the duty.[1]

This sound introduction is followed by an ingenious analysis of the moral duty that lies at the core of the tort at stake as a duty *to succeed* (as opposed to a duty *to try*)—an analysis on the success of which, it is argued, the moral

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1. Gardner, In Defence of Outcome Responsibility, Paper introduced at a London-Oxford jurisprudence workshop, 2000. The quoted passage has been omitted from the final version of the paper, *Obligations and Outcomes in the Law of Tort*, *in* RELATING TO RESPONSIBILITY (Peter Cane and John Gardner eds., 2001), but is used here with the author's permission.

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intelligibility of (certain aspects, at least, of) the law of tort, *given the conditions under which tort liability is recognized and damages are awarded*, depends.

Surely we expect legal duties and legal rights to reflect the moral duties and rights on which they are based and to prove defensible by reference to them. But how neat a correspondence should we expect to find between legal duties and rights and those moral duties and rights on which they are based before we proclaim the law unprincipled, irrational, or unintelligible, or, indeed, before we question its moral authority?

At least two types of consideration may complicate the relations between legal rights and the moral rights to which they are meant to give effect. (From hereon I omit the separate reference to duties, though my subsequent comments should be equally applicable to both.) First, various considerations pertaining to the institutional nature of the law, the circumstances surrounding its formation or development, and the like sometimes affect the precise shape that legal rights take even inasmuch as they are straightforwardly meant to give legal effect to distinct moral rights. This is well known. But the problem is compounded by the fact that often (with notable exceptions to be found in written constitutions and similar legal material), the law does not state or articulate the rights it seeks to enshrine. The only evidence as to the precise nature of these rights often comes in the shape of the remedies awarded for interference with them.

This, after all, is the kind of evidence that emerges most routinely and most directly not only from statutory law but also from the day-to-day operation of the courts, and its pervasiveness and accessibility mean that it is sometimes tempting to see it as conclusive, or at least overriding, evidence even in cases where the law does provide other, apparently incompatible indications (say, in a declaratory or constitutional provision) as to the nature of the rights in question. And the possibility remains that considerations pertaining specifically to the logic, the justification, or the practicalities of *protecting* legal rights or rectifying the wrong of violating them might themselves introduce apparent distortion, this time not between the legal right and the moral right it is meant to reflect, but between the legal right itself and the remedial right that arises out of its violation. The upshot in both cases is similar: It may mean that the apparent discrepancy between certain legal rights and moral rights may be illusory, or it may mean that even inasmuch as it exists, its existence, far from exposing the law as morally unintelligible, is justified.

The quote with which we started comes from a study of tort law. Contract law, however, provides at least as good a framework in which to examine the speculative propositions introduced in the previous paragraphs. Here we have a legal institution that is, many (myself included) believe, designed to facilitate in the law a practice that lives a full and independent life outside it in morality. The core right and obligation it is meant to embody—the core contractual right and core contractual obligation—are widely regarded as analogous to those at the heart of the moral institution of promise. At the

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same time, the remedial rights recognized and the corresponding duties imposed in this area of the law do not always, at least not at first blush, seem to reflect this outlook and have often been used as the basis (as a matter of evidence, at any rate) for calling it into question.

Elsewhere I have offered an account of the intricate relations between contract and promise, contractual obligation and promissory obligation.[2] Considerations relating to these relations will inevitably prove pertinent to the issue before us. My focus in what follows, however, will be on what I described as the second source of apparent discord between legal rights and moral rights, namely the interplay between substantive rights and remedial rights in the law.

II. THE STANDARD REMEDY AND THE THEORY OF THE PRACTICE

Having used the term *core* contractual right, I suggested that contract law displays an apparent discord between it and remedial rights. But remedies for breach of contract come in numerous shapes and forms. Is there scope for speaking of the core remedial right (or, similarly, the core remedial duty)? Is there a point in asking what is or what should be the *standard* remedial response to a breach? I think there is. It is true that the great diversity of types of contract and contractual relations and the greater diversity still of circumstances and combinations of circumstances in which contractual disputes arise mean that whatever the answers might be, there are bound to be numerous cases where the standard remedy would prove to be under- or overcompensatory, impractical, or otherwise unfair or inappropriate. Nevertheless, such questions can and should be asked.

Answering them may be understood as an attempt to determine what is (or what should be) the general rule and what should count as a justification-requiring deviation from it, allowing that instances where deviations from the rule could be justified may be many. But there is no reason to assume in advance that no grounds for a general rule could be found. Moreover, a grasp of the rule and *its* justification may well prove conducive to understanding what kind of considerations could justify deviating from it. Contrary to the popular saying, exceptions cannot prove the rule; at best they can prove that the rule has exceptions. But the nature of and the reasons for the rule may well have a role to play in explaining the need and the legitimate grounds for exceptions.

How are we to go about the task of discovering the grounds for the general rule? Where should we look first when we try to find out what the standard remedy for breach of contract should be? Intuitively, I would say that the starting point should be the underlying theory of the practice. Our

2. D. Kimel, FROM CONTRACT TO PROMISE: TOWARDS A LIBERAL THEORY OF CONTRACT (Oxford, 2002).

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understanding of the nature of the practice—the main functions that it should or should not be expected to fulfill, the nature and the normative foundations of the rights and the duties that it recognizes or constitutes—is surely highly pertinent to a critical examination of the measures to be taken when these rights are violated or these duties are not discharged.

Such an intuition can be explained a bit further. Remedies are likely to have two main, related functions: to protect the practice itself against erosion and debasement, and to protect those engaging in the practice against harm.[3] And these two functions are clearly connected to the underlying theory of the practice. Our understanding of the practice's main functions and values is surely among the things that explain what would—and what would not—amount to its erosion or debasement. It may also indicate what courses of action are to be taken in order to prevent such occurrences. Similarly, it is mainly (if not only) on the basis of an understanding of the practice's functions and values, and hence the (legitimate) purposes for which parties may put it into use, that we may determine what should (and what should not) count as harm to contracting parties or, at any rate, as harm that merits legal protection—considerations that in turn may well be relevant for deciding on the shape such protection, when due, should take.

Yet intuitive or straightforward as it may seem to be, the connection between the nature of the practice or the theory that purports to explain it and the choice of remedies for breach, while taken for granted by some, has been overlooked and in some cases directly challenged by others. Perhaps most curious is the view that acknowledges the connection but suggests that it works "the other way round," namely from remedies to the nature of the practice or, more specifically, to the nature of the rights and the duties which lie at its heart. Such an approach can be traced back to the work of Holmes,[4] but it has echoes in contemporary literature as well. Atiyah, for instance, lists as one of Holmes's "insights" the notion (which, Atiyah claims, is also the starting point for Fuller's influential contribution to modern contract theory) that "it is impossible sensibly to discuss *how* binding a contract is until one knows what form of damages are likely to be awarded for its breach,"[5] and, referring to Fuller, states approvingly that "it was . . . he himself who first demonstrated the extent to which the rights of

3. For a similar point, *see* J. Raz, *Book Review: Promises in Morality and Law*, 95 HARV. L. REV. 916 (1982) at 933–938. The two functions are related because the protection of the practice is achieved, at least in part (and plausibly for the most part), through the protection of contracting parties and, to some extent, *vice versa*: The protection of the practice against at least certain forms of erosion and debasement would tend to decrease the likelihood that individuals acting in it will be harmed as a result. This point is resumed later in the text.

4. Aptly described by Daniel Friedmann as "an attempt to view the contractual right through the looking glass of the damages awarded for its breach." *See* D. Friedmann, *The Performance Interest in Contract Damages*, 111 LAW QUARTERLY R. 628 (1995); *and see* references there, note 7.

5. P.S. Atiyah, ESSAYS ON CONTRACT (Oxford, 1986), Essay 3: *Holmes and the Theory of Contract*, 57 at 61 (italics in original).

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a contracting party are in practice *determined by* the differing kinds of damages that he may recover."[6]

Unless the emphasis in this last quote is understood to be on the "in practice," Atiyah would seem to confuse what is a common strategy of legal reasoning with the real issue of logical priority. The common or the legal response to a violation of right can at best be indicative of the nature of that right or of the way this right is commonly or legally perceived. (Later I will argue that, as such an indication, it is by no means conclusive.) It cannot, however, "determine" what the right is—or what it should be—in any deeper, normative sense.

More pervasive than the "remedies before rights" approach are arguments that deny or seek to expose the limitedness of the impact that the underlying theory of contractual obligation has or should have on the question of remedies. "Arguments" is perhaps the wrong word to use in this context, because very few have actually tried to offer an argument to that effect. In their celebrated essay, "The Reliance Interest in Contract Damages," Fuller and Perdue, for instance, seem simply to assume that the reasons to hold that contracts create obligations (something that is itself a proposition they accepted) are of little consequence for the discussion of remedies.[7] A rare attempt to *argue* that questions of remedies (as well as many other issues arising in contract law) sometimes can and should be addressed independently of "philosophical theories" of contract law was made by Richard Craswell,[8] focusing in particular on the presumed bearing of "contract as promise" theories on problems of default rules. Craswell's choice of target makes an examination of his argument particularly pertinent for our purposes.

Craswell's starting point is the perfectly acceptable notion that different theories of promissory and contractual obligations may be more or less valuable for the task of selecting default rules. Indeed, whereas one theory may have direct implications for questions of remedies, for example, another may be mostly or wholly neutral in this respect. He then argues that the latter is precisely the case with certain kinds of "contract as promise" theory, or, more accurately, with "contract as promise" theories that rest on certain kinds of philosophical explanation of promissory obligation. Thus he boldly asserts that "theories which justify the binding force of promises on the basis of the obligation to tell the truth, or on considerations of individual liberty and autonomy, are of no help at all in such an enterprise."[9]

Demonstrating this claim with regard to autonomy-based theories, Craswell concentrates on Charles Fried's theory, and in particular on Fried's conviction that his explanation of the binding force of promises—and therefore, for him, of contracts—*entails* that the appropriate remedy for breach is expectation damages. Fried's theory is in this respect

6. *Id.*, 62 (italics in original); *and see* Atiyah's examples there.
7. 46 YALE L.J. 52, 373 (1936); *and see* Friedmann, *supra* note 4, 636.
8. *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489 (1989).
9. *Id.*, 511.

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but representative of a more general trend. Liberal theories of contract (or what is commonly understood as such), and more generally theories of "contract as promise" where promises are taken to be binding,[10] tend to suggest that expectation damages (and sometimes specific performance)[11] should be the standard remedy for breach. As Atiyah put it: "[t]he liberal finds the entitlement of the promisee to the full value of the promised performance—the right to expectation damages—to be a natural corollary of basing the law on the promise principle."[12] By referring to expectation as "a normal and natural measure for contract damages," however, Fried marks himself as a particularly emphatic ambassador of this trend.[13] This would be a good juncture at which to join the debate.

Fried's argument for expectation damages as the standard remedy draws on this simple intuition:

> If I make a promise to you, I should do as I promise; and if I fail to keep my promise, it is fair that I should be made to hand over the equivalent of the promised performance.[14]

and is supplemented by this simple consideration:

> The expectation standard gives the victim of a breach no more or less than he would have had had there been no breach—in other words, he gets the benefit of his bargain.[15]

But Craswell will have none of this. While conceding that concern for personal autonomy may require that people are able to undertake obligations and thus make nonoptional a course of conduct that would otherwise be optional, he contends that:

> almost any remedy—reliance damages, punitive damages, specific performance, etc.—makes the promised course of conduct non-optional to some degree, depending on the severity of the threatened penalty. There is surely nothing in the idea of individual autonomy that requires the exact degree of non-optionality provided by the expectation measure. . . . [N]othing in the notion of individual autonomy gives any reason for favoring the expectation measure over any of the others.[16]

Craswell concludes that since all remedies are "equally compatible" with the notion of individual autonomy, selecting a standard remedy must involve

10. Distinguished from a view such as Atiyah's in PROMISES, MORALS, AND LAW (Oxford, 1981), according to which contracts are promises but neither is a source of obligation.

11. For example, Friedmann, *supra* note 4. I return to the competition between the main performance remedies, namely specific performance and expectation (or "performance") damages, later in the text.

12. *See supra* note 5, Essay 6: *The Liberal Theory of Contract*, 121, at 123.

13. Fried, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981) 21.

14. *Id.*, 17.

15. *Id.*

16. *Supra* note 8, 518.

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the invocation of "some other value"—other, that is, than that (or those) that serve to justify the binding force of promises in the first place or that follow from such a justification.[17]

It should be conceded that "other values" may have some role to play in selecting a standard remedy. Some moral considerations that are independent from the justification for the binding force of promises (or contracts, or both), for instance, or considerations of economic efficiency that are similarly independent may be shown to have some bearing on the matter, and if they point in directions different from those in which the "internal" values or the theory from which they emanate point, the conflicting values would probably have to be weighed against each other before a conclusion could be reached. The question, however, is whether it is indeed the case that the underlying theory of the practice has no bearing *at all* on the question of remedies. Is it really the case that every conceivable remedy is equally compatible with that theory?

A simple counterargument could be developed along the following lines. If a promise is binding, it invariably creates an entitlement in the promisee. And some remedies protect this entitlement better than others. Thus expectation damages, as Fried could point out, provide stronger protection for that entitlement than, say, reliance damages, for their award does not depend on the contingency of expenditure in reliance, and their monetary value would often be greater. Is that not a valid (albeit not necessarily conclusive) reason for favoring the expectation measure over the reliance one?

Craswell could object by pointing out that amputation for contract breakers would probably provide an even stronger protection for the entitlement in question, which is hardly a convincing argument for favoring it over expectation damages. But Fried has an answer for this. It is in the "no more or less" consideration that I quoted earlier and which Craswell conspicuously ignores. This consideration seems to indicate that there is indeed some natural continuity between acknowledging the binding force of an obligation and specifying expectation damages as the remedy for its breach—a continuity that is apparently broken when other remedies are specified, namely remedies that amount to giving the innocent party either more or less than she would have had had there been no breach or, to put it simply, remedies that do not reflect faithfully the value of her entitlement.

Such an argument could be further refined and further developed. For instance, as a direct reply to Craswell's claim that "almost any remedy . . . makes the promised course of conduct non-optional to some degree," it could be said that the variation at stake is not in terms of the degree to which a given course of conduct is made nonoptional but rather in terms of *what* course of conduct exactly is made nonoptional (or less optional, really); and accordingly, that the expectation measure, as one that reflects

17. *Id*., 518–520.

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the value of the entitlement that is created by a promise, no more or less, makes nonoptional the promised course of conduct, no more or less, whereas the reliance measure, for instance, makes nonoptional a completely different course of conduct.[18]

Here it could be pointed out that, for such an argument to work, it need not really matter *why* promises—or contracts, for that matter—are held binding; it matters only that they are. Later I will illustrate how the reasons for which contracts are held to be binding do have an important bearing on the choice of standard remedy. But even regardless of that, the case is clearly different from one where the underlying theory of the practice is wholly irrelevant for the question of remedies, as Craswell contends. Accordingly, those "other values" the role of which Craswell highlights may come into play at a logically secondary juncture and in a much less open-ended way than he envisages; the question would be whether some other values—other than those that justify the practice itself and the core rights and obligations that it is meant to recognize or create, or that follow from such justification—entail that expectation damages (or, as we shall see, specific performance) should *not* be the standard remedy for a breach.

III. CHOOSING A PERFORMANCE REMEDY: WHY NOT SPECIFIC PERFORMANCE?

Let us stay for the moment with the Fried-Craswell debate. Victory thus far, I suggested, belongs to Fried: Succinct though his argument is, it contains enough to rebuff Craswell's sweeping claim that a theory of contractual obligation such as Fried's is "of no help at all" for the enterprise of choosing a standard remedy for breach of contract, and more specifically that it provides nothing in the shape of "any reason for favoring the expectation measure over any of the others." But is Fried's argument ultimately successful?

As we saw, Fried's argument succeeds in showing that the expectation measure of damages enjoys theoretical support over, among others, reliance damages, because it reflects the very value of the contractual performance (and, with this in mind, I will refer to it as a "performance" remedy). However expectation damages are not the only performance remedy. Another is, of course, actual enforcement of the contract by way of ordering specific performance (or its practical equivalent, an injunction against breach). And here lies the problem. In arguing for expectation damages, Fried completely ignores the option of specific performance, while his

18. In the case of reliance damages, this course of conduct is something like "compensating the promisee if, and only if, she suffers a loss as a result of reasonably relying on a promise which was later broken, and compensating her for, and only for, this loss." An argument along similar lines was presented by Friedmann in his convincing reply to Fuller and Perdue. *See supra* note 4, esp. 635–638.

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succinct argument in no way explains this surprising omission. On the contrary, when he writes that "[i]f I make a promise to you, I should do as I promise; and if I fail to keep my promise, it is fair that I should be made to hand over the equivalent of the promised performance," his narrative only begs the question why not drop the "equivalent of" bit; and when he commends expectation damages for giving the victim of a breach "no more or less than he would have had had there been no breach—in other words . . . the benefit of his bargain," specific performance springs to mind as something that, when applicable, could surely achieve this very aim more simply, more directly, and more accurately. After all, specific performance is the remedy that aims at granting the innocent party precisely what she bargained for, whereas expectation damages merely aim at compensating her, albeit fully, for not receiving what she bargained for. At best (excuse the pun) it is a second-best. So why not opt for the best?

Fried's neglect of specific performance is particularly surprising given that for him, as he put it, "a contract is first of all a promise," so that "the contract must be kept because a promise must be kept."[19] The core contractual obligation, in other words, is not different from the core promissory obligation: It is an obligation to perform. But of course this view is not unique to Fried; it is shared by many a theoretician, practitioner, and layperson. I would speculate that, despite the emergence of arguments suggesting otherwise, it is still the most prevalent approach to the nature of contract and the normative foundations of contract law. And as I hinted in the introduction, the emergence of arguments suggesting otherwise, by scholars as disparate as O.W. Holmes and Grant Gilmore, has been largely inspired by the very fact that specific performance is not the standard or most common response to a breach of contract. The traditional prominence at common law of expectation damages and the relative rarity of actual enforcement has always provided ammunition to those who argue that contract law does not recognize and is not based on an obligation to perform and a right to performance, but rather on some tortlike obligation to compensate for nonperformance and its corresponding right.

Whereas Fried ignored the problem, some who share his view that the core contractual obligation and the core contractual right are performance of the contract have offered various explanations for the apparent discrepancy between this view and familiar regimes of remedies for breach. These explanations, as I will now suggest, have mostly been unsuccessful, or at least incomplete.

To start, it may be worth noting that explanations in terms of alluding to the historical origins of the competing remedies could not suffice. Contract law textbooks routinely point out that whereas the award of damages has always been a common law measure, specific performance originally emerged as an equitable remedy, hence its discretionary status in English

19. *Supra* note 13, 17.

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law today. But this, obviously, is not a principled explanation for the law today, let alone that even within the artificial boundaries that it draws, the problem is bound to resurface: Once courts have the discretion to order specific performance, why exercise this discretion so sparingly? What guidelines should courts be provided for its exercise, and on what normative basis?

Another familiar suggestion, this time one that is at least aimed at normative foundations, rests on the notion that specific performance is intrinsically harsh. A similar suggestion, perhaps a more specific iteration of the same idea, is the notion that specific performance represents an excessive interference with personal freedom.[20] I think that these explanations point us in the right direction. (Indeed, the solution I will introduce later follows a similar orientation.) But they are invariably incomplete. The alleged harshness of specific performance is by no means obvious or self-explanatory. It may be so in some specific cases or classes of case, due to the more or less exceptional nature of the contractual relations or the circumstances of the contractual dispute at stake,[21] but not in general. Often an order of specific performance would amount to no more than forcing the party in breach to sell something or buy something or render some service on a none-too-personal, one-off basis, and suchlike. If such treatment is harsh, it is not evident why.

And it is a similar case with the notion of "excessive" interference with personal freedom. "Excessive" is a normative term, and judging an action to amount to excessive interference with a person's personal freedom can be only an evaluative, not a factual, judgment. And as such, again, it is far from self-explanatory in the present context. After all, specific performance is merely intended to make a person discharge an obligation that she undertook herself, voluntarily. Of course the excess, like harshness, may be quite straightforward to ascertain in particular cases where, for instance, a change of circumstances means that performing a previously undertaken obligation *now* would involve giving up some once-in-a-lifetime opportunity or making some other extraordinary sacrifice. But such cases can at best (very probably) justify an exception; as an evaluative matter, it remains to be seen whether concern for personal freedom counsels against the adoption of specific performance *as a rule*.

A different and very interesting argument was offered recently by Steve Smith.[22] Smith's argument is particularly interesting for present purposes

20. *See, e.g.*, A.T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983) at 778–779; J. Penner, *Voluntary Obligations and the Scope of the Law of Contract*, 2 LEGAL THEORY 325 (1996) at 353.

21. A striking illustration of the kind of special case I have in mind here is Patel v. Ali (1984) Ch. 283, where specific performance, in a contractual area where it is normally available, was refused due to a disastrous change of the seller's circumstances subsequent to the signing of the contract.

22. S.A. Smith, *Performance, Punishment and the Nature of Contractual Obligation*, 60 MOD. L. REV. 360 (1997).

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because it draws directly not only on the notion that contractual obligations are binding but on (some of) the reasons for holding them to be so. It draws, in other words, on what Craswell would label "a philosophical theory" of contract. Moreover, the theory in question is of the particular kind that Craswell specifies as strictly unhelpful: It rests on considerations of "individual liberty and autonomy." Though I shall soon argue that Smith's argument is ultimately unsuccessful, my refutation of it will follow a similar path and draw on similar sources. I will outline my reasons for thinking not that Smith was wrong to seek a link between the theory explaining the source of substantive rights and obligations on the one hand and the choice of standard remedy on the other, but (mainly) that his argument hinges on an erroneous understanding of a certain aspect of the nature of contract. If nothing else, that will complete the thus-far only partial rejection of Craswell's view.

Having rejected (for reasons similar to mine) some traditional explanations for the law's reluctance to grant specific performance (as well as to punish a deliberate breach of contract),[23] Smith's own argument turns on what he calls the "bond-creating" function of contract. "Contracts are," he writes, "first of all, promises, and keeping promises is one of the most important ways that individuals develop bonds with each other."[24] Thus a breach of contract can cause, alongside what he calls "the tangible harm" (that is, the innocent party's failure to receive that for which it bargained), another kind of harm, this time "intangible": "A breach prevents the creation of—or, in the case of deliberate breach, destroys—the bonds that were developing between the contracting parties."[25] Now, whereas the award of no remedy could ever redress the intangible harm caused by a breach, the routine availability of specific performance "would make the intangible benefits of contracting more difficult to achieve."[26] By obscuring parties' motives for performance—as the known, general availability of specific performance would prevent parties from *knowing* "whether or not performance has been done for the right reasons" and even "make it *less likely*" that this is the case[27]—it would deprive performance, and hence contracting in general, of much of its bond-creating potential, thus "making the valuable activity of contracting less valuable."[28] Preferring damages to specific performance as the standard remedy for breach is thus justified as a way of leaving more scope "for the operation of good intentions."[29]

At first blush the argument looks attractive, especially given that Smith tackles elegantly what is probably the most obvious objection, namely the notion that the alleged bond-creating function of the practice would be

23. *Id*., 363–364.
24. *Id*., 369.
25. *Id*.
26. *Id*., 370.
27. *Id*., 370–371 (italics added).
28. *Id*. 371.
29. *Id*.

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seriously undermined not only by the general availability of specific performance but by any kind of institutionalized, well-advertised, and efficient regime of remedies, even one that does not opt routinely for the most stringent way of protecting contractual entitlements. In other words, it could be argued that taking the bond-creating function of contract seriously entails not only passing over the choice of specific performance for standard remedy but perhaps limiting legal protection to discretionary intervention in relatively extreme cases of loss suffered in reliance, and no more. Conceding that the elimination of all remedies would indeed "make performance an even stronger affirmation of the special ties binding contracting parties," Smith points out that whereas specific performance is a wholly ineffective means of rectifying the intangible harm caused by a breach, monetary damages remain independently justifiable as an effective means of rectifying the tangible harm, so that, on the balance of considerations, their elimination is not called for after all.[30]

So what is wrong with Smith's argument? I said earlier that it hinges on an erroneous understanding of a certain aspect of the nature of contract and what I had in mind is the very attribution of a bond-creating function to this practice. As we saw, in Smith's case this is the upshot of following the well-established theoretical tradition of likening contract to promise (remember the starting point: "Contracts are, first of all, promises"), here manifesting itself with particular force by the unquestioning and unargued-for assumption that contract and promise must share all their functions and values. Elsewhere I have argued in some detail that alongside the well-known similarities between contract and promise, there are some significant dissimilarities of function and value between these two practices (or, if you want, between the legal and the nonlegal version of the practice of voluntarily undertaking obligations to others).[31] This argument, one that draws on many features of contractual and promissory relations, the nature of the law, and what differentiates the law from other social and cultural institutions, cannot be reproduced here in full. But one of its main upshots—one that is particularly pertinent here—is the notion that the failure to appreciate the differences between contract and promise is bound to result not just in the attribution to contract of functions and values that this practice does not in fact possess, but also in the overlooking of some distinct, perhaps unique, functions and values that it does possess.

In the next section I will introduce a brief, admittedly incomplete, account of the relevant argument. This will provide me with an opportunity to elaborate a bit further on the notion that promises do indeed have a bond-creating function and at the same time indicate my reasons for thinking that a similar function should not be attributed to contract. I will then

30. *Id*.
31. *Supra* note 2.

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indicate in what way the correct view of the nature of contract may entail a different conclusion as to the suitability of specific performance.

IV. PERSONAL BONDS IN PROMISE AND IN CONTRACT

Both by promising and by entering a contract people undertake, voluntarily, obligations to others (typically, the promisee, or the other party to the contract). The similarity in terms of function and in turn of value between the legal and the nonlegal version of this practice is quite obvious and is much commented upon. Promises and contracts alike promote a certain form of cooperation between people, facilitate and encourage reliance, and enable certain kinds of futurity-involving exchange. Inasmuch as mutual reliance and cooperation are valuable, so are (other things being equal) the practices that facilitate and promote them.[32] (Henceforth I will refer to the value of contract and promise as practices capable of promoting cooperation and reliance as the *instrumental* value of the practice.) Yet there are differences in terms of the typical circumstances and the ways in which promises and contracts fulfill their similar instrumental function—differences that, in turn, entail even deeper dissimilarities between the two practices. These ultimately amount to a sharp contrast in terms of what I shall label the *intrinsic* value of the practices.

Let us start with promises. Over and above the instrumental function of the practice, promises have yet another related but often overlooked[33] function, one that lends it its special intrinsic value. It has to do with the practice's propensity to reinforce interpersonal relationships. Promises are typically made or exchanged in the context of ongoing personal relationships.[34] In fulfilling their typical instrumental function (i.e., creating certain kinds of expectation, facilitating reliance, etc.) promises typically draw on the kind of personal trust that exists in the context of such relationships. By making a promise—that is, voluntarily undertaking an obligation towards the promisee—the promisor invokes the promisee's trust. By taking the promise seriously or by relying on it, the promisee gives that trust or indicates that it exists. By then keeping the promise, the promisor justifies the promisee's trust, proving herself trustworthy and showing respect towards the promisee. Roughly in this way, promising can have what we may call an expressive quality. The completed circle of a promise made, relied upon, and then kept, is often invested with symbolic significance. Through it, messages can be conveyed and assurances can be given that trust and its

32. For an eloquent account of the shared instrumental value of promises and contracts, *see* Fried, *supra* note 13, ch. 2.

33. But not always overlooked. *See, e.g.*, J. Finnis, NATURAL LAW AND NATURAL RIGHTS (1980) at 306; Raz, *Promises and Obligations, in* LAW, MORALITY AND SOCIETY (P.M.S. Hacker and J. Raz eds., 1977) at 227–228; *and see*, more recently, Smith, *supra* note 22, and discussion in text.

34. But only typically. For an analysis of promises between strangers as normatively secondary to promises made in the context of ongoing relationships, *see* Kimel, *supra* note 2, ch. 1.

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counterpart, respect—surely two of the most important building blocks of every kind of personal relationship—obtain in the relationship between promisor and promisee.[35]

Contracts are different. Unlike promises, they are habitually made outside the context of ongoing personal relationships, in circumstances where the kind of interpersonal trust which typifies personal relationships cannot generally be expected to exist. And the practice as a whole can be understood as addressing this very deficit by availing contracting parties of its elaborate and uniquely powerful enforcement mechanisms.[36] The legal enforceability of contracts serves, if you like, as a substitute source of reassurance for parties—reassurance that obligations owed to them will be carried out or at least will not be breached without appropriate redress—a source which is invaluable particularly in the absence of the kind of trust which typically pervades nonlegal, promissory relations.

At this point we may be reminded that the act of promising can sometimes give rise to various reasons to keep the promise—and, accordingly, reasons for the promisee to believe that the promise will be kept—that have little to do with the kind of trust and respect that may obtain in the relationship between promisor and promisee and that may seem to play a role similar to that which legal enforceability plays in contract. A promisor may, for instance, be discouraged from breaking her promise by the prospect of losing her reputation or encountering some hostile reactions (from the promisee, from others), while the promisee, aware of this background, may gain reassurance (that the promise will be kept) through a similar channel. Yet the difference is clear. Enforceability is built into the practice of contract in a way in which no equivalent source of reassurance is built into the practice of promise. Unlike the possible adverse effects of a broken promise, the legal aftermath of an unjustified breach of contract is not speculative and contingent but known and, for the most part, certain. And, significantly, it is administered by purposely designed and famously powerful institutionalized mechanisms—mechanisms that are unique to the legal system.

All this may appear to amount to no more than a difference in terms of the precise way in which the two practices, contract and promise, fulfill their similar instrumental function. But it would be a mistake to think that the enforceability of contracts merely augments (or substitutes or compensates for the absence of) personal trust as a source of confidence, otherwise leaving the practice unchanged compared to its nonlegal equivalent. For

35. For more on the role of trust in promissory relations, *see* Fried, *supra* note 13, ch. 2; T. Scanlon, *Promises and Practices*, 19 PHIL. & PUB. AFF. 199 (1990); *and see* Kimel, *supra* note 2, especially ch. 1.

36. I am here using the term "enforcement" (of contracts) in a broad sense. It denotes measures designed to prevent or minimize the harm or loss suffered (or likely to be suffered) by a party as a result of a breach in general, and not necessarily measures that amount to the literal enforcement of contracts or contract terms, such as specific performance or injunction.

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while allowing the practice to fulfill a similar instrumental function in a much broader context (namely, outside of the context of ongoing personal relationships), the enforceability of contracts significantly detracts from the practice's ability to fulfill the kind of *intrinsic* function that promises fulfill: that of enhancing interpersonal relationships. This function, we saw, consists in the expressive potential of promissory conduct; and the predominant role that legal enforceability plays in contract significantly undermines this potential. By systematically creating powerful reasons to refrain in the first place from conduct that amounts to harming the other party, enforceability casts a thick and all-encompassing veil over parties' motives and attitudes towards each other, thus leaving reliance, performance, and other aspects of contractual conduct largely devoid of expressive content—the kind of expressive content that promissory conduct so typically possesses—and marking the practice as a patently inadequate device for the enhancement of interpersonal relations.

(Here I may be reminded that earlier I accepted Smith's contention that insisting on the elimination of specific performance in order not to interfere with the bond-creating function of contract need not be accompanied by a call for the elimination of all other remedies. But the context makes all the difference. What I accepted earlier was the notion that, *assuming that the practice really has, in common with the practice of promise, a bond-creating function*, then more scope would be left for this function to operate by the removal of specific performance (or punitive damages) even if (certain) other remedies remain available. My argument here, by contrast, is aimed at rebuffing the very notion that a bond-creating function should be attributed to contract in the first place—an argument that can indeed draw on the inevitable implications of familiar remedial regimes, regardless of whether or not these designate specific performance as a standard remedy or make it routinely available. The argument that follows should lend my rejection of Smith's assumption further support.)

Does that mean that, as a practice, contract simply lacks intrinsic value and function altogether? Far from it. The considerations outlined above not only indicate why this practice does not possess the same intrinsic function that the practice of promise possesses; they also provide the key to the unique intrinsic function that the practice does possess. This function is, indeed, very different from that of promise; in a sense, it is the diametrically opposed function. It consists in the very framework contracts provide for doing certain things with others not only outside the context of already-existing personal relationships but also without a commitment to the future prospect of such relationships, without being required to know much or form opinions about the personal attributes of others, and without having to allow others to know much and form opinions about oneself. The value that is attached to this function is what I have elsewhere labeled (the value of) personal detachment.

It may come as a surprise that two features as diametrically opposed as

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personal relations and personal detachment can both be considered good things, and that practices that are capable of promoting only one of them—and not the same one—can both be considered valuable for this very reason. But it should not. Not only is it easy to see that, when examined in isolation, both personal relations and personal detachment can be, in the right circumstances, a good thing, but in fact when the two coexist as options in people's lives, their respective values tend to be mutually reinforcing. Personal relations are more valuable, or are likely to be more valuable, the greater the freedom people enjoy and the more selective they can be in pursuing them; whereas the more dependent people are on personal relations for the pursuit of goals that are themselves external to such relations, and the less selective they are allowed to be in creating, developing, and maintaining their personal relations, the less valuable the relations they have are likely to be.

Of course, certain kinds of personal relations do not depend for their value on the parties' unlimited freedom to pursue or to mould them. Some relations exclude certain significant choices by nature—relations between family members, to take an extreme example, exclude choices concerning the identity of the other party—while still being potentially highly valuable. But the general point made here about personal relations remains valid. Note that, even when examples such as family relations are concerned, the relative freedom to draw lines, to have control over the scope, the depth, and the intensity of the relations, usually tends to improve the quality of the relations and enhance their value for their parties.

Similar reasoning applies when the value of personal detachment is concerned. It is precisely when people are capable of having valuable personal relations that their ability to do things with others without having to get personally involved is valued. Detachment is valuable as an option, not a predicament; and it is valuable as an option to dependence on (preexisting, future) personal relations. And contracts are valuable as a practice that, with regard to a certain range of activities, facilitates this very option.

What implications does that have in terms of choosing a standard remedy? The differences between contract and promise that I have highlighted suggest that whereas the intrinsic function and value of promise are at odds with the notion of enforced performance—indeed, at odds for the very reason Smith outlined, having erroneously attributed to contract the same function and value—nothing about the nature of contract produces similar conclusions. The symbolic (or "expressive") significance of a promise, the element which gives it its special value and its relationship-enhancing potential, is ruined anyway when a promise is enforced. Even the mere prospect of enforcement could seriously undermine a promise's potential to promote personal relations, because it interferes with the necessary transparency of motives. In contract, where the parties are often strangers, where the significance of performance is typically independent of motives, and

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where parties are likely to be ignorant of and indifferent to their counterparts' motives anyway, such considerations simply do not apply.

And with this objection to specific performance removed, it is back in contention as the remedy that best supports the practice's instrumental function. Not only is it back in contention, but the case for specific performance now emerges with greater force, for the routine availability of this remedy would also be conducive to the promotion of the intrinsic value that the practice does possess and to the operation of the intrinsic function that it is far more adept at fulfilling and far more commonly expected to fulfill: that of personal detachment. For as far as personal detachment is concerned, the less scope left for "the operation of good intentions," the better. To put it less provocatively, the greater the extent to which the practice can guarantee that participants would achieve through contracting precisely what they hoped to achieve in entering the contract, with minimal hassle and minimal anxiety, the better the practice at enabling participants to deal with others without being *reliant* on personal relations and while maintaining, if so they wish, their personal detachment.

So the search for an explanation for the law's reluctance to award specific performance is still on. In the next section I will introduce my proposed solution. As I hinted earlier, this solution is meant to substantiate the claim that the main or most common reason to opt for the award of damages instead is that specific performance represents an excessive interference with personal freedom. But what often renders specific performance excessive is not some intrinsic, self-explanatory harshness. It can only be judged excessive by reference to the (legitimate) purposes for which participants engage in the practice in the first place, in conjunction with some independently valid principle of freedom. The principle I have in mind can be perceived as an entailment or interpretation of a principle that is widely accepted as governing much broader aspects of our legal and political structures. It is the Harm Principle.

V. THE PROPOSED SOLUTION: THE HARM PRINCIPLE AND REMEDIES FOR BREACH

What kind of a solution is my proposed solution going to be? A suspicion that may arise at this stage is that the case built for specific performance in the previous section would now prove too robust to be demolished—especially so once we are reminded of the nature of the task at hand, namely to find grounds for a mere starting point for consideration of remedies, a general rule—while bearing in mind that instances where deviation from the rule could be justified may indeed be many. Is what has been said so far not enough to establish specific performance as that starting point or general rule?

In fact, I think it is enough. And if so, then all that is left for the proposed

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solution to explain is, indeed, what is perceived as a widespread reluctance, in the form of awarding damages, *to follow that rule*—or, if you want, the familiar willingness to *make exceptions*—and not just in contractual disputes whose circumstances are exceptional or in particular categories of contract where specific performance is impractical or particularly harsh. But since now the role reserved for the proposed solution may (though I doubt that it should) appear to be less ambitious, I should at this juncture mention that legal practice suggests that the explanatory task is in fact not quite as demanding as it may have appeared to be in the first place. A remedy for breach that has been much neglected in theoretical discussions of the subject is action for debt (or "action for an agreed sum"). The reason for this neglect may well be the fact that little is usually said about this remedy in textbooks as well as in high-level judicial decisions. But this, far from being an indication of the relative practical insignificance of action for debt, can be explained by the fact that this rather straightforward remedy (and the rather straightforward legal action which usually brings it about) has given rise to little in the way of practical or doctrinal difficulty. Action for debt is, however, one of the most popular (if not *the* most popular) legal actions brought in the aftermath or in the face of a breach of contract, and the rather routine award of an order of payment in such actions must not be confused with the award of damages. In an action for debt the plaintiff does not sue for compensation for loss suffered as a result of a breach but rather for the very performance of the defendant's (primary) contractual obligation—performance that in this case happens to be the payment of monies.[37]

The discussion of the previous section established specific performance as the general rule, as it showed it to be the most robust and most straightforward way of serving both the instrumental and the intrinsic functions of contract law. But that discussion also holds the key to the most prevalent justification for deviating from the rule. For it showed the value of performance for parties to contract to be typically isolated from all other "relational" aspects of their transaction. The value of the contract's subject matter for the innocent party, its value as a bargain, is typically all that needs to be guaranteed—all that there is to be protected—in order for parties to achieve through contracting precisely what they hoped to achieve in the first place. And that means that in the ordinary commercial context, where the whole purpose of the transaction is to facilitate some future profit, as well as very often in noncommercial contracts (where the purpose of the contract is similar, or where its subject matter is some truly generic commodity, etc.), expectation damages, though a substitutionary remedy in their rationale, are simply just as good.

37. For a discussion, *see, e.g.*, G.H. Treitel, THE LAW OF CONTRACT (9th ed. 1995), 912–918. For an illustration of the point made in the text, note that here action for debt receives six pages of discussion (which includes a discussion of the "mitigation of loss" rules, and this in a 115-page-long chapter on remedies.)

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That still does not answer the question as to why the law should allow the party in breach to choose whether to perform or to compensate for nonperformance, even in those cases where choosing the latter would leave the innocent party equally well-off. This is where the required principle of freedom must come into play. In light of what was said in the previous paragraph, however, perhaps all that is needed is, to use Joel Feinberg's language, "a general presumption in favor of liberty."[38] Given that specific performance is a more intrusive remedy than damages—at any rate, that enforced performance amounts to a greater interference with personal freedom compared to allowing the party in breach to *choose* between performance and compensation for nonperformance—such a simple presumption suffices to recommend the latter in all those cases where the innocent party (and hence, plausibly, the practice of contract) would not in any way be worse off as a result.

It could be argued in response that the scope for making that presumption in favor of liberty—that is, let us not forget, in favor of the liberty of the party in breach—is not that obvious. After all, the breaching party's obligation to its counterpart was assumed voluntarily (and, *ex hypothesis*, effectively) by it in the first place, and the obligation was an obligation to perform rather than an obligation to choose between performance and compensation come performance time. In morality, at least, that party's freedom to so choose is far from evident. But the question here is not the nature of the moral obligation; rather, it has to do with considerations of personal freedom in the legal imposition of (remedial) obligations. And in this context, the invocation of a principle of freedom, potentially "in favor" of those who fail morally, is familiar and broadly accepted. Indeed, the argument can be introduced as an interpretation or an implication of the Harm Principle.

According to a possible formulation of the Harm Principle, the imposition of legal obligations on individuals is justified only when done in order to prevent or redress harm. Given the routine allusion to various versions of this principle in numerous other areas of legal and political discussion, it is perhaps a little surprising to find that its invocation in discussions of remedies for breach of contract has been exceedingly rare. A possible explanation for the reluctance to allude to the Harm Principle in this context, even by scholars from the liberal tradition, is that taken at face value, the principle seems incapable of settling the competition between legal measures such as specific performance and expectation damages, because they are both designed to redress or prevent precisely the same harm, namely loss of bargain. If so, then if the Harm Principle bestows legitimacy on one remedy, it would legitimate the use of the other just the same. It could not, in other words, in any way settle or shed light on the internal competition between them.

38. J. Feinberg, HARM TO OTHERS (1984), 9.

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This view is supported by the Millian formulation of the Harm Principle. In Mill's canonical defence of such a principle, the principle sets a necessary condition of justified restraint of liberty but says nothing as to what measures ought to be taken when this condition (and possibly others) is satisfied. (As John Gray put it, "the principle [does not] tell us how much liberty may be restrained for the sake of the prevention of how much harm. As far as the [principle] itself is concerned, a severe restriction of liberty could be imposed for the sake of the prevention of a minor harm."[39]) In Mill's case, this limitation on the applicability of the Harm Principle is probably the result of the somewhat tenuous relations between utilitarianism and the doctrine of liberty in his moral and political thought. The finest modern example of an interpretation of the Harm Principle that is unaffected by such concerns is Joseph Raz's.[40] Raz has shown how (a version of) the Harm Principle can be vindicated from the perspective of a moral theory that sees the key to political freedom in the value of personal autonomy, and how, defended and reinterpreted as such, the Harm Principle can serve as a far richer source of inspiration for and scrutiny of legal policy than its common understanding as "setting a necessary condition for the justification of coercion and nothing more."[41]

My suggestion as to how the Harm Principle can be brought to bear on the contest between specific performance and expectation damages is simple. Though it is only from the perspective of a substantive theory of political freedom that the Harm Principle can be defended and given concrete content, the very fact that it is a principle reflecting concern for personal freedom renders it a rather straightforward implication of (any satisfactory interpretation of) this principle that whenever a certain harm could be effectively prevented in more that one way, the measure that must be used is the least intrusive one—the measure that, compared to its alternatives, amounts to a lesser interference with the freedom of the person against whom it is taken. Thus when it comes to remedies for breach of contract, the Harm Principle, assuming that it is compatible in the first place with the imposition of legal obligations in order to prevent or redress the harm which is *loss of bargain*, counsels against the employment of the more intrusive remedy whenever the award of a less intrusive remedy could redress this harm just as effectively. More specifically, the upshot is that even if it is thought that the plaintiff's "core" right is the right to performance, accepting the Harm Principle entails that specific performance should be awarded only when the less intrusive remedial measure, the award of (expectation) damages, could not fully redress the harm caused through a violation of this right.

39. J.S. Mill, ON LIBERTY AND OTHER ESSAYS (1998), Introduction, xix. *See also* J. Gray, MILL ON LIBERTY: A DEFENCE (2d ed. 1996), and D. Lyons, RIGHTS, WELFARE, AND MILL'S MORAL THEORY (1994), esp. ch. 4.

40. *See* Raz, THE MORALITY OF FREEDOM (1986), esp. ch. 15.

41. *Id.*, 421.

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Employing the logic and language of the Harm Principle in this context is particularly useful as it serves to remind us of two key points. First, denying the innocent party of specific performance need not amount to denying that the party in breach should have performed in the first place: The very point of the Harm Principle is to suggest that something more than a mere failure to do what is right may be required in order to justify legal enforcement. Second, special reasons against the award of specific performance may prevail even in circumstances where the Harm Principle requirement is satisfied. That is, the Harm Principle is but a negative guideline; while providing that the imposition of legal obligations is justified only when done in order to prevent or redress harm, it does not entail that obligations should be imposed in order to prevent every harm or redress it to the full and does not purport to exclude special reasons for not doing so where such reasons exist. Thus in those particular cases or categories of case with which contract lawyers are familiar, where considerations such as the spectre of economic waste on a grand scale, the inherent difficulty in supervising performance, or the exceptional hardship that enforced performance would cause militate against the award of specific performance, opting for a "lesser" remedy may be justified even though the innocent party's (otherwise) legitimate interest in performance is not in doubt.

I said earlier that it has been exceedingly rare for the Harm Principle to be invoked in discussions of remedies for breach of contract. I am, in fact, aware of one such case, and that is Raz's own deployment of the Harm Principle in such a context. But unlike my argument, which alludes to the Harm Principle as a possible justification for deviating from the rule which is specific performance, Raz's suggests that the Harm Principle supports a remedial regime whereby none of the performance remedies is the rule. Allow me to quote his concise argument in its entirety:

> Those who, like myself, accept Mill's harm principle or some modified version of it will doubt the legitimacy of the law's adoption of a general policy of enforcing voluntary obligations. . . . It follows from the harm principle that enforcing voluntary obligations is not itself a proper goal for contract law. To enforce voluntary obligations is to enforce morality through the legal imposition of duties on individuals. In this respect it does not differ from the legal proscription of pornography. Compensating individuals for harm resulting from reliance on voluntary obligations is, on the other hand, a proper goal for the law. As far as this argument goes, supporters of the harm principle should favour reliance damages rather than expectation damages as a standard legal remedy for breach of contract. Contrary to often expressed views, the belief that the proper role of contract law is the protection of the practice of undertaking voluntary obligations does not necessarily lead to endorsement of an expectation-value measure of the legal protection of contracts.[42]

42. *Supra* note 3, 934.

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As a professed supporter of the Harm Principle (and, moreover, of the same version of that principle adopted by Raz), I should explain why I do not think that the principle lends support, not even prima facie, to limiting remedial intervention to compensation for loss incurred in reliance.[43] But before I do so, it should be noted that although the emphasis in my argument so far has been on how the Harm Principle can legitimize the transition from specific performance to expectation damages (as this is bound to be the most prevalent scenario), the same argument indicates how sometimes the Harm Principle would support the imposition of a lesser remedial obligation still, such as reliance damages, and sometimes not even that.

To take the extreme case, in cases where, say, a buyer reneges but an alternative buyer is ready to step in under the same conditions (price, schedule, etc.), and the circumstances are such that the new transaction is entirely costless for the seller (and no loss of "transaction volume" is at issue, etc.), the Harm Principle as I deployed it would counsel against the award of any remedy against the original buyer. Or if the case is similar other than the fact that the seller has already incurred some expense in reliance on the original buyer's performance, then my argument would support reliance damages but no more. But my position still is very different from Raz's, as according to his argument the Harm Principle is incompatible with expectation damages (let alone specific performance) even in cases where the award of the lesser remedy would not suffice to put the innocent party in just as good a position as that in which it would have been had the contract been performed.

Unlike my proposed solution, Raz's view is, to my mind, simply incompatible with holding the core contractual obligation to be an obligation to perform and the core contractual right a right to performance—a proposition that Raz himself did not seek to deny as a basis for his argument concerning remedies. Raz's view on the Harm Principle's implications in terms of remedies for breach depends for its validity on the notion that denying the innocent party the benefits of the bargain through an unjustified breach does not amount to harming it (not for the purposes of the Harm Principle, at any rate).

But if the innocent party's core contractual right is the right to performance and so a right to the advantages or benefits that performance would bring about, then this view is unsustainable. "Harm" is a forward-looking concept. To harm a person is to affect adversely her prospects, deny her what she is entitled to, and the like. And if the benefits of the bargain are something to which parties to contract are entitled—part and parcel of seeing them as the subject of the parties' core rights—then at least inasmuch as these benefits are of a discernible value for a party, denying them to that party is harming it, and harming it in a rather paradigmatic sense. The fact

43. I have done this in greater detail in *supra* note 2, ch. 4.

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that the innocent party had not yet had, prior to the breach or indeed prior to the formation of the contract, the very benefits (profit, etc.) that it was denied through the breach (as opposed to, say, the money it lost through reasonable expenditure in reliance) simply does not matter. The fact that an aspiring concert pianist has not yet enjoyed the fame and the income that her talent would undoubtedly have brought her had her hands not been damaged irreversibly does not mean that such lost prospects are not a component of the harm done to her through the damaging of her hands. The Harm Principle is equally compatible with a general policy of awarding performance remedies for breach of contract as it is with legal measures designed to prevent or redress (among other things) the loss of future income by the injured pianist.[44]

Raz's argument concerning the implications of the Harm Principle for remedies was followed by three considerations which, he conceded, could tilt the balance in favor of performance remedies after all. The third of these is as follows:[45] "Since protecting the practice of undertaking voluntary obligations from erosion and debasement prevents harm, enforcement of contracts can be accepted if justified as a means to that end."[46] This is an important reminder of the fact that remedies for breach, other than protecting contracting parties, have an additional function: that of protecting the practice itself. For supporters of the Harm Principle, the legitimacy of this function, too, depends on accepting a certain version of the Harm Principle: a version that accommodates (and so allows for measures designed to prevent) institutional harm. Though, as I indicated earlier, the two legitimate functions of remedies are closely related, Raz alludes to this second function to illustrate how the protection of the practice could justify

44. We can now see where the analogy Raz draws between the legal enforcement of voluntary obligations and the legal proscription of pornography falls apart. To follow the analogy we have to assume that performed contracts and a pornography-free environment are both, morally speaking, good things. But here lies the difference. Parties to contracts' right to performance—their moral right, at any rate—can be traced to obligations voluntarily and effectively assumed by their counterparts. This is the view shared by Raz and myself. The question as to whether or not people (in general, or women in particular) have a right to a pornography-free environment, by contrast, is at the very centre of the debate concerning the proscription of pornography. Raz (as his use of this example attests) and many others think that though a pornography-free world might be a good thing indeed, preventing this good from materializing does not amount to harming anybody and is hence incompatible with the Harm Principle. Arguments in support of the proscription of pornography typically seek to establish that pornography, over and above being morally repugnant, in fact harms (certain) people directly and seriously—for instance, by encouraging sexual aggression towards women—so that its proscription becomes something to which people are entitled (and so that, in turn, a failure to do so may again amount to harming, or at any rate that proscribing pornography is not incompatible with the Harm Principle). It is the very existence of such an entitlement that the objectors deny. Note that in a later text, Raz wrote the following: "Roughly speaking, one harms another when one's action makes the other person worse off than he was, *or is entitled to be*, in a way which affects his future well-being." (*Supra* note 40, 414; italics added.) This view strikes me as incompatible with his earlier argument concerning the Harm Principle and remedies for breach.

45. For my comments on the other two, *see supra* note 2, ch. 4.

46. *Supra* note 3, 937.

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the legal imposition of (remedial) obligations even where the protection of individual participants in the practice does not. Now, unlike Raz, I argued that the protection of contracting parties against harm does, in principle, warrant resort to performance remedies. Nevertheless, the case for these can be reinforced by a separate examination of what is involved in the protection of the practice. I wish to conclude the current discussion with two brief points on this issue.

The first point is a direct implication of the argument concerning the protection of parties to contract and serves as an illustration of the interrelation between the two main functions of remedies. The fact that the reliance measure of damages is often inadequate, as I argued, for the task of protecting parties against harm marks it also as inadequate for the task of protecting the practice against erosion and debasement, as these are particularly likely to result from the practice's very failure to protect its participants. If parties remained largely unprotected against unjustified denials of the benefits for which they have engaged in the practice in the first place (i.e., entered a contract) and to which they are entitled—if parties were only protected against the contingency of loss suffered in actual reliance but not otherwise—the practice of making contracts would lose much of its efficacy and much of its point.

The second point, though again related, pertains more directly to the protection of the practice as a whole. Since the actual reliance measure deters and compensates for a breach only when actual expenditure or loss in reliance occurred and only to the extent of such an expenditure or loss, selecting it as the standard response to breach of contract would encourage a peculiar and highly undesirable—economically and otherwise—contractual behavior: Parties who are keen on performance (or, at any rate, on securing the benefits performance was to bring about) would be impelled to generate unnecessary or fictitious reliance-expenditure, whereas parties who are keen on leaving open the possibility of a future breach would try to prevent or discourage their counterparts from relying.[47] While contract as a practice should be expected, among other things, to enable and in the right circumstances encourage expenditure in reliance, this is not in itself its only or even main purpose. Not only the occurrence but also the desirability of expenditure in reliance is merely contingent upon a range of considerations that are inseparable from the nature and circumstances of individual transactions and the type and purpose of the expenditure itself. Creating an artificial reason to generate (or to thwart) such expenditure by making its occurrence a necessary condition for and its value a limit upon legal protection is bound to undermine the practice's ability to fulfill its main functions.

By contrast, the approach I outlined above excels as a means of protect-

47. For a similar argument, *see* Atiyah, *supra* note 5, Essay 7: *Executory Contracts, Expectation Damages, and the Economic Analysis of Contract*, 170–171.

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ing the practice precisely because of its sensitivity to the practice's main functions and values—sensitivity which was guaranteed through the concern for protecting participants. Specific performance as the rule serves better than any alternative rule both the practice's instrumental function and value of cooperation, and the practice's intrinsic function and value, personal detachment. And deviations from this rule, inasmuch as they are governed, as suggested, by the Harm Principle, could do little to undermine the practice's propensity to fulfil these functions and promote these values. The fact that such deviations do not involve a compromise to the legitimate advantages which parties can and hope to derive from participation in the practice, coupled with the very fact that the logic which governs such deviations from the rule, prevalent as the circumstances which allow them may be, is that of making an exception (indeed, deviating from a rule), together guarantee as much.

VI. CONCLUSION

It may all seem somewhat anticlimactic. I said at the outset that the relations between legal rights and those moral rights on which they are based may be less straightforward and perhaps less transparent than some might expect. The subsequent foray into contract law, with the apparent discrepancy it displays between substantive rights and remedial rights, was meant to illustrate one way in which apparent distortions between legal rights and corresponding moral rights may arise. But then, rather than expose some deep-rooted chasm between substantive rights and remedial rights in contract law—and thus, in turn, between legal rights and moral rights—I ended up suggesting that that remedial right which most naturally complements the popular (and correct) understanding of the nature of the core substantive right is, despite appearances, the fundamental rule or the starting point of remedies for breach.

Yet I do not think that the upshot of this discussion is particularly underwhelming or that it should come as a disappointment. First, it is significant that the remedial rule that emerged is such that there may be as many opportunities to deviate from it as to follow it. Moreover, the basic principle that governs the most prevalent justification of such deviations, though a moral principle, is one that belongs uniquely in the legal and political realm. It is, in other words, a principle that is defensible only within that network of considerations relating to the value and the implications of personal freedom in the political arena and that operates, predominantly as a restraint on how the law ought to be used, uniquely in this sphere.

Second, the defence of both the basic rule of remedies and, in turn, the principle governing deviations thereof drew inevitably on considerations that are unique to the legal version of the practice at stake, that of voluntarily undertaking obligations to others. And here, perhaps, lies the most

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important lesson to be drawn from the foray into contract law in terms of refining our understanding of the relations between law and morality, legal rights and moral rights. The very notion that the law can systematically replicate existing moral or social institutions or simply enforce the rights or the obligations to which they give rise, without altering these institutions in the process and while leaving their functions and values intact, is an over-simplification that is best abandoned.

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