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### Expecting Specific Performance

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# EXPECTING SPECIFIC PERFORMANCE

TESS WILKINSON-RYAN,\* DAVID HOFFMAN,† EMILY CAMPBELL‡

*Using a series of surveys and experiments, we find that ordinary people think that courts will give them exactly what they bargained for after breach of contract; in other words, specific performance is the expected contractual remedy. This expectation is widespread even for the diverse array of deals where the legal remedy is traditionally limited to money damages. But for a significant fraction of people, the focus on equity seems to be a naïve belief that is open to updating. In the studies reported here, individuals were less likely to anticipate specific performance when they were briefly introduced to the possibility that courts sometimes award damages in contract disputes.*

*We argue that the default expectation of equitable relief is a widespread but malleable intuition—and that even a fragile legal intuition has practical consequences, individually and systemically. In a follow-up experiment, we show that subjects are more interested in the prospect of efficient breach when they know that money damages are a possible remedy. This finding suggests that the mismatch between what people assume the law will do (specific performance) and what it actually does (money damages) sometimes encourages performance. We consider the potential for exploitation of this tendency. Finally, we offer some suggestions about how scholars of law and psychology should elicit folk beliefs about legal rules and remedies.*

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‡ J.D. Candidate, 2024, University of Pennsylvania Carey Law School. Copyright © 2023 by Tess Wilkinson-Ryan, David Hoffman & Emily Campbell.

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## INTRODUCTION

For a moment in the summer of 2022, it looked like a Delaware judge was going to order Elon Musk to buy Twitter, over his objections. Had it happened, a compelled purchase of Twitter after Musk's breach of contract would have been the highest-profile specific performance order in living memory.<sup>1</sup> Before the case settled in the shadow of that forthcoming command, commentators asked whether equitable relief

<sup>1</sup> See Andrew Ross Sorkin, Vivian Giang, Stephen Gandel, Lauren Hirsch, Ephrat Livni & Jenny Gross, *Why Musk May Be Stuck*, N.Y. TIMES (July 11, 2022), <https://www.nytimes.com/2022/07/11/business/dealbook/elon-musk-twitter-deal-lawsuit.html> [<https://perma.cc/XHH8-U5XR>] (listing other instances where specific performance was awarded in connection with an acquisition and noting “[a] \$44 billion deal dwarfs past cases”).

was wise,<sup>2</sup> practical,<sup>3</sup> or even constitutional.<sup>4</sup> In this ferment accompanying a simple broken corporate deal, society at large confronted a question that bedevils an introductory contracts class: Should breaching parties be forced to actually perform their contracts, or can they just pay off a breach with money damages?<sup>5</sup>

The answer to that question depends on who is being asked. If you skim a contracts casebook, ask a first-year law student, or consult a treatise, specific performance is exceptional<sup>6</sup>: It is available for land deals,<sup>7</sup> some sentimental or special goods,<sup>8</sup> and some services contracts, but only when the performance is essentially negative, such as in non-disclosure or noncompete agreements.<sup>9</sup> The example of specific

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<sup>2</sup> See Matt Levine, *The Price of Not Buying Twitter*, BLOOMBERG (July 11, 2022, 12:14 PM), <https://www.bloomberg.com/opinion/articles/2022-07-11/the-price-of-not-buying-twitter> [<https://perma.cc/WD35-6V7M>] (“[F]orcing an unwilling buyer to own a big public company—with thousands of employees and an outsized influence on politics and culture—seems bad for the buyer, the employees, the users and the world.”).

<sup>3</sup> See Matt Levine, *Elon’s Out*, BLOOMBERG (July 9, 2022, 10:40 AM), <https://www.bloomberg.com/opinion/articles/2022-07-09/elon-s-out> [<https://perma.cc/W3RA-QJSG>] (“The banks’ commitment letters do not give them an out for anything that Musk does or doesn’t do; if *Twitter* cooperates . . . and a court finds . . . no cause to terminate the merger agreement, then . . . specific performance should still be available. But it’s messy . . .”).

<sup>4</sup> See Carliss Chatman, *Twitter Wants to Force Musk to Buy It. But There’s a Hitch.*, BARRON’S (July 30, 2022), <https://www.barrons.com/articles/twitter-elon-musk-thirteenth-amendment-51659101363> [<https://perma.cc/W3UC-E3VA>] (explaining that because “it isn’t Elon Musk Inc. but Elon Musk the individual who offered to buy the company,” the Court of Chancery “can block compulsion” because of “[t]he 13th Amendment prohibition against involuntary servitude, an underpinning of the rareness of the remedy of specific performance”).

<sup>5</sup> There are contracts, like loans, where these are treated more or less identically.

<sup>6</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 359 (AM. L. INST. 1981) (“Specific performance . . . will not be ordered if damages would be adequate to protect the expectation interest of the injured party.”); see also TIMOTHY MURRAY, 12 CORBIN ON CONTRACTS § 63.1, LexisNexis (database updated June 2023) (“Specific performance is a remedy developed by courts of equity to provide relief when the legal remedies of damages and restitution are inadequate. Equity will give no remedy unless the plaintiff can show that injustice will be the result if equitable relief is refused.”); E. Allan Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1153 (1970) (discussing cases in which specific performance is impractical, including personal service contracts, and examining difficulties with supervision or enforcement). *But cf.* DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 100–01 (1991) (arguing specific performance is routine in certain cases).

<sup>7</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 360 cmt. e (AM. L. INST. 1981) (stating that land contracts “have traditionally been accorded a special place in the law of specific performance”); see also Farnsworth, *supra* note 6, at 1154 (“Land . . . was singled out for special treatment. Each parcel, however ordinary, was considered to be ‘unique’ . . .”).

<sup>8</sup> See MURRAY, *supra* note 6, § 63.1 (stating that specific performance will be granted “in the case of a contract for the sale of unique goods, [e.g.,] . . . heirlooms, original paintings, family portraits, and papers that cannot be replaced” as well as “a contract to supply articles of which the defendant has a monopoly by virtue of a patent”).

<sup>9</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 360 cmt. c (AM. L. INST. 1981) (“A suitable substitute is never available for a performance that consists of forbearance, such as that under a contract not to compete.”).

performance in business transactions is an exception that doesn't quite fit the rule.<sup>10</sup> Courts and hornbooks justify their wariness by citing the high costs of monitoring<sup>11</sup> and the deep concerns about infringing on personal liberty in potential violation of the Thirteenth Amendment.<sup>12</sup>

The standard resistance to equitable remedies in American contract law is neither very popular nor very intuitive. It has been criticized by international and comparative commentators, who observe that specific performance is the default remedy in many civil law jurisdictions.<sup>13</sup> Law and economics scholars have also come out in favor of loosening the availability of specific performance.<sup>14</sup> They argue that equitable relief for breach offers predictability so that parties can bargain efficiently, *ex ante* and *ex post*, for the right outcome.<sup>15</sup> Moreover, on an economic analysis, the specific performance remedy sets the incentives at the right

<sup>10</sup> See Theresa Arnold, Amanda Dixon, Hadar Tanne, Madison Whalen Sherrill & Mitu Gulati, "*Lipstick on a Pig*": *Specific Performance Clauses in Action*, 2021 WIS. L. REV. 359, 370 (2021) ("[T]he vast majority of M&A contracts—between 85% and 90% in every year—contract around the money damages default and specify specific performance as the preferred remedy."); *In re IBP, Inc. S'holders Litig.*, 789 A.2d 14, 83–84 (Del. Ch. 2001) (granting specific performance against Tyson Foods because, in acquisitions where the transaction will "yield value of an unquantifiable nature," specific performance is "decisively preferable to a vague and imprecise damages remedy that cannot adequately remedy the injury to . . . stockholders").

<sup>11</sup> *E.g.*, Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 277 (1979) ("[W]hen the promisor's performance must be rendered over time, as in construction or requirements contracts, it is costly for the promisee to monitor a reluctant promisor's conduct.").

<sup>12</sup> See, *e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 367 cmt. a (AM. L. INST. 1981) ("The refusal [to specifically enforce personal service contracts] is based in part upon the undesirability of compelling the continuance of personal association after disputes have arisen and confidence and loyalty are gone and, in some instances, of imposing what might seem like involuntary servitude.").

<sup>13</sup> See, *e.g.*, Charles Szladits, *The Concept of Specific Performance in Civil Law*, 4 AM. J. COMPAR. L. 208, 212 (1955) ("It is a basic principle of modern civil law systems that the promisor is obligated to perform his duty under the contractual obligation and, in the case of a breach, the promisee has the right to enforce this duty, while it is possible and conscionable.").

<sup>14</sup> See generally Schwartz, *supra* note 11, at 271 (arguing that "the remedy of specific performance should be as routinely available as the damages remedy"); Thomas S. Ulen, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies*, 83 MICH. L. REV. 341, 343 (1984) ("[I]n the absence of stipulated remedies in the contract that survive scrutiny on the usual formation defenses, specific performance is more likely than any form of money damages to achieve efficiency in the exchange and breach of reciprocal promises."). But see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 163–65 (2011) (arguing that specific performance prevents efficient breach); Edward Yorio, *In Defense of Money Damages for Breach of Contract*, 82 COLUM. L. REV. 1365 (1982) (arguing for damages because they can be tailored to individual fact patterns).

<sup>15</sup> See Schwartz, *supra* note 11, at 291 ("Further expanding the availability of specific performance would produce certain efficiency gains: it would minimize the inefficiencies of undercompensation, reduce the need for liquidated damage clauses, minimize strategic behavior, and save the costs of litigating complex damage issues.").

level for parties to breach only when breach is pareto-superior—that is, when breach makes some parties better off and no parties worse off.<sup>16</sup> On this view, equitable relief ought to be the default in more categories of contracts than are currently protected: ordinary goods, certain kinds of services transactions, and the like.<sup>17</sup> Because parties will negotiate pre- and post-breach in the shadow of the law, scholars contend that courts will be unlikely to actually face the tough monitoring and liberty concerns that supposedly made traditional common-law judges prefer damages.<sup>18</sup> Experience from jurisdictions that make equitable remedies more freely available would seem to bear this out.<sup>19</sup>

In the meantime, if equitable relief is controversial among contracts theorists, it is in fact quite straightforward for the largest constituency: regular people. To the extent that there is data on the question, it appears that most non-lawyers not only think specific performance is a good idea, they believe courts do it all the time.<sup>20</sup> And data from real-world surveys about noncompetes at work and controlled psychology experiments appears to cohere to one message: Most people who are not lawyers think that you do get (and should get) what you bargained for, at least some of the time.<sup>21</sup>

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<sup>16</sup> See Ulen, *supra* note 14, at 365 (stating that specific performance “promotes contract breach only if it is efficient, that is, if someone will be better off and no one will be worse off because of the breach”).

<sup>17</sup> See, e.g., Netta Barak-Corren, *Does Antidiscrimination Law Influence Religious Behavior? An Empirical Examination*, 67 HASTINGS L.J. 957, 967 (2016) (proposing a specific performance preference in cases involving discriminatory termination of employees in part because “damages are interpreted to mean that antidiscrimination values can be legally traded for money, [while] reinstatement is interpreted as affirmation of antidiscrimination values and their binding power”).

<sup>18</sup> For an argument suggesting that those who point to the concerns about high supervisory costs associated with specific performance are misguided, see Ulen, *supra* note 14, at 399–400. Since the remedy functions as “an instruction to the litigants to use the market, rather than the court, to solve their dispute,” parties would either bargain out of performance post-breach or negotiate liquidation clauses while discounting the contract price pre-breach. *Id.*

<sup>19</sup> The evidence suggests that specific performance in civil law jurisdictions is more common than it is in the United States, but still not the usual remedy, in part because the parties themselves do not seek specific performance when enforcement costs are very high. See, e.g., Henrik Lando & Caspar Rose, *On the Enforcement of Specific Performance in Civil Law Countries*, 24 INT’L REV. L. & ECON. 473, 479–82 (2004) (noting that “one can find cases from both Germany and France where specific performance is . . . applied . . . particularly . . . for construction contracts . . . and for the delivery of already existing goods,” but arguing that specific enforcement is more costly for the authorities to enforce than damages, and that plaintiffs generally do not demand this remedy).

<sup>20</sup> See *infra* Section II.A. To be clear, it may be that they are right! See LAYCOCK, *supra* note 6, at 102–04 (collecting and providing evidence from reported cases). The actual rate of how often equitable relief is sought as an endpoint to contract litigation is unknown, let alone what parties would choose if they were not predicting what courts would do.

<sup>21</sup> See Tess Wilkinson-Ryan & Jonathan Baron, *Moral Judgment and Moral Heuristics in Breach of Contract*, 6 J. EMPIRICAL LEGAL STUD. 405, 413 (2009) (reporting that, in a

Of course, people hold moral intuitions about what law should be in a variety of settings.<sup>22</sup> But as in other areas of law—like criminal law,<sup>23</sup> constitutional law,<sup>24</sup> antidiscrimination law,<sup>25</sup> and torts<sup>26</sup>—individuals' views about what the law should be seem to be centered around what they think it actually is.<sup>27</sup> Is this true about contract remedies too? The

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series of experiments, “[s]ubjects showed . . . a preference for specific performance as a remedy for breach”); Evan Starr, J.J. Prescott & Norman Bishara, *The Behavioral Effects of (Unenforceable) Contracts*, 36 J.L. ECON. & ORG. 633, 666 (2020) (“[B]eliefs about noncomplete enforceability and the likelihood of being sued, as well as simple reminders by the employer, are strong predictors of whether an employee will decline an offer from a competitor . . .”).

<sup>22</sup> See, e.g., John Darley, *Realism on Change in Moral Intuitions*, 77 U. CHI. L. REV. 1643, 1644 (2010) (“[P]eople in a culture have well-developed intuitions about what constitutes a morally wrong action that requires punishment.”); Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1, 11 (2007) (“Whatever the source of intuitions of justice, it is beyond the normal influence of culture or demographic.”).

<sup>23</sup> See Donald Braman, Dan M. Kahan & David A. Hoffman, *Some Realism About Punishment Naturalism*, 77 U. CHI. L. REV. 1531, 1604 (2010) (“[I]ntuitions of justice and law are endogenous . . . . [U]nderstandings of wrongdoing and law are reciprocally related: what is considered ‘wrongful’ influences law, and what the law prohibits influences understandings of what is wrongful, and also how wrongful it is.”); cf. Christopher Slobogin & Lauren Brinkley-Rubinstein, *Putting Desert in Its Place*, 65 STAN. L. REV. 77, 94–95 (2013) (finding participants demonstrated “consistency in the ordinal ranking of [various] crimes” but “var[ie]d widely in their assessments about specific punishments, whether they are focused on desert . . . or are given additional factors relating to dangerousness and treatability”). But see Paul H. Robinson, Robert Kurzban & Owen D. Jones, *The Origins of Shared Intuitions of Justice*, 60 VAND. L. REV. 1633, 1687 (2007) (“Shared intuitions of justice are not easily altered . . . . Even if the[ir] source is general social learning, it must be social learning arising *only* from an aspect of human life experience that is so fundamental as to be essentially universal to all persons without regard to circumstances or culture.”).

<sup>24</sup> See Cass R. Sunstein, *Some Effects of Moral Indignation on Law*, 32 VT. L. REV. 405, 429 (2009) (discussing *Washington v. Glucksberg*, 521 U.S. 702 (1997), and noting that many people have a strong moral intuition that failing to provide life-sustaining care is acceptable but “that the injection is morally abhorrent” and “American constitutional law reflects [these] judgments” given that “people have a constitutional right to withdraw equipment that is necessary to keep them alive, but they have no . . . right to physician-assisted suicide”).

<sup>25</sup> See Barak-Corren, *supra* note 17, at 1017 (demonstrating that “religious people who were inclined to dismiss a pregnant out-of-wedlock teacher were willing to comply with a reinstatement decision, a decision which in turn increases their intention to adhere to antidiscrimination law in the future,” which could signify that “managers’ attitudes are shaped by their interactions with courts and lawyers, and are therefore epiphenomenal to the rareness of reinstatement decisions in the real world”).

<sup>26</sup> See JENNIFER K. ROBBENOLT & VALERIE P. HANS, *THE PSYCHOLOGY OF TORT LAW* 200 (2016) (discussing the campaign for tort reform and how “perceptions of the tort system are often influenced by vivid anecdotes”).

<sup>27</sup> See, e.g., Sara Emily Burke & Roseanna Sommers, *Reducing Prejudice Through Law: Evidence from Experimental Psychology*, 89 U. CHI. L. REV. 1369, 1409 (2022) (“Those who view courts as legitimate alter their social attitudes based on the law itself. Thus . . . antidiscrimination laws may still provide a plausible path to changing social attitudes, so long as people know about the legislation and buy into the moral authority of the law.”);

available evidence on intuitions about specific performance is sparse; the results that exist tend to crop up in studies where the specific performance issue is an example or a side note. But the question is important on its own. When people make a deal, how do they think it gets enforced? When they see Elon Musk breach an agreement, what do they think that means for him, or for Twitter? Those questions matter, because, as every legal economist observes, the remedy that parties expect for breach drives their contracting behavior overall. It changes who they deal with, how they draft their terms, how they perform, and whether they breach when they have the chance.<sup>28</sup>

Conducting a series of mixed-methods experiments, we intervene into this debate at three levels. First, we build on the very limited existing literature to show that non-lawyers do indeed overestimate the likelihood of getting specific performance in a variety of breach scenarios. We start with Study 1 by simply asking people what remedies they think will result from different kinds of breaches and record their responses. Overwhelmingly, they expect specific performance. In Study 2, we give subjects a wider range of contracts to consider: construction, M&A, property rental, regular goods, and noncompete. At baseline, we were impressed by the overall enthusiasm for specific performance; across scenarios—including some where injunctive relief would be incredibly unlikely—large majorities appeared to think that courts give non-breaching parties what they actually bargained for. Our studies show consistent evidence, across contract types and across subjects, that people overestimate the role of specific performance in American courts.

But it turns out that these views are quite fragile. When we asked subjects to estimate the likelihood of specific performance in our first study, we were asking them to approach the remedy question from a naïve perspective unless they happened to have knowledge of contract law from another part of their life. In the second study, we also gave some subjects introductory information about the existence of expectation damages. When we told subjects that damages were a *possible* remedy

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David A. Hoffman, *From Promise to Form: How Contracting Online Changes Consumers*, 91 N.Y.U. L. REV. 1595, 1627 (2016) (presenting subjects with a modification of the *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965), case and demonstrating that “[y]ounger subjects were [least] likely . . . to think that the store was wrong when they did not know the law” but, after learning of the unconscionability defense, were most likely to think it was satisfied, i.e., the store was wrong and the contract was unenforceable).

<sup>28</sup> See, e.g., Lewis A. Kornhauser, *An Introduction to the Economic Analysis of Contract Remedies*, 57 U. COLO. L. REV. 683, 687 (1986) (“[O]ne may use economic theory to predict the behavior of people in response to particular legal rules. For example, economic theory allows us to predict when a promisor will fail to perform a contract if the legal remedy for non-performance is expectation damages.”).



(not even a preferred or default regime), their estimates of the likelihood of specific performance plummeted. Simply being told that the law *might not* order performance depressed estimates of the likelihood of equitable relief. It is as if a lot of people expected specific performance only when they hadn't thought seriously about it.

Fragile intuitions have implications both for contract law and law and psychology more generally, and our paper concludes with a third study suggesting some real-world effects of an "equity heuristic" that is susceptible to updating. Most people have moral intuitions about the content of law; this seems clear. These intuitions are often shaped by how they are elicited: question framing, what subjects know, and what subjects think they know about the law.<sup>29</sup> Small differences in presentation can turn what looked like moral certainties into ambiguous findings. Fragility is especially likely where individuals don't have deep experiences with the legal system—they lack the opportunity to learn what the law "really" is and have to rely on half-formed and shallow impressions.

In other fields, scholars have argued that when ordinary intuitions are in deep tension with the law, it makes the system less legitimate.<sup>30</sup> In the case of contracts intuitions around specific performance and damages, our normative conclusions are less dire. It seems likely that we have many degrees of freedom in offering citizens different varieties of contract law without confronting deeply held moral intuitions—in contracts, as in other fields, the legal rules may shape the informal norms.<sup>31</sup> But our results also offer a caution: We need to be careful in the degree of confidence we can take from particular studies about intuitive beliefs about law.<sup>32</sup> To the extent that reform proposals rely on empirical accounts of contract preferences, we need to ground those proposals

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<sup>29</sup> See, e.g., Wilkinson-Ryan & Baron, *supra* note 21, at 420–21 (finding that experimental subjects responded differently to the same efficient breach when it was motivated by profit rather than loss avoidance).

<sup>30</sup> See, e.g., Robinson & Darley, *supra* note 22, at 25–31 (arguing that when legal rules depart from moral intuitions, they risk becoming seen as illegitimate and, therefore, less likely to influence behavior); cf. Christopher Slobogin, *Some Hypotheses About Empirical Desert*, 42 ARIZ. ST. L.J. 1189, 1196–97 (2010) ("When there is serious disagreement about desert rankings, which could exist for any crime outside the core, legislators trying to follow empirical desert are between a rock and a hard place.").

<sup>31</sup> See Braman et al., *supra* note 23, at 1604 ("[L]aw reform often *can* be a catalyst for norm change—indeed, for norm change that itself feeds back on law and thus back on itself.").

<sup>32</sup> See Krin Irvine, David A. Hoffman & Tess Wilkinson-Ryan, *Law and Psychology Grows Up, Goes Online, and Replicates*, 15 J. EMPIRICAL LEGAL STUD. 320, 345 (2018) ("[P]sychology of law is . . . heavily mediated by individual experiences with the particular culture and legal system in which they live . . .").

in multilayered research about the relationship between attitudes and law, robust to different ways of eliciting that information.

The Article concludes with Study 3, which speaks to the relationship between expectations about remedies and performance itself. Elon Musk aside, it's widely thought that individuals comply with most of their contractual obligations. The question is why. Is it because they are afraid of reputational harm? Because they think that contracts are moral instruments? Or perhaps there is something in addition—perhaps people comply because they expect specific performance. To get some traction on this puzzle, the third study takes a different approach than Studies 1 and 2. Rather than having individuals estimate what remedy they would expect, we asked them what they would do personally in a series of potential breach opportunities. We asked: If you were a party to this contract, and you had a reason to get out, would you take it?

It turns out that when thinking about that question at baseline, with no extralegal information, subjects were very reluctant to breach. When they were alerted to the mere possibility that money damages, not specific performance, might be the consequence they would face, their self-reported willingness to breach went up significantly. It is as though because parties *expect* specific performance—they think it's what they'll get as a sort of heuristic—they price the likelihood of an order into their breaching calculus. When we offered what was, in effect, a light debiasing intervention,<sup>33</sup> breach suddenly looked much more attractive. At this stage, we cannot pin down the mechanism for this change, but we consider some possibilities. First, understanding expectation damages changes the subjective calculus of breaching, since breach cannot in fact be profitable if the remedy forces the parties to essentially un-breach. Second, the damages remedy may act as a signal to people that contractual obligations are financial rather than moral, in keeping with crowding-out literature.<sup>34</sup>

The idea that people fulfill their contractual obligations because they misunderstand the *real* remedial regime has somewhat startling implications. On the bright side, it probably helps the whole economic enterprise function more smoothly; at some level of breach frequency, the system falls apart. Less happily, the misunderstanding could be leveraged opportunistically by sophisticated parties. One of the consequences of legal knowledge is that it allows parties in the know to

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<sup>33</sup> See Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199, 202 (2006) (“The central idea of debiasing [study participants] through substantive law is that in some cases it may be desirable to understand or to reform the substance of law—not merely the procedures by which the law is applied in an adjudicative setting . . .”).

<sup>34</sup> See *infra* Section III.B.

behave opportunistically in contracts: “We” understand that a contract is merely a promise to perform or pay; “they,” by contrast, wrongly think that it’s a moral endeavor backed up by a court ready to enforce the letter of the law.<sup>35</sup> This sort of view again finds its apotheosis in Elon Musk. After taking over Twitter and facing funding shortages, he repeatedly breached his contractual commitments, implicitly telling his suppliers and counterparties to sue if they wanted to be paid. And while he might ultimately pay money to compensate his counterparties, he explicitly defied the contract’s moral command.<sup>36</sup>

Indeed, Musk’s behavior through the Twitter saga really presses many specific performance buttons. One last facet of his contracting heterodoxy is especially notable: Early in the litigation, commentators suggested that the Chancery Court ought to have cared about Musk’s history of noncompliance with judicial orders in shaping its remedy.<sup>37</sup> The concern was that an order that a court cannot enforce is extraordinarily corrosive to the rule of law.<sup>38</sup> Musk’s past behavior signaled to some commentators that an expectation of specific performance poses a terrible dilemma for courts. Had the court denied Twitter specific

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<sup>35</sup> Cf. Tess Wilkinson-Ryan & David A. Hoffman, *Breach Is for Suckers*, 63 VAND. L. REV. 1001, 1010–11 (2010) [hereinafter Wilkinson-Ryan & Hoffman, *Breach Is for Suckers*] (“[I]ndividuals perceive a kind of relational harm even when the contract itself is a simple, one-shot commercial arrangement. They believe that breach is immoral.”).

<sup>36</sup> See Kate Conger, Ryan Mac & Mike Isaac, *What’s Gone at Twitter? A Data Center, Janitors, Some Toilet Paper.*, N.Y. TIMES (Dec. 29, 2022), <https://www.nytimes.com/2022/12/29/technology/twitter-elon-musk.html> [<https://perma.cc/6ZKC-QUVF>] (discussing missed rent payments and instructions given to employees to delay paying various contractors and vendors); Brian Contreras, *Outgoing Twitter Employees Prepare for Legal Campaign Against World’s Richest Man*, L.A. TIMES (Dec. 6, 2022, 5:00 AM), <https://www.latimes.com/business/story/2022-12-06/twitter-severance-employee-lawsuits> [<https://perma.cc/UAS9-TF35>] (noting that Musk’s offer of three months of severance pay violated “the terms of his deal to purchase Twitter [which] obligate him to provide a severance package ‘no less favorable’ than the one promised by its prior leadership”).

<sup>37</sup> See J.B. Heaton & M. Todd Henderson, *Twitter’s Lawsuit Against Elon Musk Looks Like a Loser*, WALL ST. J. (July 13, 2022, 8:42 AM), <https://www.wsj.com/articles/twitters-lawsuit-against-elon-musk-looks-like-a-loser-11657716142> [<https://perma.cc/YE9D-HMK3>] (“Mr. Musk could play a high-stakes game of chicken that ultimately reveals that courts are extremely limited in cases like this if the parties don’t want to play along.”); Michael Hiltzik, *Column: Who’s Really on the Hot Seat in the Musk/Twitter Fight? This Little-Known Delaware Court*, L.A. TIMES (July 15, 2022, 6:00 AM), <https://www.latimes.com/business/story/2022-07-15/elon-musk-twitter-delaware-chancery-court> [<https://perma.cc/EG36-J2Y8>] (“On the other side of the argument is the Chancery Court’s interest in upholding its own reputation. Legal and business authorities have been debating online what might happen if Musk simply refuses to comply with a court order . . .”).

<sup>38</sup> Cf. Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 349 (2003) (arguing that, for the law to be effective, most people must cooperate most of the time, because “people evaluate and react to the law and to legal authorities in large part by evaluating the processes through which legal institutions and authorities exercise their authority”).

performance, it would have been susceptible to charges that contract performance was essentially voluntary.<sup>39</sup> But grant it, and you risk putting the world's then-richest person in the position to thumb his nose at the court, which raises some genuine concerns for overall trust in the legal system. More practically, specific performance is just hard to execute, and it would be particularly hard to enforce at scale. Both as a breach deterrent and as a desirable remedy, it probably works better as an intuitive default than it would as a legal one.

This is a familiar tension. In criminal enforcement, too, there is a sense that the more people know about the “real” likelihood of being arrested and jailed, the less well law works to deter misconduct.<sup>40</sup> Legal enforcement regimes are relatively low-touch<sup>41</sup> (albeit discriminatorily so<sup>42</sup>). But whether it's paying your taxes or driving the speed limit (ish), compliance is the norm—even in areas of private law where you would not expect parties to be concerned about state punishment.<sup>43</sup> Based on our results here, we argue that parties are often transacting in the shadow of equity. But even apart from offering a different way to

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<sup>39</sup> See Steven Bainbridge, *Does Twitter's Lawsuit Against Elon Musk Really Look “Like a Loser”?*, PROFESSORBAINBRIDGE.COM (July 13, 2022), <https://www.professorbainbridge.com/professorbainbridgecom/2022/07/does-twitters-lawsuit-against-elon-musk-really-look-like-a-loser.html> [<https://perma.cc/24AY-VA35>] (“Imagine what would happen to [Delaware] M&A deals if suddenly merger agreements with bullet-proof specific performance language suddenly aren't specifically enforceable after all.”).

<sup>40</sup> See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 640–41 (1984) (noting that “acoustic separation”—that is, permitting less-sophisticated actors to overestimate the likelihood of enforcement—is a cheap strategy for deterrence); cf. Christine Jolls, *On Law Enforcement with Boundedly Rational Actors*, in THE LAW AND ECONOMICS OF IRRATIONAL BEHAVIOR 268, 274 (Francesco Parisi & Vernon L. Smith eds., 2005) (“[T]he estimated probability of arrest for various crimes is higher than the actual probability observed in official arrest rates.” (citation omitted)).

<sup>41</sup> See Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 32 (1983) [hereinafter Galanter, *Reading the Landscape*] (surveying the existing data on litigation and disputes and concluding that “only a small fraction of all disputes” are resolved by courts and only a small fraction of disputes come to courts' attention).

<sup>42</sup> See, e.g., Alex Chohlas-Wood, Marissa Gerchick, Sharad Goel, Aziz Z. Huq, Amy Shoemaker, Ravi Shroff & Keniel Yao, *Identifying and Measuring Excessive and Discriminatory Policing*, 89 U. CHI. L. REV. 441, 442 (2022) (“Minority racial status, poverty, and exposure to both violent crime and coercive policing are all tightly correlated . . . . [T]he costs of coercive policing fall heaviest on the minority communities that are already exposed to the highest rates of crime.”).

<sup>43</sup> Cf. Tess Wilkinson-Ryan, *Do Liquidated Damages Encourage Breach? A Psychological Experiment*, 108 MICH. L. REV. 633, 668 (2010) [hereinafter Wilkinson-Ryan, *Do Liquidated Damages Encourage Breach?*] (showing that “subjects use a kind of promise-keeping heuristic that causes a bias against breach” in an experiment on liquidated damages and efficient breach).

think about the value of legal sophistication, the idea that legal remedy regimes are subsidized by misunderstandings offers a research agenda for other areas of private law.

Our work proceeds in four additional parts. First, we lay out the state of knowledge about the commonsense understanding of contract remedies. In Part II, we describe experiments that show how individuals overestimate the likelihood of specific performance. Part III discusses those results and then introduces our experiments on breach. Finally, the Conclusion expands on the discussion above, and suggests that the law of remedies ought to be more attentive to lay intuitions about its content.

## I

### THE PSYCHOLOGY OF SPECIFIC PERFORMANCE

The goal of this Article is to figure out what people really think about specific performance—both their empirical beliefs (is specific performance available?) and their attitudes (is specific performance desirable?).

In most contracts courses, and in most contracts case opinions, specific performance is framed as an exception to the rule of expectation damages.<sup>44</sup> Outside of the land context,<sup>45</sup> parties arguing for equitable relief have to make the case that they don't just deserve specific performance, but they can't go on without it—the harm will be “irreparable”<sup>46</sup> or the goods are otherwise totally unavailable.<sup>47</sup> In the legal mind, specific performance needs justification. But there are a lot of reasons to think that non-lawyers will find this counterintuitive. Indeed, commonsense support for specific performance over money damages is likely overdetermined, an agglomeration of moral intuitions, cognitive heuristics, and genuine confusion.

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<sup>44</sup> See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 359(1) (AM. L. INST. 1981) (“Specific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party.”).

<sup>45</sup> See MURRAY, *supra* note 6, § 63.8 (“The common law remedies for breach of a contract to transfer an interest in land have been regarded as inadequate . . . because of the part that land plays in the life of humankind. . . . [I]nterest in land is . . . presumed to be unique and a contract to convey will be specifically enforced.”).

<sup>46</sup> See *id.* § 63.7 (stating that irreparable injury “is an important factor in some decisions” to award specific performance).

<sup>47</sup> See *id.* (“If the subject matter of a contract is such that its exact duplicate or its substantial equivalent for all practical purposes is readily obtainable from others than the defendant in exchange for a money payment, this fact will usually . . . be sufficient to show that money damages are an adequate remedy . . .”).

### A. *The Commonsense Psychology of Damages*

The first body of evidence that we have about specific performance comes from the other side of the coin, namely attitudes toward money damages. A growing literature suggests that people find money damages for contract breach unintuitive, inadequate, and inappropriate, which we describe briefly in turn.

#### 1. *Damages and Moral Harms Are Intuitively Mismatched*

Expectation damages are the default remedy even as they get harder and harder to calculate with precision—what is the dollar amount that puts George Hawkins in the position he would have been in with a perfect hand,<sup>48</sup> or even Otis Wood with an exclusive right to license Lucy's fashion?<sup>49</sup> Courts face these kinds of dilemmas every day, and have evidentiary procedures and limiting doctrines (certainty, foreseeability) to guide them. But on an intuitive understanding of remediating harm, money damages are almost always second best, because in some important and deep ways, money and performance are not equivalent.

Most of us are familiar with “taboo trade-offs,” whether or not we know the term. Taboo trade-offs in psychology are exchanges that are offensive because they trade something sacred with something secular (i.e., money)—money for love, sex, or organs.<sup>50</sup> In early studies, one of us would sometimes come across comments from subjects along the lines of, “You broke your contract and now you want to make up for it with money!”<sup>51</sup> Exclamations like this were meant to communicate a natural outrage that someone could pay their way out of a deal—but, of course, money damages are par for the course in most contract actions.

At the core of this knee-jerk discomfiture is the problem of incommensurability, that some values and goods cannot be measured on the same scale as others—or, even if they can be measured, it's very hard and the task is morally unappealing. There is more room for error when matching money to behaviors or goods than behavior to behavior or

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<sup>48</sup> *Hawkins v. McGee*, 146 A. 641, 644 (N.H. 1929) (“[T]he true measure of the plaintiff's damage in the present case is the difference between the value to him of a perfect hand or a good hand . . .”).

<sup>49</sup> *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214 (N.Y. 1917) (“The defendant gave an exclusive privilege. She was to have no right for at least a year to place her own indorsements or market her own designs except through the agency of the plaintiff.”).

<sup>50</sup> See Alan Page Fiske & Philip E. Tetlock, *Taboo Trade-offs: Reactions to Transactions That Transgress the Spheres of Justice*, 18 *POL. PSYCH.* 255, 256 (1997) (“By a taboo trade-off, we mean any explicit mental comparison or social transaction that violates deeply-held normative intuitions about the integrity, even sanctity, of certain forms of relationship and of the moral-political values that derive from those relationships.”).

<sup>51</sup> See Wilkinson-Ryan & Baron, *supra* note 21, at 423.

good to good. This is true for positive exchanges<sup>52</sup> just as it true for negative reciprocity.<sup>53</sup> Imagine, for example, that the authors of this paper agreed—promised!—that we would each finish our sections of the first draft of this paper by January 1. And now imagine that two of us circulated our sections and the third emailed to say she was going to be a couple days late and she would Venmo everyone \$100 to make up for it. It wouldn't just be weird (though it would be very weird), it would also be a) almost certainly the wrong number and b) insulting.<sup>54</sup>

It is not that people are unable to apply financial units to all kinds of harms—certainly American juries do it every day.<sup>55</sup> It is just that it is not intuitive. It takes some cognitive effort, and it doesn't feel natural or stable. And as other research has shown, it leads to error-prone judgment, especially when people are trying to match dollars to moral violations.<sup>56</sup>

## 2. *People Think Breach Is a Big Deal and Expectation Damages Are Inadequate*

Speaking of moral violations, breaching contracts is a big deal. People think of breach as a serious violation of a norm of promise-keeping.<sup>57</sup> In contract doctrine, specific performance is offered as the remedy that parties should seek when expectation damages are undercompensatory<sup>58</sup>—but a lot of laypeople think expectation damages are intrinsically undercompensatory. Even when damages are high enough to put the non-breaching party in the same financial position she would

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<sup>52</sup> See Sanford E. DeVoe & Sheena S. Iyengar, *Medium of Exchange Matters: What's Fair for Goods Is Unfair for Money*, 21 PSYCH. SCI. 159, 162 (2010) (“[T]he extent to which a resource is a medium of exchange is a causal variable in fairness-allocation preferences.”).

<sup>53</sup> See, e.g., Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56, 60–61 (1993) (describing the core challenges of compensating non-pecuniary losses with money damages).

<sup>54</sup> One of the authors, reading this passage, wants to point out that no one actually thought the January 1 date was real, whatever the other authors now say.

<sup>55</sup> See generally CASS R. SUNSTEIN, REID HASTIE, JOHN W. PAYNE, DAVID A. SCHKADE & W. KIP VISCUSI, *PUNITIVE DAMAGES: HOW JURIES DECIDE* (2002) (describing jury decisionmaking when punitive damages are available).

<sup>56</sup> See, e.g., Cass R. Sunstein, Daniel Kahneman, David Schkade & Ilana Ritov, *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1153, 1155 (2002) (“Even when people show coherent and consistent moral intuitions, they may show little consistency and coherence in translating those intuitions into numbers . . .”).

<sup>57</sup> See Wilkinson-Ryan & Baron, *supra* note 21, at 421 (stating that their findings suggest that subjects believe that intentionally breaking a contractual promise is a punishable moral harm in itself).

<sup>58</sup> RESTATEMENT (SECOND) OF CONTRACTS § 359(1) (AM. L. INST. 1981) (“Specific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party.”).

have been in had the contract been performed, the number will always leave out the cost of the moral harm.<sup>59</sup>

In early studies of contract intuitions, subjects routinely wanted to impose punitive damages for breach of contract, even though the harm from the breach was clearly limited and purely financial.<sup>60</sup> Subjects found breach of contract disrespectful and insulting, and they wanted the damages remedy to reflect the moral harm the breacher had done.<sup>61</sup> They rated a contract breacher as significantly more immoral than a negligent wrongdoer.<sup>62</sup> In fact, in an explicit comparison, subjects wanted to assign higher damages awards to a willful breacher than a tortfeasor who had caused an identical harm—a result exactly the inverse of the normal legal rule for punitive damages.<sup>63</sup>

People take this same view—expectation damages are not enough—even when they are being asked to take the perspective of the would-be breacher. In a series of studies, subjects were asked, essentially: Assuming that you would be on the hook for paying your counterparty expectation damages, how much better would a competing offer have to be for you to be willing to breach? Study participants routinely demanded a high premium for any potential breach-to-gain situation.<sup>64</sup>

Psychological studies of contract intuitions like those described here are intentionally contrived and constrained.<sup>65</sup> Subjects read stories

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<sup>59</sup> In a number of empirical studies, participants indicated they would impose punitive damages on contract breachers. See, e.g., Marc Galanter, *Contract in Court; Or Almost Everything You May or May Not Want to Know About Contract Litigation*, 2001 Wis. L. REV. 577, 604 (2001) [hereinafter Galanter, *Contract in Court*] (“Plaintiffs in tried contracts cases not only win higher compensatory damages but they are also awarded punitive damages far more frequently than plaintiffs in tort cases.”).

<sup>60</sup> See Wilkinson-Ryan & Baron, *supra* note 21, at 422 (“When a promisor breaches in order to make more money, subjects want to treat him or her like an intentional tortfeasor, including levying punitive damages.”).

<sup>61</sup> Wilkinson-Ryan & Hoffman, *Breach Is for Suckers*, *supra* note 35, at 1033 (finding that subjects felt that breaching to profit was “disrespectful” and that when breach is intentional it causes “greater feelings of being suckered and disrespected”).

<sup>62</sup> Wilkinson-Ryan & Baron, *supra* note 21, at 419 (finding that on a seven-point scale of immorality, where 7 is “extremely immoral,” a negligent wrongdoer is rated at a 3.3 and a breacher is rated at a 5).

<sup>63</sup> See *id.* at 420 (testing the within-subjects difference when subjects are responding to a contract harm versus a tort harm and finding significantly higher damages awarded in the former scenario); see also William S. Dodge, *The Case for Punitive Damages in Contracts*, 48 DUKE L. J. 629, 645 (1999) (explaining that the general rule in most jurisdictions is that punitive damages are unavailable for breach of contract claims, even when the breach was willful or malicious, if there is no independent tort alleged).

<sup>64</sup> Wilkinson-Ryan, *Do Liquidated Damages Encourage Breach?*, *supra* note 43, at 659 (showing that in scenarios where a breacher would profit with any offer above \$2000, study participants indicated that they would require \$3000 to \$4000 to be willing to breach).

<sup>65</sup> Though to be fair, the same results occur when mock jurors are given real contract damage instructions. See David A. Hoffman & Alexander S. Radus, *Instructing Juries on*



in which there are no plausible concerns about psychic benefits or reputational costs. If the breacher has refused, for example, to refinish a floor, the subjects are given to understand that the refinished floor is in a home that no one currently lives in (so there is no reason to think the homeowner will be mourning his dull floors), and that the only harm is to the slightly decreased market value of the home—all of which will be compensated by expectation damages, which will be offered spontaneously before anyone has to pay for lawyers or court fees.<sup>66</sup> Which is to say, in a series of studies about the appeal of expectation damages, expectation damages were made to be improbably appealing—just perfectly calculated compensation, handed over seamlessly.<sup>67</sup> Even so, in study after study, subjects thought they were inadequate to redress the serious harm of breach.<sup>68</sup>

### 3. *People Think Courts Enforce the Letter of the Contract*

In a review of the psychology of contracts, Professor Roseanna Sommers outlined a contract “schema”—that is, what the contract *is* in the popular imagination: “[F]or laypeople, contract schemas supply . . . the assumption that terms will be enforced as written.”<sup>69</sup>

A lot of people are intuitive formalists,<sup>70</sup> in the sense that they think that contracts are created with formal rituals—signing, clicking “I agree”—and then enforced exactly as written.<sup>71</sup> If there is paperwork involved, subjects are remarkably deferential to it.<sup>72</sup> In a series of experimental studies, participants identified the moment of contract formation as the moment of signing documents.<sup>73</sup> One study even asked subjects to consider an offeror who was unusually specific about the medium of acceptance, announcing “This is my offer. Call me at my

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*Noneconomic Contract Damages*, 81 *FORDHAM L. REV.* 1221, 1251 (2012) (finding mock jurors award supracompensatory damages).

<sup>66</sup> Wilkinson-Ryan & Baron, *supra* note 21, at 418–19.

<sup>67</sup> *See id.*

<sup>68</sup> *See id.* at 409 (showing “that many people find expectation damages inadequate to remedy an intentional breach”).

<sup>69</sup> Roseanna Sommers, *Contract Schemas*, 17 *ANN. REV. L. SOC. SCI.* 293, 296 (2021).

<sup>70</sup> *See generally* Tess Wilkinson-Ryan, *Intuitive Formalism in Contract*, 163 *U. PA. L. REV.* 2109 (2015) (reporting empirical studies that suggest a focus on formal rituals of contracting rather than substantive agreement or consent).

<sup>71</sup> *See id.* at 2110.

<sup>72</sup> *See id.* at 2126 (illustrating in a series of studies that “signing a formal contract made subjects less willing to exit the deal in favor of another more lucrative partnership, even though the signature had no legal force or meaning”).

<sup>73</sup> Tess Wilkinson-Ryan & David A. Hoffman, *The Common Sense of Contract Formation*, 67 *STAN. L. REV.* 1269, 1286 fig.2, 1288 (2015) [hereinafter Wilkinson-Ryan & Hoffman, *The Common Sense*] (showing that most subjects “identify the signing of the contract . . . as the moment of formation”).

office to accept.”<sup>74</sup> When asked when the contract was formed, only 28% of subjects chose the phone call; 62% thought the contract was binding when the offeree signed the papers, alone in his home.<sup>75</sup>

In different studies, subjects have been asked to evaluate the validity of terms buried in fine print,<sup>76</sup> stuck in a “welcome” folder,<sup>77</sup> or kept in a guest binder with the hotel manager.<sup>78</sup> As long as they were told that they should assume that they signed a piece of paper referring to the existence of terms somewhere, subjects thought the terms were enforceable.<sup>79</sup>

Most contracts do not, of course, have a specific performance clause. Many contracts say nothing about breach at all, but specific performance is always built into the terms of the deal. It *is* the deal. Damages, by contrast, are a judicial remedy. Absent a liquidated damages clause, people who have not gone to law school or worked with a lawyer on a contracts dispute would not know from their terms and conditions that the remedy for breach is money damages. It makes sense that if people basically think you have to do what the contract says—even if it’s unfair, even if it’s hidden—they would also think that you have to actually *do* what the contract *says*, and that’s specific performance.

All this is to say that the existing literature offers a number of reasons to think that people will disfavor or overlook damages awards when they have a more intuitive alternative—and they always have a more intuitive alternative in equitable relief.

### B. *Intuitions and Beliefs About Specific Performance*

Most of the time when parties are seeking redress for a contractual harm, the harm has already occurred and the only (or at least the primary) compensation available is money.<sup>80</sup> But sometimes the timing

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<sup>74</sup> *Id.* at 1286.

<sup>75</sup> *Id.* at 1286 fig.2.

<sup>76</sup> See Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 IOWA L. REV. 1745, 1762–66 (2014) (describing a study in which subjects were asked to read a scenario about a hidden fee in a credit card contract and consider its validity).

<sup>77</sup> See Tess Wilkinson-Ryan, *The Perverse Consequences of Disclosing Standard Terms*, 103 CORNELL L. REV. 117, 155–56 (2017) [hereinafter Wilkinson-Ryan, *The Perverse Consequences*] (presenting a contract scenario where a customer was faced with a fee after failing to read the terms and conditions in a “welcome” folder).

<sup>78</sup> See *id.* at 153–55 (describing a contract scenario where the agreement included policies outlined in a guest binder).

<sup>79</sup> See *id.* at 159–60 (“[S]ubjects appeared to believe that the terms available in a non-contractual document, presented only after the contract had been signed, were viewed as similar to a standard form contract in terms of enforceability, assent, legitimacy, and subject to challenge.”).

<sup>80</sup> Surely this is true.

of the breach or the nature of the contract is such that the breaching party really could perform, if only a court would insist.

And unlike damages awards, specific performance is intuitive in an ordinary promissory morality—it makes parties keep their promises. But specific performance has received less empirical attention than damages remedies, and the existing results are mixed. There are four main results, which we describe briefly here so that we can identify the open questions and opportunities for follow-up.

1. *Will People Pay More for the Chance to Get Equitable Remedies?*

In 2013, Professor Daphna Lewinsohn-Zamir hypothesized that people prefer “in-kind” remedies to money damages.<sup>81</sup> Her subjects were Israeli students and businesspeople, and she was interested in a variety of remedies, including injunctions, employment reinstatement, and even apologies.<sup>82</sup> Her study offered a novel way to measure preferences for remedies. For each dispute, she asked subjects to choose between two possible terms or deals, and then to indicate how much money they would need to be offered to be willing to take the other deal.<sup>83</sup> Overall, whether she was surveying students or experienced commercial dealers, she found a strong preference for in-kind remedies—only about one in five of her subjects across scenarios preferred monetary compensation to actually getting the thing (or the status, or the land) they were owed.<sup>84</sup> This study is suggestive of the kind of universal aversion to remediating moral harms with money, but it is of course not directly on point for Americans’ intuitions about American contract law.

2. *Do People Correctly Predict Whether a Home Contractor Will Be Required to Specifically Perform His Contract to Build a Deck?*

Specific performance intuitions have been studied with American subjects, including most notably a recent study by Matthew Seligman. Seligman investigated non-lawyers’ perceptions of contractual remedies

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<sup>81</sup> Daphna Lewinsohn-Zamir, *Can’t Buy Me Love: Monetary Versus In-Kind Remedies*, 2013 U. ILL. L. REV. 151, 159 (2013) (“[I]ndividuals are not indifferent between in-kind and monetary redress of equal pecuniary value and would likely opt for the former.”).

<sup>82</sup> *Id.* at 159 n.34.

<sup>83</sup> *Id.* at 160.

<sup>84</sup> *Id.* at 162–63.

in the event of breach.<sup>85</sup> After reading the vignette, respondents were asked the following question<sup>86</sup>:

When a court rules in favor of the plaintiff—that’s you, the party suing in court—it typically awards a “remedy” that orders the defendant to pay money or to do something. Of the following two options, which remedy do you think the court will award to you in your case against Jones?

- a. The court will order Jones to build the deck for you by Labor Day in exchange for the agreed-upon price.
- b. The court will order Jones to refund your \$5,000 and to pay you an additional amount of money to compensate for not having the deck in time for the family reunion.

Seligman found overall that 23% of his subjects selected the specific performance option.<sup>87</sup> His results are somewhat surprising. On the one hand, that’s about a quarter of his subjects who got the question wrong. On the other hand, the overwhelming majority got the question right, which is surprising in light of the strong anecdotal sense among lawyers and law professors that non-lawyers think specific performance is the default remedy in contracts. In Studies 2 and 3 below, we take up the possibility that a multiple-choice presentation of remedies can be leveraged as a *de facto* education about contract law for subjects in these studies.<sup>88</sup>

### 3. *Do People Think Their Noncompete Agreements Mean that They Cannot Change Jobs?*

Noncompete agreements are a high-stakes and somewhat salient contract term, and perceptions of noncompetes have been studied. A recent study examined employee beliefs about the enforceability of noncompete clauses in employment contracts.<sup>89</sup> Evan Starr, J.J. Prescott, and Norman Bishara analyzed data from a nationally representative online panel of verified U.S. labor force participants and found that employees who believed they were bound by a noncompete agreement had a longer tenure at a given employer and a decreased likelihood to leave that employer for a competitor.<sup>90</sup> They found that 41.5% of employees who believed they were bound by noncompetes cited the agreement as a motivating reason for declining a competitor’s job offer.<sup>91</sup>

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<sup>85</sup> Matthew A. Seligman, *The Error Theory of Contract*, 78 MD. L. REV. 147 (2018).

<sup>86</sup> *Id.* at 168.

<sup>87</sup> *Id.* at 175.

<sup>88</sup> See *infra* Sections II.B and III.A.

<sup>89</sup> Starr et al., *supra* note 21.

<sup>90</sup> *Id.* at 640, 652.

<sup>91</sup> *Id.* at 663.

Most strikingly, these findings remained consistent despite variances in state laws on noncompete enforceability.<sup>92</sup> Even in states where noncompetes were entirely unenforceable, Starr, Prescott, and Bishara found that employees' decision-making was driven by their *beliefs* about the noncompete's enforceability and the likelihood of being sued by their employer—the actual law was largely irrelevant.<sup>93</sup>

Noncompete agreements cue up complex contract intuitions, especially in the context of equitable remedies, because the promise is essentially negative, meaning that specific performance would involve the court enjoining the employee from working somewhere. A series of papers by Starr and Prescott suggest that people think the agreements are enforceable, and it seems most likely that people expect them to be specifically enforceable—i.e., they think that if sued, a court would prohibit the new employment rather than suing for damages.<sup>94</sup> But it is also possible that the fear of being sued for damages could explain their result rather than the fear of specific performance. This remains an open question that we try to tease out in Study 2.<sup>95</sup>

#### 4. *Do People Choose Specific Performance over Damages Remedies?*

Finally, the preference for specific performance has also been studied in the form of an experimental game. In a study by Ben Depoorter and Stephan Tontrup, German students and workers were paired up in transactional teams and one partner was incentivized to breach.<sup>96</sup> In one condition, the non-breaching partners could enforce the contract by claiming “damages” in the amount of the contract value.<sup>97</sup> In the other condition, the non-breaching partners could enforce the contract by choosing to force the breacher to perform as promised.<sup>98</sup> Subjects were more likely to enforce the contract when they had the option of specific performance.<sup>99</sup> The authors argued that it may be “that a default of specific performance makes the ethical norm to perform the contract more salient.”<sup>100</sup>

Experimental game studies of specific performance are especially challenging to design because it is hard to establish a meaningful

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<sup>92</sup> *Id.* at 666.

<sup>93</sup> *See id.*

<sup>94</sup> *See* Starr et al., *supra* note 21; J.J. Prescott & Evan Starr, *Subjective Beliefs About Contract Enforceability*, J. LEGAL STUD. (forthcoming 2023), <https://ssrn.com/abstract=3873638> [<https://perma.cc/AYP9-T52Z>].

<sup>95</sup> *See supra* Introduction.

<sup>96</sup> Ben Depoorter & Stephan Tontrup, *How Law Frames Moral Intuitions: The Expressive Effect of Specific Performance*, 54 ARIZ. L. REV. 673, 690–92 (2012).

<sup>97</sup> *Id.* at 690.

<sup>98</sup> *Id.* at 694.

<sup>99</sup> *Id.* at 701.

<sup>100</sup> *Id.* at 710.

difference between a specific performance remedy and a damages remedy in a game where the only thing that players can exchange is money. The subjects in this study were also German, and Germany is a country where the non-breaching party generally has the option of specific performance.<sup>101</sup> But we take the data point seriously that there is an intuitive connection between contract sanctity and specific performance.

## II

### DO PEOPLE THINK SPECIFIC PERFORMANCE IS THE DEFAULT REMEDY IN CONTRACTS?: TWO VIGNETTE EXPERIMENTS

We started this research with a basic question: Is it true, as we have always thought (and thought we knew!) that non-experts expect that the remedy for a breach of contract will be specific performance?

We have robust reasons to make this prediction given the existing behavioral research on contract remedies, as well as some suggestive but uneven evidence from studies that have folded specific performance intuitions into research on in-kind remedies, legal errors, and noncomplete agreements.<sup>102</sup>

Asking people what they think about something they have never heard of (“specific performance”) is challenging. After several rounds of heavily designed pilot studies, we came away more confused than when we started. As such, we began the first study reported here in the most hands-off, bare-bones approach we could devise. What we wanted to do was to ask what subjects thought of specific performance but ask it in such a way that we would not inadvertently tell them anything about contract law, indicate what we were studying, or otherwise influence their views. Study 1 was not designed as an experiment (there are two conditions, but that’s because we had two dependent variables of interest, and we didn’t want subjects’ responses to one to be influenced by their responses to the other) and is not preregistered. As well as we could, we just wanted to ask subjects, “What do you think happens if someone breaches a contract?” and then let them answer naturally.

#### A. Study 1

##### 1. Method

150 subjects, recruited through Prolific, were paid \$1.00 to read a short contract scenario and report, in a free-response text box, what they expected would follow from breach. The mean age was thirty-five;

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<sup>101</sup> See Lando & Rose, *supra* note 19, at 477.

<sup>102</sup> See *supra* Introduction.

49% of subjects were male and 65% had completed some college or had a college degree.

Subjects were randomly assigned to be asked what a court *would* do, or what a court *should* do. Our hypothesis, to the extent that we formed one, was that a significant fraction of subjects would invoke a specific performance remedy in a scenario in which the legal rule would normally be money damages. The two conditions were not intended for comparison; we were interested in overall patterns for each response mode separately. The scenario read as follows:

John is selling his used 2015 Toyota Corolla. He advertised it on a local listserv, had several people come by to look at it and take it for a test drive, and he just accepted an offer of \$15,000 from a buyer named Bill. They signed an agreement of sale and scheduled a time for Bill to come back with a check for the full amount, giving them time to sort out the title and registration.

Two days after they sign the agreement of sale, John sees that people are getting a lot more than Blue Book value for their used car. He decides he does not want to sell it to Bill, and that he is going to look for a buyer who will pay more.

Bill has seen similar cars for sale in the area, but they are all at least \$17,000—\$2,000 more than he thought he was going to have to pay.

Assume that Bill's sister is an attorney, and she has told him that this is a classic breach of contract case, and a court would definitely find in Bill's favor.

Imagine that Bill and John are in court in front of the judge, and the judge has found that John breached his valid contract with Bill. What do you think the judge orders to resolve the case—i.e., what do you think the judge requires from John? Please describe the most likely outcome in one or two sentences.

This scenario has a couple of key features that we honed in on, in response to our own pilot studies and what we had read in other work. First, the scenario makes the damages easy to calculate. Not only does it specify the contract price (\$15,000) and the market price (\$17,000), it also does the math for the subjects and specifies that the non-breaching party needs \$2,000 to get the kind of car he wants. Second, we chose an ordinary sale of goods where we would expect courts to order money damages, but where it would not be especially difficult to order performance. This was in large part to cut out the complex relational context that subjects might speculate about if there was ongoing work (building a deck, buying Twitter, etc.). Though we are interested in those questions, we wanted to keep the scenario as clean as possible since we were inviting free response. We chose the wording carefully and asked what the judge would “require,” on the theory that a

judge could “require” that a party perform or pay damages. Finally, we did not want to prompt subjects to think about specific performance or damages—our goal was to essentially measure legal naivete as we found it—so we did not specify what the non-breaching party was suing for, and we did not tell subjects anything about the possible remedies. Because we did not want to identify the remedies, we could not (and did not) use a multiple-choice format.

## 2. Results

All responses were written by subjects in their own words. We roughly coded them to have a way of describing them in the aggregate. We are reporting percentages here but doing no statistical tests. All 152 responses are available in Appendix A.

Overall, whether participants were asked for their predictive intuitions or their normative intuitions, they overwhelmingly, spontaneously, invoked specific performance. About 75% of subjects answered the prompt by suggesting that the judge would (or should) require John to sell the car to Bill.

A sample of (unedited) subject responses includes:

- John will be forced to sell the car to Bill at their initially agreed price
- The judge ordered John to sell the car for the agreed-upon amount plus court costs for Bill.
- I think the judge would make John accept the offer.
- He should make John honor the contract and sell the car to Bill.
- I think the contract should be upheld. The car should be sold for the agreed amount. John should have to pay for any legal costs in this case.
- The judge should make John execute the contract as signed. He should have done his investigating before putting it on the market.
- The judge should award the auto to Bill for the amount they agreed to in the beginning. As it was a valid contract John can not back out just because he wanted more money.

Some subjects, about 10%, also described damages remedies, including expectation damages. Some of these quotations include:

- I think John should have to pay Bill the price difference he will have to pay for a similar car.
- John should have to make up the difference of the cost of a similar car. For example, if Bill can now only find a car for 17K then John needs to give him 2K, plus 1K for the breach [sic] of contract and inconvenience.



- If John breached the contract with Bill, I think the Judge should make him pay Bill at least \$5000. This should cover an award for breach of contract and the difference in the amount Bill had to pay for another car.

Of the 150 subjects, twenty-eight discussed attorney's fees.

### 3. *Discussion*

Subjects overwhelmingly wrote about specific performance. In their responses, a lot of subjects used the language of "agreed-upon" or the "agreed price." What was agreed to? The sale of the car for \$15,000. How to enforce it? Make John sell Bill the car for \$15,000.

It's also worth noting that subjects who discussed money damages often proposed amounts other than expectation damages. It is hard to know what to make of this, except to suggest that expectation damages may be especially unintuitive for non-lawyers. Even subjects who envisioned a monetary remedy seemed to land on a variety of available numbers—attorney's fees, some sort of fine just for breaching, and then the cost of cover. We note too that the imagined damages remedy tends to be higher than expectation. It includes attorney's fees, which would be unusual. Or it includes an award that's "for the breach of contract" and then something compensatory to make up for the cost of cover. Expectation damages are notoriously undercompensatory, as we have discussed—they don't cover many of the hassle and reputation costs for the non-breaching party, or the lost profits from downstream consequences. But subjects who are thinking about money damages seemed to be thinking about supracompensatory damages, not the limited remedy that courts really give.<sup>103</sup>

Overall, we began our next study with the understanding that specific performance as a remedy is top-of-mind, and easy to grasp; expectation damages, even for subjects thinking about money damages generally, is not.

#### B. *Study 2*

What Study 1 offered is a glimpse at unconstrained contracts naivete. Subjects responded to a scenario quickly, without consulting another person, and presumably with minimal research (most subjects finished the questionnaire in three minutes). For most of our subjects, specific performance seemed to be the first stop on their route to reasoning through contract remedies. This is in line with the literature: The way you fix a broken promise is to do the thing you said.<sup>104</sup>

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<sup>103</sup> See *supra* Introduction.

<sup>104</sup> See *supra* Section I.A.3.

Our question in Study 2 is whether there is a second stop. With more deliberation or knowledge about the range of remedies, will subjects stick with specific performance, or will their equitable intuitions wane?

### 1. Background

Study 2 is grounded in existing research on the effect of learning about the law. Even widely shared beliefs and attitudes about contracts are surprisingly malleable or subject to re-examination. For example, most people think that contract terms are enforceable if there is any thread of assent in the original document.<sup>105</sup> Hidden terms, confusing terms, terms that follow—most people think those terms are part of the contract as long as they can make the formal connection to any piece of paperwork or available hyperlink.<sup>106</sup> And most people report, repeatedly, that no matter how hidden a term was, or how difficult to find, the consumer has meaningfully consented to it and is to blame for his own predicament.<sup>107</sup>

However, in one manipulation from a previous study, subjects were asked to read a contract scenario in which a hidden fee was being challenged in small claims court by a consumer.<sup>108</sup> Some subjects were randomly assigned to the Enforceable condition, and they read that the judge ruled that the “fee is upheld on the basis of the customer’s consent.”<sup>109</sup> Others in the Unenforceable condition read that the judge ruled that the “fee is void for lack of consent.”<sup>110</sup> In a control condition, a third group simply read that the judge heard the case and made a ruling.<sup>111</sup>

Subjects in the Control and Enforceable conditions blamed the consumer and thought that the right decision was to enforce the contract.<sup>112</sup> But subjects in the Unenforceable condition disagreed.<sup>113</sup> Once they had exposure to the possibility that a judge would agree that a hidden term in an unmarked folder of assorted paperwork arriving

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<sup>105</sup> See *supra* Introduction.

<sup>106</sup> Wilkinson-Ryan, *The Perverse Consequences*, *supra* note 77, at 159 (showing that in all conditions, including one with no notice at all, 80–93% of subjects thought a bad term would be enforceable).

<sup>107</sup> See *id.* at 155, 159 (reporting that subjects in a study agreed with the statement, “[The customer] agreed to the policy” about 80% of the time when the term was in a standard contract or a rolling contract).

<sup>108</sup> *Id.* at 162.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 162 tbl.E.

<sup>112</sup> *Id.* at 163 fig.3.

<sup>113</sup> *Id.*

after acceptance might not be valid assent, they changed their responses dramatically, reducing their blame of the consumer by about two points on a seven-point scale, and decreasing their support for enforcement by the same amount.<sup>114</sup> Their harsh and formalistic judgments appeared to be based at least in part on their beliefs about what contract law does rather than a robust core value of their own.<sup>115</sup>

This finding aligns in subtle ways with the work on “digital natives” and contracts intuitions. People who have less exposure to negotiated deals and more exposure to form contracts are more likely to believe that oral contracts are unenforceable<sup>116</sup> and that exploitative terms are legally and morally acceptable as long as they’re written down.<sup>117</sup> But in one study, young people, who normally assume that contract law is very formalistic and rigid, were exposed to the doctrine of unconscionability.<sup>118</sup> Once they learned the defense exists, they dramatically changed their views about how to resolve a case of predatory lending.<sup>119</sup>

Prescott and Starr built upon these findings in a more recent study on noncompetes.<sup>120</sup> They found 70% of employees with unenforceable noncompetes are either misinformed or uninformed,<sup>121</sup> and that subjective beliefs about the probability of an employer lawsuit and court enforcement of the noncompete are not positively correlated with enforceability.<sup>122</sup> But when Prescott and Starr provided employees with accurate information about their noncompetes’ enforceability, especially in those states where they were unenforceable, employees were far less likely to believe their noncompete was enforceable relative to those who do not receive the updated information<sup>123</sup> and felt significantly

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 163–64.

<sup>116</sup> See Hoffman, *supra* note 27, at 1619 (“Because more of their experience with contracting is over the web, younger consumers are more likely to discount the legitimacy of other forms of formation.”).

<sup>117</sup> See *id.* at 1625 fig.6 (showing that young participants rated a predatory lender’s terms as more appropriate than older participants).

<sup>118</sup> *Id.* at 1626 (telling subjects “that contracts are ‘unenforceable when they [are] entered without meaningful choice and the contract terms are unreasonably favorable to the other party’” (emphasis omitted)).

<sup>119</sup> See *id.* at 1626 fig.7 (demonstrating that “[a]ge increases are significantly and positively associated with finding the contract legally binding” after being educated on the unconscionability doctrine).

<sup>120</sup> Prescott & Starr, *supra* note 94.

<sup>121</sup> *Id.* at 11 (“[E]mployees bound by noncompetes tend to believe that noncompetes are enforceable in their state—even when they are not—and . . . this pattern is relatively stable across education levels.”).

<sup>122</sup> *Id.* at 45 fig.17.

<sup>123</sup> *Id.* at 41 fig.10, 43 fig.13 (showing that those who received information tended to drop their estimate of enforceability from 81% to 26%).

less constrained by the agreement in terms of future mobility.<sup>124</sup> Wholly, their findings suggest that “contracts matter independent of the laws governing their enforceability.”<sup>125</sup>

There are some beliefs in contracts that appear deeply rooted and sticky. People think negotiated agreements are morally binding;<sup>126</sup> they think courts should award supracompensatory damages;<sup>127</sup> they think breach is morally wrong.<sup>128</sup> But other beliefs seem more fragile, more susceptible to updating. Our hypothesis was that the preference for specific performance would fall in the latter camp, at least in some cases. Ordering specific performance seems easy and fair, but that initial impression grows more complicated with any consideration of the counterarguments. How exactly is a court supposed to enforce a contractor’s performance? What if the goods are already unavailable? On reflection, when I read about lawsuits, what kind of remedy do I usually hear about?

Study 2 was designed against two background observations. The first is that specific performance seems to be incredibly intuitive, and the second is that money damages seem relatively unintuitive. Our question was: What happens if we just give people information that money damages is one possible remedy?

## 2. Method

In Study 2, we were testing the hypothesis that subjects are more likely to overestimate the availability of specific performance when they have not been introduced to the possibility of a damages remedy. The hypothesis was pre-registered.<sup>129</sup>

1010 subjects were paid \$2 each to complete a five-minute questionnaire. 48.5% of subjects were female, 48.7% male, and 2% non-binary,

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<sup>124</sup> *Id.* at 43 fig.14 (revealing that 51% of those not updated indicated their noncomplete was a factor in declining a competitor’s job offer versus 26% who were updated).

<sup>125</sup> Starr et al., *supra* note 21, at 665.

<sup>126</sup> See Wilkinson-Ryan & Hoffman, *The Common Sense*, *supra* note 73, at 1296 (“[E]ven parties who believe that legal obligation is about formalities take seriously the moral obligations associated with making promises and participating in reciprocal exchange relationships.”).

<sup>127</sup> See Wilkinson-Ryan & Baron, *supra* note 21, at 416 (showing that subjects assigned punitive damages values (above the expectation amount) in three different conditions: “a liquidated-damages clause in the contract; a request to be released from the contract; and a simple breach”).

<sup>128</sup> See *id.* at 405 (stating that their findings “suggest that subjects believe that intentionally breaking a contractual promise is a punishable moral harm in itself”).

<sup>129</sup> Preregistration is available at Tess Wilkinson-Ryan, David Hoffman & Emily Campbell, *Specific Performance in the News* (#108179), ASPREDICTED (May 4, 2023, 6:25 AM), <https://aspredicted.org/re58q.pdf> [<https://perma.cc/4VfV-65DK>].

and the median age was thirty-two. Half of the sample was a general population sample and half of the sample was screened for only subjects who indicated that they had posted on Twitter at least once in the last twelve months.<sup>130</sup> The two samples did not differ significantly in age distribution, gender, or education. The two samples are combined below for all analyses.

Each subject saw a total of two of the five scenarios, with each subject seeing scenarios in only one of the two conditions. The two conditions were a control condition (Control), with no information about remedies, or an information condition (Damages) in which the subjects read about the choice between damages and specific performance.

For example, in the Deck Scenario, subjects read that:

Robert has hired Alan to build a deck on the side of his house. They have written up a contract with the design of the deck and the materials Robert wants, and the price they have agreed on is \$7,000, payable on completion. Alan has promised that he will work on the deck in May and have it completed no later than July 1.

Alan completes much of the initial prep work in May, including demolition of the old porch. The materials have been ordered and they are stacked around Robert's lawn.

Alan calls and says that he is not going to come back, because he has taken on a full-time job with a local developer. The only qualified carpenter in the area who could finish the deck on Robert's timeline is charging \$10,000.

Imagine that Robert took Alan to court for failure to complete the deck. Robert has asked the court to require Alan to finish the deck, per their contract. Assume that the judge rules that Alan has breached his contract. Courts can have different approaches for how to resolve breach of contract cases.

Subjects in the Damages condition also read that: "In this situation, the court could either require Alan to pay Robert \$3,000 or require Alan to complete the deck."

There were four additional scenarios: a noncompete agreement, a contract to sell a used car, a contract to rent an event space, and a merger agreement between two car dealerships (the full text of all scenarios is included in Appendix B).

After each scenario, subjects were asked to report on the probability that the court would award specific performance. They gave their

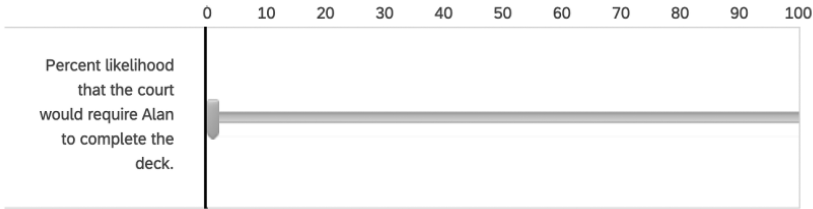
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<sup>130</sup> When we began this study, the Musk/Twitter litigation had not been settled. We wanted to hold open the possibility of pre- and post-surveys for subjects most likely to have knowledge of the outcome of that litigation. We used Twitter use as a proxy for likely knowledge of the litigation.

response by moving a slider bar to indicate a probability between 0% and 100%, which looked like this:

**FIGURE 1. SLIDER BAR OF SUBJECTIVE PROBABILITY OF SPECIFIC PERFORMANCE AWARD**

**In this situation, the court could either require Alan to pay Robert \$3,000 or require Alan to complete the deck. Please give your estimate of the likelihood that the court would require Alan to complete the deck.**



### 3. Results

In every scenario, subjects who read about both specific performance and damages were significantly less likely to believe that a court would award specific performance.<sup>131</sup> Means are shown in Table 1, and a t-test of mean comparisons is significant for each of the five scenarios.<sup>132</sup>

**TABLE 1. MEAN ESTIMATED LIKELIHOOD THAT A COURT AWARDS SPECIFIC PERFORMANCE**

	<b>Control</b>	<b>Damages</b>
Deck	62.7	43.7
Car	64.3	52.8
Noncompete	60.1	44
Merger	57.8	50.5
Rental Value	59.6	49.7

Figures 2 and 3 help to illustrate the shift in the distribution by condition. These charts show every subject's response for each condition in two of the five scenarios—the noncompete scenario and

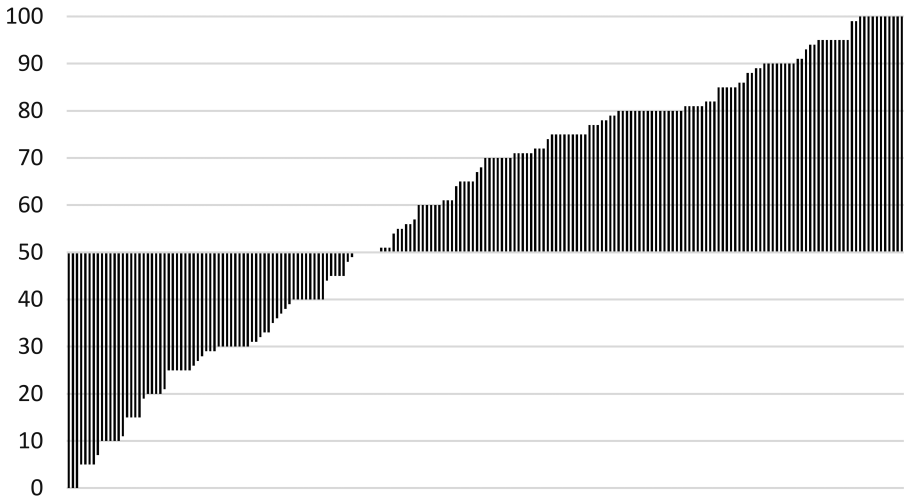
<sup>131</sup> We are using "significant" in the standard way here to refer to predicted differences that have p-values less than .05 when tested with standard two-tailed statistical tests.

<sup>132</sup> The effect of condition on estimate of specific performance likelihood was measured with a straightforward t-test, which is a statistical comparison of means. Deck ( $t=6.91$ ,  $df=402.6$ ,  $p<.0001$ ); Car ( $t=4.04$ ,  $df=394.7$ ,  $p<.0001$ ); Noncompete ( $t=5.79$ ,  $df=399.9$ ,  $p<.0001$ ); Merger ( $t=2.99$ ,  $df=400.8$ ,  $p=.003$ ); Rental ( $t=3.57$ ,  $df=399.7$ ,  $p=.0004$ ).

the used car. The charts for the remaining three scenarios are shown in Appendix C. Subjects were estimating the probability of specific performance on a scale from one to 100, so we set the x-axis at the midpoint.

FIGURE 2. EACH SUBJECT'S ESTIMATE OF THE LIKELIHOOD OF SPECIFIC PERFORMANCE, BY CONDITION, NONCOMPETE SCENARIO

Non-Compete Control



Non-Compete Damages

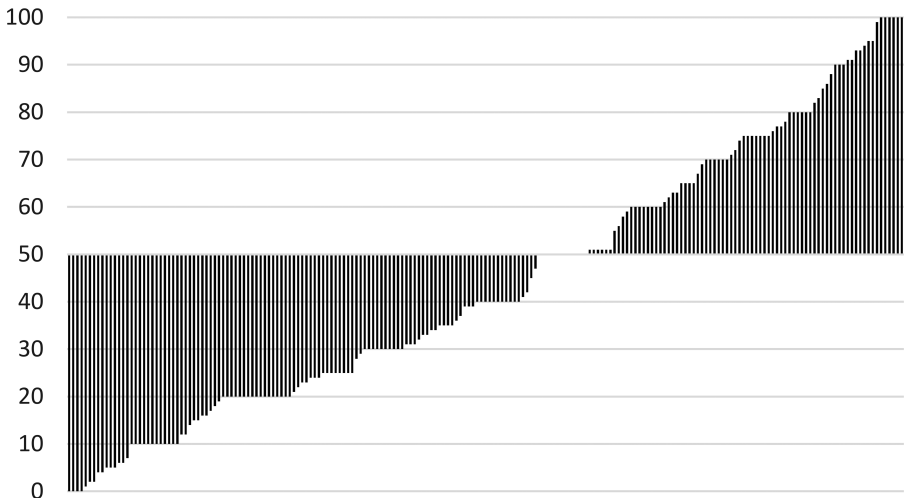
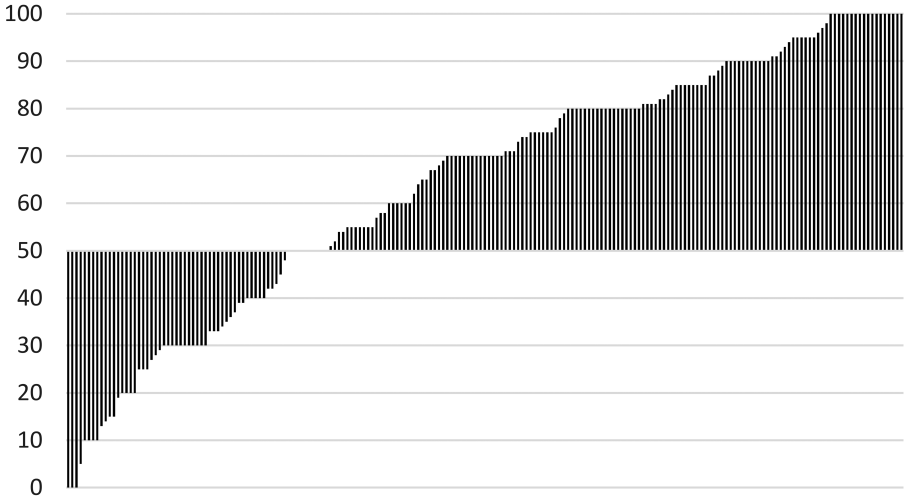
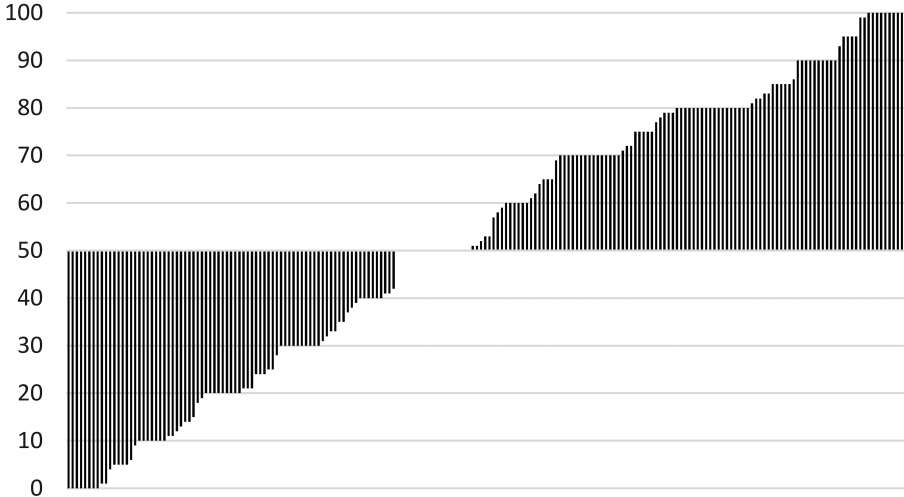


FIGURE 3. EACH SUBJECT'S ESTIMATES OF THE LIKELIHOOD OF SPECIFIC PERFORMANCE, BY CONDITION, USED CAR SCENARIO

### Used Car Control



### Used Car Damages

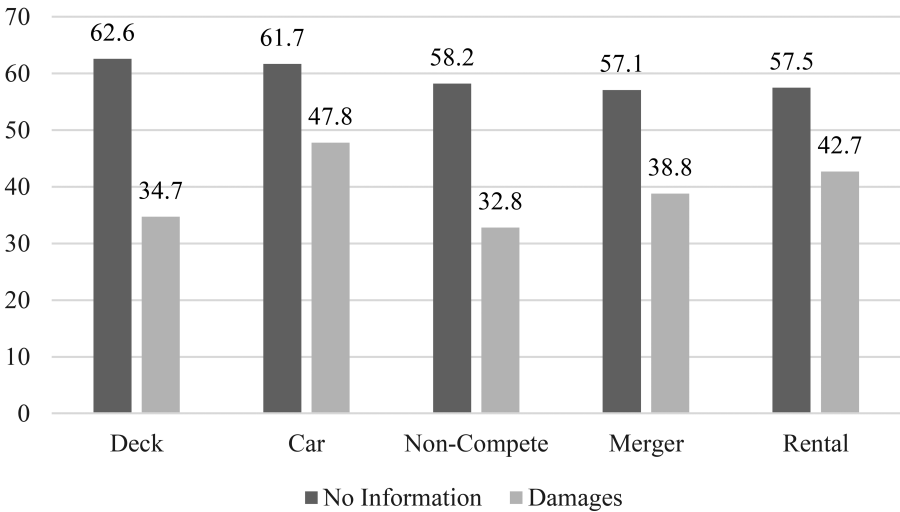


We also looked at a difference in the distribution of responses by condition. We did this by comparing, for each scenario, what percentage of the subjects in each condition were relatively confident that a court would award specific performance. Our goal here was to look specifically at what the effect of damages information on subjects who believed that



specific performance was likely, rather than subjects whose responses suggested total uncertainty (i.e., subjects whose responses were right around the 50% mark). These differences are statistically significant, but we offer them below mainly to make it easier to visualize the effect of damages information on subjects.

FIGURE 4. PERCENTAGE OF SUBJECTS AT LEAST SOMEWHAT CONFIDENT (60% OR MORE ESTIMATE) THAT A COURT AWARDS SPECIFIC PERFORMANCE



Even more so than the mean differences in Table 1, the differences in Figure 4 illustrate the magnitude of the effect of damages information. In the Deck Scenario, for example, more than 60% of subjects affirmatively believed that a court would award specific performance—unless they knew that a court could choose between specific performance and damages. Once they were prompted to think about a damages remedy, only one-third predicted specific performance.

We do not statistically test differential effects of damages information on different kinds of contracts (as we did not pre-register that hypothesis), but our results may suggest some patterns for future hypotheses. We observe in our results that some of the biggest effects—on the deck, on the noncompete, and on the merger—are in cases in which specific performance would be a relatively intrusive outcome for the breacher. And in the deck and merger situations in particular, the potential supervisory role of the court would be pretty unwieldy. It may be that those are cases in which that second thought—hmm, would a court actually want the breacher to go back and finish the deck himself, or would they just tell him to pay money?—goes further when there

are somewhat ready reasons to think that the equitable remedy is hard to order.

### C. *Are Equitable Remedies More Salient?*

We draw three tentative conclusions from the first two studies. The first is that most people do not naturally think of money damages in breach of contracts cases; instead, their automatic reaction is to think of specific performance. Second, the intuitive appeal of specific performance is somewhat fragile. The intervention in Study 2 was a relatively light touch; we did not tell subjects that the default rule in contracts is money damages, or that specific performance would be an unlikely outcome in the cases they read (though that is our view). We only told them that expectation damages are a possible remedy for the kind of breach they were reading about—and that piece of information moved a lot of subjects to downgrade their predicted probability of specific performance. Third, our results suggest that some subjects favor specific performance even when they know damages are available. One set of conjectures for future research is which contracts and which parties are most intuitively connected to equitable relief. In an early pilot that we did not pursue, we experimented with telling subjects that the default rule was damages for most cases. We were surprised in that brief study to see that across a variety of contrived scenarios (contract to sell a family heirloom, contract to paint a portrait), around 40% of the subjects still thought a judge would and should require specific performance.

Our inference from the results of Studies 1 and 2 is that the availability of damages information creates a distinct judgment task for the subjects. Without damages information, subjects are asking themselves, “Does it make sense that a court would resolve a breach of contract case by making the breacher keep his promise?” The answer to that question seems like a no-brainer, at least at first blush. Enforcing means making it happen. In the damages condition, subjects are doing something pretty different. They are asking themselves an essentially comparative question: “Which seems *more likely*, that a court would order someone to build a deck, or that a court would order someone to compensate for not building the deck?”

In the psychology literature, there are a cluster of heuristics that describe the predilection to make essentially lazy predictions.<sup>133</sup> So, if it’s a sunny day and I ask you, do you think tomorrow will be sunny,

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<sup>133</sup> See generally DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011) (discussing cognitive biases and heuristics as coming from “System 1” processing, which is automatic and quick, making a lot of mistakes but relying on shortcuts that are cognitively low effort).

you look up and say, "I guess so." In making predictions, some information or reference points are just more salient than others, whether it's today's weather or the terms and conditions in your car rental agreement. Salience refers to the proposition that some events, memories, or concepts just come more easily to mind than others.<sup>134</sup> This can be for a variety of reasons. So, for example, imagine that one group of people is asked to estimate the frequency of words that have the letter 'n' in the penultimate position. Another group is asked to estimate the frequency of words that end in '-ing'. Obviously by logic there must be more words in the former group—but people will dramatically underestimate how many words have 'n' in the second-to-last position. It's hard to figure out how to make a list of words that have a particular letter near the end. Of course, for 'n', once you think of the suffix '-ing', you realize that there are probably more words with 'n' in the penultimate position, because almost every English verb has a gerund form. It's easier to think of words that end in '-ing'; they are more salient. Salience in this case refers to the difficulty of searching for the information in your own mind.

Salience can also be related to your own experiences or memories. It is easier to imagine things you have personally experienced than things you have not experienced, or easier to call to mind things you have seen or heard a lot about. Studies have shown that people overestimate the frequency of events that get a lot of news coverage as compared to events that happen a lot but are not newsworthy.<sup>135</sup> People overestimate the frequency of, for example, celebrity divorce or political sex scandals.<sup>136</sup>

Overall, the pattern in these phenomena is that when information is more obvious, easier to find, and easier to understand, it plays a bigger role in judgment. The bias toward salient stimuli is a bias that rewards cognitive ease.

With that in mind, our inference is that the implicit message of contractual performance is just more salient than what courts do. When people are asked, *What would a court do with this broken contract?*, the natural answer is, *Put it back together. Make it right. Do what the contract*

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<sup>134</sup> See Daniel Kahneman & Amos Tversky, *On the Reality of Cognitive Illusions*, 103 PSYCH. REV. 582, 586 (1996) (citing a study showing that "the median estimate for words ending with 'ing' was nearly three times higher than for words with 'n' in the next-to-last position").

<sup>135</sup> See KAHNEMAN, *supra* note 133, at 130 ("A dramatic event temporarily increases the availability of its category.").

<sup>136</sup> *Id.* at 130 ("Divorces among Hollywood celebrities and sex scandals among politicians attract much attention, and instances will come easily to mind. You are therefore likely to exaggerate the frequency of both . . .").

says.<sup>137</sup> Our proposition is that there is probably a broader salience to equitable remedies. What courts of equity are doing is often closer to commonsense fairness. If someone takes your stuff, they remedy the situation by giving it back. If they're trespassing on your land, the court makes them leave (or not come back). If they violate a custody agreement, the court makes you bring the kids back. If they violate your constitutional rights, they should be made to stop.<sup>138</sup>

This salience is particularly true for contracts, where subjects have an unusual amount of exposure to a key part of the legal content of the operative law: the contract itself. The old Oliver Wendell Holmes chestnut that “[t]he 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”<sup>139</sup> gets so much play precisely because it's shocking. That's just not how people think about the duty to keep a contract.

If we are right that equitable remedies are more salient—indeed, that there is an “equity heuristic” of sorts in the folk psychology of law—we should expect to see people overestimate the availability of specific performance, and we should also see them update their estimate when they get new information.

### III

#### DISCUSSION, AND A BONUS STUDY!

To recap: A lot of people expect specific performance where the law seems not to give it, at least when they don't deliberate too much on the issue. This equity heuristic is fragile, but it appears across a variety of contracting problems.

What we haven't done, at least so far, is make a case for why that matters, whether to legal policymakers, scholars, or the rest of us. In this final Part, we explore how the fragile nature of the specific performance expectation might affect behavior in the world.

Gaps between legal rules and lay intuitions about those rules have preoccupied law and psychology for generations.<sup>140</sup> Some scholars

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<sup>137</sup> See, e.g., Sommers, *supra* note 69, at 296 (“[F]or laypeople, contract schemas supply . . . the assumption that terms will be enforced as written.”).

<sup>138</sup> Cf. Barak-Corren, *supra* note 17, at 995 (finding that even violators thought that damages relief for constitutional violations were less legitimate than reinstatement decrees).

<sup>139</sup> Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).

<sup>140</sup> In evidence, see, for example, Elizabeth F. Loftus, *Eyewitness Testimony: Psychological Research and Legal Thought*, 3 CRIME & JUST. 105 (1981). In criminal law, see, for example, Paul H. Robinson, *Testing Lay Intuitions of Justice: How and Why?*, 28 HOFSTRA L. REV. 611 (2000). In tort law, see, for example, Jonathan Baron & Ilana Ritov, *Intuitions About Penalties and Compensation in the Context of Tort Law*, 7 J. RISK & UNCERTAINTY 17 (1993).

have suggested that as gaps grow larger, they erode the shared trust in the legal system: If we don't get what we expect from the legal system, we'll find the rules increasingly aversive.<sup>141</sup> Others think that this concern is overblown, since most of the time, especially at the level of granularity at which rules are applied to citizens, legal beliefs are contingent.<sup>142</sup>

A more direct way ordinary intuitions matter is that they affect out-of-court behavior, and in contracts, most behavior is out of court.<sup>143</sup> The effects might be direct: Parties negotiate, perform, or breach given the law they imagine.<sup>144</sup> To the extent that law aims to regulate contracting behavior—promoting welfare-maximizing exchanges and preserving relationships—it matters what ordinary citizens think the rules look like.

### A. *Equity Assumptions and Incentives to Breach: Study 3*

To begin to investigate the relationship between lay intuitions about remedies and contracting behavior, we ran a third study. As before, we used Prolific: 401 subjects, paid \$1.50 to complete a three-minute questionnaire. Of the subjects, 49% of subjects were male, 48% of subjects were female, and 2% of subjects were non-binary. Their ages ranged from eighteen to eighty-nine (one subject indicated that their age was three, which we attribute to a typo and do not include in the age data), with a median age of thirty-two.<sup>145</sup>

Subjects each read two scenarios. In both, we varied the text in bolded and underlined font below. Our first scenario was a case of a contract for the sale of a non-unique (standard) good:

Please imagine the following scenario. You have a used Toyota Camry that you want to sell. You look up the Kelley Blue Book value

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<sup>141</sup> See, e.g., Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 Nw. U. L. Rev. 453, 482 (1997) (“[C]riminal penalties for non-condemnable conduct cause the public to sympathize with the person charged, and to despise the legal system that brings the charge.”).

<sup>142</sup> See, e.g., Slobogin, *supra* note 30, at 1193–94 (hypothesizing that individuals either won't notice departure from ordinary intuitions about punishment or won't care); Braman et al., *supra* note 23, at 1566–92 (contending that individuals' views about the morality of punishment are culturally contingent); David A. Hoffman & Tess Wilkinson-Ryan, *The Psychology of Contract Precautions*, 80 U. CHI. L. REV. 395, 444 (2013) (arguing that damages measures are “unlikely to be known, appreciated, or experienced by the vast majority of individuals participating in commercial life”).

<sup>143</sup> Galanter, *Reading the Landscape*, *supra* note 41, at 5 (surveying the existing data on litigation and disputes and concluding that “only a small portion of troubles and injuries become disputes; only a small portion of these become lawsuits”).

<sup>144</sup> This is true for all parties, including counseled ones!

<sup>145</sup> 11% of subjects reported an educational attainment of high school or less; 68% had completed some college or graduated from college; and 21% had a graduate degree.

which is about \$12,000. You advertise it on a website that people in your area often use for buying and selling cars, furniture, and other goods. Roughly similar cars are available for about \$13,000 at local used car lots.

Within three days, you find a buyer. The buyer, Mike, offers to pay \$11,500, which you accept. You both sign a written contract agreeing that you will deliver the car, cleaned, detailed and with title, in three weeks, and the buyer will pay in full on delivery.

Only a few days after you sign the agreement with Mike, one of your neighbors inquires about the car. He is looking for this make and model as a starter car for his teenage daughter, and he knows that you are a responsible car owner yourself. He wants to get it for her 18th birthday coming up in 3 months. You tell your neighbor you've sold it. He says to let him know if you change your mind. He says his budget is \$18,000 and he'd pay that much for your car.

You are pretty sure that if you break the deal with Mike that he'll sue, or at least threaten to sue. You ask a lawyer friend what would happen if Mike goes to small claims court to demand the car. She says the court would certainly find that you'd breached your contract and then courts have different approaches for how to resolve breach of contracts cases. **In theory, they could either require you to pay \$1,500 to Mike, or they could require you to sell Mike the car as agreed.**

Your neighbor is offering you \$18,000 for a car that you have contracted to sell to Mike for \$11,500.

Would you cancel your deal with Mike?

The second scenario was a contract for the rental of a commercial space:

Please imagine that you run a small restaurant, which you sometimes rent out for events. In mid-July, you are contacted about renting the space to a small accounting firm for their annual Halloween party. You typically charge \$3,000 to rent the space, and you do not provide staffing or clean-up, so the events are virtually pure profit. You and the owner of the accounting firm sign a contract promising the firm use of your space from 4pm to 10pm on October 30 for a charge of \$3,000.

In September, you receive a call from the producer of a movie whose crew will be in town filming at Halloween. The producer loves your space and it's directly across the street from the lot where they're filming. They'd like to rent the space for their crew's wrap party the same night you've promised to the accounting firm. They're willing to pay \$10,000 for it.

You know there are other venues like yours still available in town for the October dates, and they typically rent out at \$4,000 for the night. You are pretty sure if you breach your contract the accounting firm will secure another space that they will like just as much. You ask a

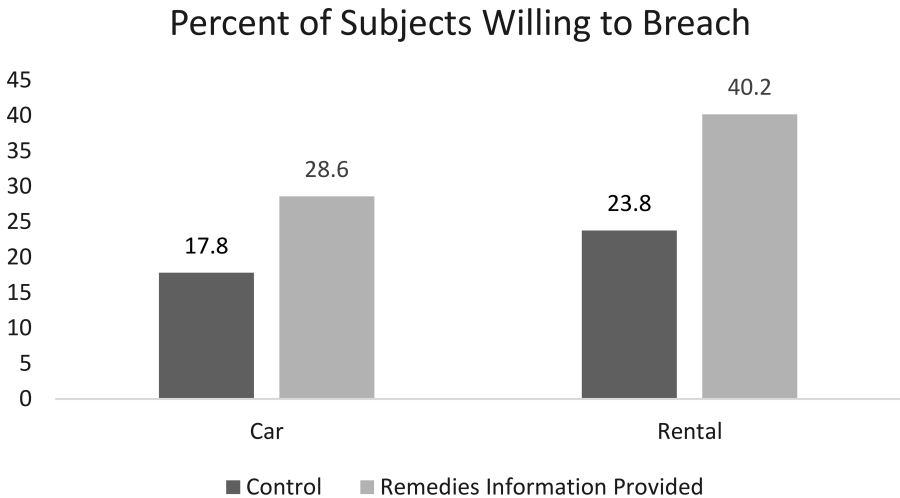
lawyer friend what would happen if you cancelled the contract with them. She says the court would certainly find that you'd breached your contract and then courts have different approaches for how to resolve breach of contracts cases.

Would you cancel your deal with the small accounting firm?

In both scenarios, subjects could only answer "Yes" or "No" to the breach question.

The main hypothesis of this set of studies was that for each of the two scenarios, a higher percentage of subjects would report willingness to breach when they were prompted to think about the availability of either specific performance or money damages.<sup>146</sup> And, as the figure below illustrates, that's precisely what we found.<sup>147</sup>

FIGURE 5. PERCENTAGE OF SUBJECTS WILLING TO BREACH CAR AND RENTAL CONTRACTS, BY REMEDIES CONDITION



As the results suggest, subjects' self-reported breach behavior was affected by their projection of the remedies that would occur in court, *even when the scenario didn't explicitly suggest that they were involved in a lawsuit!* In the car case, specific performance likely would be

<sup>146</sup> The study's main question was preregistered at AsPredicted.org #109969. See Tess Wilkinson-Ryan, David Hoffman & Emily Campbell, *SP and Breach* (#109969), ASPREDICTED (May 4, 2023, 06:25 AM), <https://aspredicted.org/sd5up.pdf> [<https://perma.cc/MY58-ZM4M>].

<sup>147</sup> For each scenario, the difference between the Control condition and the Remedies condition was tested with a chi-square test of independence. In both cases, the difference was statistically significant (Car: X-squared=6.00, df=1, p=.014; Rental: X-squared=11.72, df=1, p=.001).

unavailable in real courts;<sup>148</sup> the rental case is closer, but on the same side of the line.<sup>149</sup> And yet individuals projected that possibility, and remained wary of breach, until we told them that it was not the only remedy out there. Only then did they allow themselves to take the gains that sat in front of them.

As we consider the last study in light of the results of the first two, we see a picture of overestimates of specific performance that in turn lead to reluctance to breach. At this stage, we do not know what it is specifically about damages information that changes parties' willingness to breach.

### B. *Bargaining in the Shadow of the Wrong Law*

This third experiment offers evidence that one way that the equity heuristic might play out is that it increases compliance with contracts overall—perhaps, at times, to an inefficient degree. As we've already suggested, contract damages underdeter breach by design.<sup>150</sup> Expectation awards typically exclude a promisee's subjective valuation;<sup>151</sup>

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<sup>148</sup> See *McCallister v. Patton*, 215 S.W.2d 701, 704 (Ark. 1948) (holding that specific performance was not an appropriate remedy in a contract for the sale of a car, because “[w]hile it is alleged that new Ford automobiles have been hard to obtain, no harm or inconvenience of a kind which could not be fully compensated by an award of damages in a law action is set forth in the complaint”).

<sup>149</sup> For a rare example of a specific performance award for a rental contract, see *Barry v. Dandy, LLC*, 851 N.Y.S.2d 62 (N.Y. Sup. Ct. 2007) (awarding specific performance for rental of a wedding venue on the basis of the unique importance of a wedding day and the difficulty plaintiff would have finding a suitable replacement venue).

<sup>150</sup> See Daniel A. Farber, *Reassessing the Economic Efficiency of Compensatory Damages for Breach of Contract*, 66 VA. L. REV. 1443, 1443 (1980) (“Contract damages are designed to put the plaintiff in precisely the same position as would performance of the contract, not to deter nonperformance. Under this strict-compensation standard, parties have an incentive to breach if the profits from breach exceed the plaintiff’s damages.”); see also Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273, 291 (1970) (arguing that the rule of expectation damages “encourages breach where the product of the worker would be greater in an alternative position and discourages breach where the product would be less [such that] [m]ovement toward Pareto optimality is facilitated”); John H. Barton, *The Economic Basis of Damages for Breach of Contract*, 1 J. LEGAL STUD. 277, 299 (1972) (arguing that the most typical contracting situations are those “in which damages determined under the allocative rule are inadequate to provide an incentive to complete performance”).

<sup>151</sup> See, e.g., *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109, 114 (Okla. 1962) (entering judgment against a breaching lessee who failed to complete improvements to land for the diminution in value of the land rather than plaintiff’s requested cost of completion, because the latter far exceeded the former); *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889, 891 (N.Y. 1921) (holding that the builder was entitled to payment for substantial performance, because the cost of replacing Cohoe pipe with the defendant’s requested Reading pipe would far exceed any change in value to the home); *Avery v. Fredericksen & Westbrook*, 154 P.2d 41, 41 (Cal. Dist. Ct. App. 1944) (awarding damages for the market value of the land, rather than the plaintiff’s request of cost of completion, because the land had not



reliance damages don't count opportunity costs;<sup>152</sup> restitution disgorges the gains from trade which the contract would have created.<sup>153</sup> And for every damage award, familiar limitations cut back on what promisees can recover: damages must not be avoidable,<sup>154</sup> they must be certain,<sup>155</sup> foreseeable,<sup>156</sup> and emotional losses are generally unrecoverable.<sup>157</sup> The result is that systematically, promisors do not have to internalize the full costs of their breaches. The natural consequence of underdeterrence is more breach than there would be under an optimal regime.

Specific performance is traditionally thought to add little to this calculus, since equitable relief is the exception, not the rule.<sup>158</sup> Professor Yonathan Arbel has found that as a practical matter, attorneys tend to dissuade litigating commercial parties away from even requesting equitable relief, in part to avoid difficulties in enforcement that those orders engender.<sup>159</sup> The exception that proves the rule—land sales—is noteworthy, typically defended to fully deter breach in the otherwise frothy markets for land.<sup>160</sup>

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decreased in value and, as such, the plaintiff had not “suffered any detriment for which he [was] not compensated”); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 348 (AM. L. INST. 1981) (articulating expectation damages calculations that do not include subjective value).

<sup>152</sup> *See* Robert E. Hudec, *Restating the “Reliance Interest,”* 67 CORNELL L. REV. 704, 721 (1982) (discussing the Restatement (Second) of Contracts as “limiting the concept of reliance losses under section 349 to something like out-of-pocket expenditures”).

<sup>153</sup> *See* Joseph M. Perillo, *Restitution in the Second Restatement of Contracts*, 81 COLUM. L. REV. 37, 43 (1981) (“A comment to the *Restatement (Second)* defines the promisee’s restitution interest as ‘his interest in having restored to him any benefit that he has conferred on the other party.’”).

<sup>154</sup> *See* Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 967 (1983) (“The duty to mitigate is a universally accepted principle of contract law requiring that each party exert reasonable efforts to minimize losses whenever intervening events impede contractual objectives.”).

<sup>155</sup> *See* Farnsworth, *supra* note 6, at 1210–11 (discussing the “well established rule of the common law that the damages to be recovered for a breach of contract must be shown with certainty, and not left to speculation or conjecture”).

<sup>156</sup> *See id.* at 1199 (“[T]he loss must have been foreseeable by the party in breach at the time he made the contract.”).

<sup>157</sup> *See* Farber, *supra* note 150, at 1443 n.4 (“[P]unitive or exemplary damages are generally unavailable.”).

<sup>158</sup> *See* RESTATEMENT (SECOND) OF CONTRACTS § 359 (AM. L. INST. 1981) (“Specific performance . . . will not be ordered if damages would be adequate to protect the expectation interest of the injured party.”). Professor Laycock is the primary foil to this general rule, having forcefully argued that specific performance is more common in the reported cases than doctrine would hold it to be. *See* Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 689 (1990).

<sup>159</sup> *See* Yonathan A. Arbel, *Contract Remedies in Action: Specific Performance*, 118 W. VA. L. REV. 369, 388 (2015) (“[L]awyers have a systematic bias towards money damages, and this bias may lead them to sway their clients in favor of seeking money damages even when the client’s best interest is served by a specific performance award.”).

<sup>160</sup> *See, e.g.,* Steven Shavell, *The Design of Contracts and Remedies for Breach*, 99 Q.J. ECON. 121, 146 (1984) (“In regard to contracts for transfer of possession, the situation

This leads to a well-known deterrence gap in contract remedies. And yet most contracts, most of the time, are neither disputed nor litigated (and, most would therefore say, performed).<sup>161</sup> Ordinary promisors rarely walk away from their deals, even though they know that in court they would not have to internalize all the costs of breach. And they also know that lawsuits are unlikely: Most small stakes contracts are not economically worth suing over, especially ones without fee shifting provisions.<sup>162</sup> And if promisors are un- or under-insured, they are effectively judgment proof, making lawsuits and contract remedies practically unavailable.<sup>163</sup>

So what explains the extent of ordinary compliance with contracts? The literature offers two, mutually complementary, explanations. First, promisors are constrained by what they imagine others will think of them if they do breach—that is, reputational costs.<sup>164</sup> These can result in financial costs as markets aggregate reputational effects. As Professor Stewart Macaulay, studying Wisconsin businessmen more than sixty years ago, found:

Disputes are frequently settled without reference to the contract or potential or actual legal sanctions. There is a hesitancy to speak of legal rights or to threaten to sue in these negotiations. . . . Or as one businessman put it, “You can settle any dispute if you keep the lawyers and accountants out of it. They just do not understand the give-and-take needed in business.”<sup>165</sup>

The role of reputational markets has been the subject of extended study in a variety of contexts, and it is difficult to generalize from the literature except to say that reputation constrains breach often, but not

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seems different; specific performance appears to be most desirable . . . [because] [u]nder specific performance, there is . . . no variability in the seller’s position—he gets his payment and delivers the good that he has in his possession to the buyer.”)

<sup>161</sup> Galanter, *Reading the Landscape*, *supra* note 41, at 5 (showing most contracts are not litigated or disputed).

<sup>162</sup> See Galanter, *Contract in Court*, *supra* note 59, at 595 (“[W]e have reason to think that the individual plaintiffs in the uphill cluster [cases involving buyer plaintiffs, fraud, and employment contracts] are represented by lawyers in smaller practices who are engaged on a contingency fee.”).

<sup>163</sup> See S. Shavell, *The Judgment Proof Problem*, 6 INT’L REV. L. & ECON. 45, 45 (1986) (“Parties who cause harm to others may sometimes turn out to be ‘judgment proof,’ that is, unable to pay fully the amount for which they have been found legally liable.”).

<sup>164</sup> See generally Yonathan A. Arbel & Roy Shapira, *Theory of the Nudnik: The Future of Consumer Activism and What We Can Do to Stop It*, 73 VAND. L. REV. 929, 947 (2020) (“When nudniks air their grievances in public courtrooms, they not only contribute to the development of decisional law and legal deterrence, but also create a public record of seller behavior, thereby contributing to better *reputational* deterrence.”).

<sup>165</sup> Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIO. REV. 55, 61 (1963).

always.<sup>166</sup> Reputation clearly plays a role in depressing the incidence of breach (or at least of disputed breaches) in thick commercial markets where parties are repeat players.<sup>167</sup> But there are plenty of breach opportunities with minimal reputational costs at risk, and reason to think people still prefer not to breach.

The second explanation is what the *Mills v. Wyman* court called the “internal forum” or the “tribunal of conscience”—our own moral sense of the rightness of breach.<sup>168</sup> In Part I, we described the psychological literature that illustrates this phenomenon. Essentially, individuals think that breach of contract is wrong, at least when our counterparties are other humans.<sup>169</sup> Parties don’t take gains when we might otherwise expect that they would, because they think it’s wrong and prefer not

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<sup>166</sup> See, e.g., Lisa Bernstein, *Social Norms and Default Rules Analysis*, 3 S. CAL. INTERDISC. L.J. 59, 67 (1993) (“In many transactional settings, promises are kept for reasons wholly unrelated to the existence of a legally enforceable contract. Parties may be induced to perform or voluntarily compensate the promisee in the event of nonperformance out of fear of nonlegal sanctions such as reputational damage.”); Oren Bar-Gill & Omri Ben-Shahar, *Credible Coercion*, 83 TEX. L. REV. 717, 725 (2005) (arguing that “[s]ocial norms and extra legal sanctions” such as “trade reduction . . . and reputational harm” can “also affect the payoff attached to [a breach]”); Omri Ben-Shahar & Lisa Bernstein, *The Secrecy Interest in Contract Law*, 109 YALE L.J. 1885, 1925 (2000) (“Because reputation sanctions do not require an aggrieved party to reveal information about the magnitude of the loss she suffered, she may have a credible threat to impose them even when she does not have a credible threat to sue for damages.”); Arbel, *supra* note 159, at 402 (“[I]n the cases analyzed, reputation did not have sufficient force to preclude the breach from taking place, but was strong enough to ensure obedience to the court order.”); see also Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1738 (2001) (“[A]ssociation and exchange imposed penalties [by the Board of Appeals], together with their attendant social and reputational sanctions, are usually sufficient to induce merchants to promptly comply with arbitration decisions unless they are bankrupt or in severe financial distress.”).

<sup>167</sup> See e.g., Barak D. Richman, *The Antitrust of Reputation Mechanisms: Institutional Economics and Concerted Refusals to Deal*, 95 VA. L. REV. 325, 340 (2009) (describing the New York Diamond Dealer’s Club’s “industry[] reputation mechanism” as “a coordinated, multilateral effort to punish bad behavior [that is] similar to court judgments for breached contracts, since both are instruments to punish individuals who deviate from their promised obligations”); Bernstein, *supra* note 166, at 1787 (discussing the mechanisms at play in the cotton industry, “[t]ogether, reputation-based NLSs [nonlegal sanctions] and the threat of terminating a valuable bilateral relationship work in tandem with the PLS’s [private legal system’s] provision of monetary remedies . . . to support highly cooperative contracting relationships”).

<sup>168</sup> *Mills v. Wyman*, 20 Mass. 207, 210 (1825) (“What a man ought to do, generally he ought to be made to do, whether he promise or refuse. But the law of society has left most of such obligations to the interior forum, as the tribunal of conscience has been aptly called.”).

<sup>169</sup> Cf. Uriel Haran, *A Person–Organization Discontinuity in Contract Perception: Why Corporations Can Get Away with Breaking Contracts but Individuals Cannot*, 59 MGMT. SCI. 2837 (2013) (finding that individuals are more likely to view breach by other individuals as a moral transgression, and breach by organizations as a legitimate business decision).

to do things that are morally wrong.<sup>170</sup> And they judge others for doing so.<sup>171</sup>

So far, so good. But our last experiment offers an additional, and more novel, perspective on why individuals perform contracts: They think the court would make them perform. We can think about this as a very high price for breach, or as a way that the legal system works to make the putative benefits from breach altogether impossible to obtain. Why try to breach when the court isn't going to let you go through with it? This is a complementary phenomenon to the reputational and moral accounts available and suggests a sort of shadow legal remedial system. And, if this is right, the effect goes beyond breach: Individuals might change how they negotiate deals, take precautions, and interpret contracts having in mind a view about contract remedies which is imagined and inaccurate.<sup>172</sup> An equity heuristic could affect all kinds of contracting behavior.<sup>173</sup>

The naïve expectation of specific performance seems to influence behavior, but we want to be clear that we do not know exactly how. The existing explanations for overperformance of contracts are either that people have high estimates of the real cost of breach (reputation) or that they have high estimates of the moral seriousness of breach (internal forum). Updating them on the real remedy could work through either of the two calculations. The most intuitive explanation is that when subjects learn about money damages, they downgrade their estimate of the cost of breach. They thought that breach would be very expensive, in the sense of having a negative expected value, and now they think that they can breach and still profit.

There is another possibility, not mutually exclusive, which is that the switch from an equitable remedy that acts as a *de facto* prohibition on breach to money damages signals to subjects that the moral violation

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<sup>170</sup> See Tess Wilkinson-Ryan, *Incentives to Breach*, 17 AM. L. & ECON. REV. 290, 306 (2015) (finding that “most of the participants were unwilling to breach for an amount of money that was arguably significant to them”).

<sup>171</sup> See Wilkinson-Ryan & Baron, *supra* note 21; Wilkinson-Ryan & Hoffman, *Breach Is for Suckers*, *supra* note 35; Wilkinson-Ryan, *Do Liquidated Damages Encourage Breach?*, *supra* note 43.

<sup>172</sup> See Hoffman & Wilkinson-Ryan, *supra* note 142, at 418 (describing how individuals engage in self-protective negotiating behavior with the perceived consequences of contracting in mind).

<sup>173</sup> Cf. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 971–72 (1979) (positing that private negotiating behavior will be constrained by the expected value of a court-imposed resolution of a dispute); Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 686 (1986) (“Because it is costly to carry out legal research and to engage in legal proceedings, a rational actor often has good reason to apply informal norms, not law, to evaluate the propriety of human behavior.”).

is not as serious as they first thought. In psychology and law, there is a longstanding literature on the theory of “crowding out,” the proposition that sometimes the specification of fines and fees for wrongdoing crowds out the intrinsic motivation to cooperate or comply.<sup>174</sup> It is possible that when people consider that the law routinely prices breach, they will reconsider their own moral compunctions.<sup>175</sup> In the end, our best guess is that the two mechanisms each explain some of the effect of the updating intervention.

How we judge the scope of this behavioral effect turns on empirical facts which we don't yet have in hand. As described above, one way to think about the equity heuristic is that it acts as a *subsidy* for contract law. A problem that private law has generally is how to ensure compliance when low numbers of cases end up adjudicated.<sup>176</sup> One response, common in torts, is to increase the price of misconduct with extra-compensatory damage regimes.<sup>177</sup> But contract law has generally avoided this strategy, fearing that it might overdeter breach and make individuals unlikely to want to enter into contracts in the first instance.<sup>178</sup> Contract law has stuck with under-compensatory remedies in part to motivate entrepreneurial risk-taking: a wealth maximizing bet that has paid off for society at large, but with downside risks for promisees who face higher odds of breach than they'd perhaps bargained for.<sup>179</sup>

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<sup>174</sup> See Bruno S. Frey & Reto Jegen, *Motivation Crowding Theory*, 15 J. ECON. SURVS. 589, 606 (2001) (describing empirical evidence that indicates “external interventions via monetary incentives or punishments [can] crowd[-]out intrinsic motivation”); see also Uri Gneezy & Aldo Rustichini, *A Fine Is a Price*, 29 J. LEGAL STUD. 1, 10 (2000) (finding in an experiment in a daycare setting that when fines were imposed for late-coming parents, the number of late-coming parents significantly increased, suggesting that “the fine changes the agents’ perception of the social situation in which they are involved” by giving them “reason to believe that a fine is the worst that can happen” rather than an “unspecified and uncertain but possibly more serious consequence”).

<sup>175</sup> See Kristen Underhill, *When Extrinsic Incentives Displace Intrinsic Motivation: Designing Legal Carrots and Sticks to Confront the Challenge of Motivational Crowding-Out*, 33 YALE J. REG. 213, 248 (2016) (describing the concept of endogenous preference adaptation, which suggests that individual preferences are not independent of public policy, as economic models assume, but instead adapt in response to the policy environment); Samuel Bowles, *Policies Designed for Self-Interested Citizens May Undermine “The Moral Sentiments”*: Evidence from Economic Experiments, 320 SCI. 1605, 1607 (2008) (describing the results of a study in which a fine was imposed for overexploiting a common resource, finding that the fine was “insufficient to enforce the social optimum . . . [but] all but extinguished the subjects’ ethical predispositions that in the earlier rounds had induced them to withdraw much less than would maximize their own payoffs”).

<sup>176</sup> Galanter, *Reading the Landscape*, *supra* note 41, at 9.

<sup>177</sup> See generally A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (5th ed. 2019).

<sup>178</sup> See POSNER, *supra* note 14, at 159–63 (arguing that it is inefficient to impose penalty clauses because they would deter entry into contracts).

<sup>179</sup> See Farber, *supra* note 150, at 1443–44.

This bet makes sense in market segments where litigation is relatively common, since at least breaching parties face a positive probability of sanctions. But it could leave low-stakes contracts excessively vulnerable to underperformance.

One approach to mitigate this outcome is to have different remedies for different market types, a strategy we sometimes see in contract law already. *Tongish v. Thomas* provides an illustration. In that case, a farmer breached a contract to sell sunflower seeds to a middleman who in turn would have resold them to a seed distributor for a small markup. The farmer breached and sold them instead to a third party because the market for seeds had skyrocketed post-formation. The farmer admitted liability but sought to limit damages to the middleman's actual expected benefit from the deal, his handling fee. That would have been the basic lost-profits expectation measure defined by Uniform Commercial Code (UCC) Section 1-106 instead of the specific measure (market price minus contract price) found in Section 2-713 of the Code.<sup>180</sup> But the Court disagreed, writing:

We are not persuaded that the lost profits view . . . should be embraced. It is a minority rule that has received only nominal support. We believe the majority rule or the market damages remedy as contained in [UCC] 2-713 is more reasoned and should be followed as the preferred measure of damages. While application of the rule may not reflect the actual loss to a buyer, it encourages a more efficient market and discourages the breach of contracts.<sup>181</sup>

Here, a court was willing to award higher damages because of their effects on projected market stability. The problem is that courts are also aware that having different damage rules for different parties is administratively challenging to say the least.

A widespread equity heuristic likely achieves that same outcome, with lower administrative costs. If ordinary people think that remedies are stronger than they in fact are, that wrong belief will depress the incidence of breach in smaller deals, even though reputation costs and litigation constraints are minimal. At the same time, it should not overdeter breach in thicker markets, where parties are more likely to have litigation experience and access to counsel. In theory, without adding complexity to remedies, an informal heuristic that favors equity might offer a goldilocks calibration of breach and performance.

On the other hand, that account may be too sanguine. One possibility is that parties' overestimation of equitable relief helps correct for some underdeterrence in contract law. Another possibility, not mutually

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<sup>180</sup> See *Tongish v. Thomas*, 840 P.2d 471, 476 (Kan. 1992).

<sup>181</sup> *Id.* (quoting *Tongish v. Thomas*, 829 P.2d 916, 921 (Kan. Ct. App. 1992)).

exclusive, is that parties' overestimation of equitable relief results in *too much* deterrence. There are a few lines of evidence suggesting that this could be the case, at least for particular deals. For example, following the foreclosure crisis of 2008, several authors observed that poor homeowners were not exiting mortgage contracts that they ought to have—i.e., they would be better off financially walking away from mortgages and paying than continuing to pay monthly, given their home's net worth.<sup>182</sup> In experimental work, one of us showed that individuals could be nudged to be more likely to breach, particularly when we saw that behavior as pulling in fewer relational costs.<sup>183</sup>

And the noncompete literature, discussed above, reinforces the point. Even in states where noncompetes are not legally enforceable, individuals still assume they are legally bound by their noncompete agreements, meaning they don't take jobs and advance their careers where they otherwise would.<sup>184</sup> Now, perhaps this is overdetermined. Not only an equity heuristic but individuals' own written contracts (sometimes) tell them they are bound, and sometimes those deals specifically state that the noncompete can be enforced by court order. Nevertheless, the ability of firms to induce compliance with illegal noncompetes ought to puzzle scholars who think that individuals rationally update their behavior to align with legal rules.

The penchant for overperformance is subject to manipulation by knowledgeable parties, who can free ride on common mistakes. Elon Musk, our aberrant foil, illustrates the point. When recent news stories announced his plans to breach contracts (on purpose!) and simply pay the damages due, many were quick to criticize the plan as unjust.<sup>185</sup> But performing or paying is all that contract law seems to demand of parties: Breaching, says traditional doctrine, is no sin, nor performance a

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<sup>182</sup> See, e.g., Tess Wilkinson-Ryan, *Breaching the Mortgage Contract: The Behavioral Economics of Strategic Default*, 64 VAND. L. REV. 1547 (2011) [hereinafter Wilkinson-Ryan, *Breaching the Mortgage Contract*] (finding resistance to strategic default); Brent T. White, *Underwater and Not Walking Away: Shame, Fear and the Social Management of the Housing Crisis*, 45 WAKE FOREST L. REV. 971, 983–88 (2010) (positing psychological barriers to strategic default).

<sup>183</sup> Wilkinson-Ryan, *Breaching the Mortgage Contract*, *supra* note 182, at 1579 (illustrating that “when people perceive foreclosure to be common, they are less sure that default is morally wrong”).

<sup>184</sup> Starr et al., *supra* note 21, at 655.

<sup>185</sup> See Mike Isaac & Ryan Mac, *As Elon Musk Cuts Costs at Twitter, Some Bills Are Going Unpaid*, N.Y. TIMES (Nov. 22, 2022), <https://www.nytimes.com/2022/11/22/technology/elon-musk-twitter-cost-cutting.html> [<https://perma.cc/33XY-ZJVZ>] (“‘Elon has shown that he cares only about recouping the losses he’s incurring as a result of failing to get out of his binding obligation to buy Twitter,’ one employee wrote on Twitter’s internal Slack messaging system this month.”).

virtue.<sup>186</sup> Parties “in the know” can take advantage of the gap between their knowledge and their counterparties’ moral intuitions in a variety of ways. They might play with the contract/no-contract boundary and thereby encourage counterparties to take fewer precautions against exploitation than would be wise.<sup>187</sup> Or they might keep their counterparties in bad deals by playing on fears about equitable remedies (“If you don’t comply, the court will make you!”).

This play in the joints is an inevitable aspect of any legal system that relies on ex post and private enforcement to give substance to legal commands. The point isn’t that it’s *bad* that people systematically overestimate the likelihood of equitable relief in contract. It’s just that we should be attentive to the gap where it exists and consider whether it might put pressure on existing legal rules in certain fields. Revealing gaps like these make salient the enormous potential returns available to knowing even a little bit about the law and expose the distributive effects resulting from problems with access to justice.

As we’ve shown, individuals naively anticipate specific performance for ordinary goods—nearly 60% thought that a contract for the sale of a regular car would be enforced by an order. And even post-debiasing, 30–40% of individuals expected specific performance across a variety of contract types where we are fairly sure that the law would not award it. This large minority of individuals appears to have more deeply rooted expectations (or perhaps preferences) for equity. They are likely to be supercompliers with contract and (we hypothesize) vulnerable to exploitation by savvy sellers and service providers.

Empirical contracts scholarship can contribute to the normative enterprise by offering evidence for which parties in what circumstances we should expect to perform on contracts that are not strictly worth it. Whether a particular outcome is normatively desirable, we often want to know what is doing the work, and who it’s working for, in law.

## CONCLUSION

If contract law has a secret ambition, it’s to be predictable, uncontroversial, and unremarkable.<sup>188</sup> Contract law’s anodyne reputation has advantages: It makes it simpler to teach, in some ways, and certainly

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<sup>186</sup> See Birmingham, *supra* note 150, at 292 (“Encouragement of repudiation where profitable through elimination of moral content from contract promise might . . . be socially desirable.”).

<sup>187</sup> See generally Hoffman & Wilkinson-Ryan, *supra* note 142.

<sup>188</sup> See Wilkinson-Ryan & Hoffman, *Breach Is for Suckers*, *supra* note 35, at 1011 (“[C]ontract law is usually considered to be the most technical and least political of the first-year law courses for a reason: the framing of damages has dampened the stakes.”).



quite a bit easier to exceed student expectations. But it was nevertheless exciting for us when the Musk/Twitter deal suddenly made contracts doctrine salient. Contract teachers nationwide were unexpectedly called upon at their family gatherings and summer picnics to explain the law of specific performance. And what we told them was a little shocking. No, it's *not* true that specific performance is an ordinary remedy. No, you usually *don't* get what you bargained for. Contract law engages in a bit of a grand bait-and-switch. And its moment in the sun seemed to show those of us who teach it that our settled doctrines are distant from what our fellow citizens demand of the law.

We systemized that puzzlement. When we asked subjects, *What do you think happens when you, or Elon Musk, or anyone else breaches a contract?*, we found out that specific performance is not just a curiosity. For most people, it is what contracts are about. In the three new studies we reported here, individuals told us that they think specific performance is the default remedy, and that it keeps them from breaching contracts. Unlike Elon Musk, most citizens really do think you should keep your promises, and if you don't, you'll be made to by some judge. Specific performance isn't exceptional: It is expected.

But they were open to updating. A mere introduction to the possibility that parties sometimes get damages downgraded their expectations of equitable relief and upgraded their interest in efficient breach. It didn't take much to get people to start thinking a bit more like lawyers. This surprised us, but it probably shouldn't have: Most people are quite capable of reasoning their way, quickly, to precisely the same worries about specific performance as those developed over the centuries by judges and lawyers alike.

Understanding what parties expect from their contracts, and their breaches, helps contract law assess when to expect too much, too little, or optimal levels of performance. These results also have implications for the study of legal intuitions: They offer some methodological tools for mapping preferences without overclaiming. We need to be careful in how we elicit preferences about the legal system and talk about them. The law of remedies is complicated, and so are our intuitions.

## APPENDIX A

**Study 1 Responses***1. What Do You Think the Judge Requires from John?*

- Judge will require John to pay
- To give Bill the car for 15,000 dollars per the contract.
- I think the judge (assuming there truly was a valid contract, verbal or written) would favor on Bill's side and likely require John to either sell the car to Bill, or re-imburse him for that amount
  - I believe the judge will require John to sell Bill his car at the original agreed upon price and also ensure he provides Bill with a discount of 10% for the breach of contract.
  - that john sell the car.
  - I think the judge would order John to sell the vehicle at the agreed price. I John had already sold the car I think he would order him to pay Bill the extra amount so he could buy a like vehicle without have to spend more of his money on it.
  - The judge would probably make John honor the original signed contract.
  - I believe this would cause John to have to sell the car to Bill and would get a fine for breaching the contract. Also there might be a discount for Bill because of this.
  - The judge would order John to follow through with the original contract and get that title and registration worked out.
  - John will be forced to sell the car to Bill at their initially agreed price.
  - The judge will order an extra \$2000 to match the Blue Book price.
  - I think that the judge will require John to stick to the contract or pay a fee to get out of it.
  - I think the judge will require John to sell the car to Bill at the agreed upon price of \$15,000, and pay for Bill's attorney fees and any missed work time from appearing in court.
  - The judge rules that John accept the sale to Bill at the agreed-upon price of \$15K.
  - The judge ordered John to sell the car for the agreed-upon amount plus court costs for Bill.
  - He requires John to sell the car to Bill for \$15,000 and cover attorney costs.
  - I think that the judge will require John to go through with the contract and receive the \$15,000 that he first agreed upon with Bill.
  - I think the judge would make John accept the offer.

- I believe Bill would likely receive monetary damages but that they would likely be relatively small unless he can prove that the lack of said car was costing him significantly.

- John would have to pay for Bill's legal expenses, as well as any other expenses related to the purchase. Without a well-defined contract, there's likely clauses pertaining to non-economic restitution.

- I think that the judge would order that John sell the car to Bill and accept the amount that they agreed on, and that he should honor the contract that is already in place or be in contempt of court.

- The judge will require John to return to the original contract

- I feel that the judge would have to tell the one that owns the car that he has to follow his contract, no? I'm not sure if a contract like that would have to be notarized or something before it's valid, though.

- I think that the judge will order John to honor the original contract. He will have to give Bill the car in exchange for 15,000 per the contract.

- The judge would require that John honor the contract and accept Bill's \$15k. John would also possibly (probably) have to pay Bill's lawyer's fees.

- The most likely outcome would be for John to sell Bill the car for the agreed upon price.

- If John still has the car, I believe the judge would order him to fulfill the contract and sell it to Bill.

- John should pay bill the difference it takes to get the car he was contracted to buy and reimburse him for legal fees.

- I think that the judge will side with bill

- he would have to sell the car at the price that they agreed and signed on.

- John would be required to honor the agreement of sale that he signed, and sell the car to Bill for \$15,000. John would have to also pay court fees.

- I think the judge would require John to go through with the contract with Bill. Bill would be allowed to buy the car.

- i think they would require him to pay a fee for breaching the contract or to sell bill the car.

- I believe the judge would have him sell the car to him for 15000

- I believe the judge will give Bill the option to buy at \$15,000 or decide not to buy it. I believe the judge will force John to stick to the contract.

- I believe the judge would order John to conduct the sale at \$15k, or pay any differences if the car had already been sold elsewhere and Bill purchases another car.

- The judge would require a amount of money, a fine, or a fee on John for a punishment
- I think that the judge will require John to choose between 2 options: either John can sell the car for the agreed-upon amount, or John can pay Bill \$2000
  - That John will be required to uphold the original deal.
  - The judge requires John to proceed with the contracted sale and sell the car to Bill for \$15,000, as per their original signed agreement.
  - The judge orders John to sell the car to Bill at the original price they agreed on.
  - I assume he would rule that John should sell the car to Bill at the agreed price.
  - The judge would require John to fulfilled his end of the contract and sell the care to Bill alongside any legal fees occurred in the process of getting this judgement. In the case the used 2015 Toyota Corolla was already sold to someone else, monetary compensation of the vehicle's worth would likely be in order.
- John will have to sell the car to bill per their original agreement
  - I would assume that the judge would force the deal to go through and have the car be sold for \$15,000.
  - A settlement of \$2000 plus cost of attorney and court fees.
  - The judge will favor on the side of Bill. The agreement was made prior to John's discovery of pricing trends.
  - That he sell the car to Bill at the agreed upon price.
  - The judge requires John sell the car to Bill at the agreed-upon price.
  - I feel that the judge would be on Bills side because he signed an agreement of sale
  - Since the two individuals signed the Agreement of Sale, I would imagine that the judge would order that John honor the Terms and sell the car to Bill for the price originally agreed upon.
  - I think the judge would demand that Bill receives from John compensation comparable to the value of what he had agreed to buy, or that the transaction simply happen as agreed to.
  - Judge requires that John sell his car to Bill for the \$15,000.
  - I think the judge will order John to sell the car to Bill. John will most likely also have to pay a fine & court costs.
  - The judge would require John to fulfill the contract.
  - He would require John to fulfill the contract by selling the car to Bill

- I think the judge would require that John honor the Agreement of Sale that was already signed by him and Bill, specifying that John's car be sold to Bill for \$15000.
- John must agree to fulfill the contract he signed. Seems like if both parties discussed and signed the same contract Then John should have to sell the car for the listed amount.
- Judge will tell John to sell the car to bill for \$15k. That was the agreed upon price and John should honor the contract
- The judge will probably let Bill purchase the car for the agreed amount and given additional compensation from John.
- The judge will require the sale to happen at the agreed upon price in the agreement of sale. The judge will also require John to pay Bill's legal/attorney fees.
- The judge will rule in favor of Bill. There was a contract signed and trying to not sell now would be a breach of contract.
- The judge will require John to sell the car at the agreed upon price.
- Judge will order to uphold the contract and to have to pay the court and lawyers fees
- I think the judge will order John to sell the car for the agreed \$15,000.
- Sell the car to Bill under the agreed upon contract.
- I think the judge would require that John have to give his car to Bill at no charge for breaching their contract.
- I think it would depend on what John was seeking in terms of damages. It might be reasonable to ask for a couple of thousand dollars, unless he agreed to sell the car to him at the agreed-upon price.
- I think most likely the judge would require John to adhere to his original agreement.
- I have no idea. But if I had to guess John would either have to sell his car to Bill or pay him the difference (2000 dollars) for breaching his contract
- That he receive payment in full for \$15,000 and then turn car and title over to the buyer.
- the judge would have him sell the car to him at the price that was agreed upon.
- the judge would make john sell it to bill for the price he asked
- I would hope he would order John to allow Bill to buy the vehicle.
- Since they already signed the agreement of sale, John has to sale his car to Bill at that price.
- John will need to pay for breaching his contract.

2. *What should the judge require from John, if anything?*

- I think the judge should require John to complete the sale with Bill as originally agreed upon for \$15,000.
- The judge should make John keep the contract.
- John should pay Bill for his loss of time and sell him the car for the agreed upon price.
  - The judge should require John to sell his car to Bill at the agreed upon price listed on the agreement of sale - \$15,000.
  - The judge should require John to honor the agreed-upon price as well as cover any fees incurred by Bill during this process.
  - John should sell the car to bill at exactly the agreed upon amount and a swift kick in the bum.
  - He should require John to pay Bill \$2000. That would be fair because that is the amount Bill is losing out on.
  - I think that John should have to sell his car to Bill because if he doesn't it is a breach of the contract.
  - John should have to give bill the car for the originally agreed upon \$15,000 and pay bills court fees.
  - John must sell the vehicle for the originally agreed on amount of \$15000. They already both signed the contract so the sale just proceed.
  - The judge should require John to sell the car to Bill for the agreed upon amount of \$15,000 since they have a signed contract.
  - I think the judge should make John honor the agreement with Bill. John shouldn't be allowed to sell the car to anyone else unless Bill decides he doesn't want it anymore.
  - I would require John to allow Bill to buy the car for 2000 below the agreed amount of the car, pay all legal fees and 500 for pain and suffering for breaking the contract
  - I think the outcome should simply involve John selling the car to Bill for \$15,000. In this scenario I do not think punitive charges would be useful.
  - require john to sell the vehicle at the agreed price
  - I think John should have to pay Bill if not just allowing him to buy the car.
  - If John breached the contract with Bill, I think the Judge should make him pay Bill at least \$5000. This should cover an award for breach of contract and the difference in the amount Bill had to pay for another car.
  - The judge should request the agreement of sale and request that John sell it to him for \$15,000
  - I think that they will be in favor of John. This is because he has the contractual information signed by Bill as an agreement to their trade-off.

- He should make John honor the contract and sell the car to Bill.
- I think the contract should be upheld. The car should be sold for the agreed amount. John should have to pay for any legal costs in this case.
  - I think John should have to follow through with the original contract of \$15,000 in full in exchange for the car.
  - The judge should rule in Bill's favor by having John sell him the car for the agreed upon amount of \$15,000 and to cover any costs associated with the trial
    - John should have to compensate Bill for the breach of contract and pay all of Bill's court costs
    - I think the judge should make John sell the car to Bill for \$15,000.
    - I think that John should have to honor the contract and pay for any of Bill's lawyer fees.
    - John should just let the sale go through. The judge shouldn't punish John. The judge should just make John follow the contract.
    - John should have to make up the difference of the cost of a similar car. For example, if Bill can now only find a car for 17K then John needs to give him 2K, plus 1K for the breach of contract and inconvenience.
    - They signed the agreement of sale, therefore the price in the contract should be honored by John
      - Ensure the sale goes through at the agreed upon price and fine John a small amount.
      - The judge is likely to have John return the money to Bill, especially if the car has already been sold. If not then the judge may have John fulfill the contract.
      - John should agree to sell Bill the car for the amount they originally agreed upon - \$15,000.
      - Have John face the consequences of the breach and a fine as compensation for Bill's time.
      - They had a contract he must sell the car to Bill or return the full amount
      - The judge should require the contract from John and I think the judge will rule in John's favor.
      - I think John should have to pay Bill the price difference he will have to pay for a similar car.
      - "If John still has possession of the vehicle I think he should have to sell Bill the car, but at a reduced price. Because of the inconvenience he caused.
      - If John has already sold the vehicle then I believe John should be court ordered to pay Bill. John should have to pay the difference from

the 15000 his contract stated, to the actual amount he sold the vehicle at. and also ordered to pay court cost”

- I think that the judge should require John to fulfill the contract and sell the car to Bill for the agreed upon price of \$15,000.

- The judge should force John to stick to the original agreement, because John did not do his due diligence in checking the market value and already signed an agreement to sell to Bill. The judge should also make John cover Bill’s legal representation and cost.

- The judge should order John to either honor the original contract or pay a fine to Bill to compensate him for the time spent looking for a similar car, perhaps \$2,000.

- John has to sell the car to him. Alternatively he could pay him off somehow

- They signed an agreement so I would say he has to fully go through with the original agreement.

- If John still has the car he should have to sale it to bill. John should also have to pay court costs

- John should be required to honor his original agreement with Bill, as well as covering his court costs.

- The judge should require from John a copy of the contract to look over it and see if there’s a clause where John could break his agreement with Bill

- The judge should make John execute the contract as signed. He should have done his investigating before putting it on the market.

- I think that if the judge knows John breached the contract then the case should be dismissed, so that way Bill still gets the car for the agreed amount of 15,000 dollars.

- I think John should honor his agreement and sell the car to Bill for \$15000

- I think John should be required to honor the original agreement

- He should have John sell the car to Bill for the agreed upon 15,000 plus pay for Bill’s court fees.

- John should have to sell the car to Bill for the original agreed upon price

- The judge should require John to sell Bill the vehicle for the originally agreed upon price of \$15,000

- Force the sell under the original terms that they both agreed to

- Sell the car to Bill at the agreed upon price in the contract.

- John should have to pay bills attorney fees and also still have to sell the car to him.

- John should be held accountable for the contract he signed with Bill and the outcome should be left up to the judge.



- John should have to honor the original agreement both parties signed.
- I think the bill of sale stands. Judge will make John pay courts costs.
- John should have to follow through with the sale of the car as there was a signed contract between both parties.
- Since there was a physical agreement with a signature signed by Bill stating that he was purchasing the vehicle, John is inclined to sell the Corolla to Bill. The judge should agree in Bill's favor for John is breaching the contract that he originally agreed to.
- The judge should give judgement to Bill. John should be forced to sell the car at the agreed upon price
- John should be required to fulfill the contract he signed with Bill and sell him the car for the agreed upon price.
- Require John to sell Bill the car at the agreed upon price; and pay any court fees incurred in the litigation.
- She shouldn't force him to sell it, but make sure they're able to come to an amount they both agree on.
- I believe that this is a pretty set case. John broke a written contract, and Bill is suing him for doing so. Bill wins and John loses.
- Perhaps the judge should order that John pay Bill the difference between the agreed upon amount (15,000) and the amount for which John ended up selling the car.
- John should honor the contract and sell the vehicle for the initial asking price.
- The judge should require John to sell the car to Bill if Bill still wants that for the price agreed upon.
- The judge should award the auto to Bill for the amount they agreed to in the beginning. As it was a valid contract John can not back out just because he wanted more money.
- John should be required to fulfill terms of the contract.
- I think John should be forced to sell the car for what they agreed on from the beginning
- I think that John should have to honor the agreement. He agreed to sell the car and made a deal with Bill. It is John's own fault he did not research the price better.
- I think the judge should require that John honor his contract with Bill and sell him the car for \$15,000. John should also have to pay any court costs.
- I don't know what the judge should do to resolve this case. If John signs the contract sale, then that's a binding contract. The product should be then given to Bill for the prices agreed on

- The judge could force the sale of the vehicle at the agreed upon price. John should honor the terms of their agreement.
- I believe that John should have to pay some sort of fine or amount to Bill for the loss of sale and the possible delay he caused by retracting his offer.

## APPENDIX B

**Study 2 Text***1. Rental*

Michael owns a small restaurant in Springfield. He sometimes rents the space out to groups for special events like weddings or corporate events. The Pattersons approached him in May about renting his space for an anniversary party at the end of July. They scheduled the party for a Sunday, when the restaurant would normally be closed, and Michael agreed he would rent them the space for \$1,000, payment due the morning of the event. They were going to bring in their own food for the event and there would be no staff on hand, just someone to open and close up.

In early June, a different family asked Michael about availability for that same weekend. They were planning an engagement party, and they were willing to pay more than the going rate for the convenience of Michael's space. Michael called the Pattersons to cancel, and told them he knew other places in town were available for that night for around \$2,000.

Imagine the Pattersons took Michael to court that June for failure to rent them the restaurant space. The Pattersons have asked the court to require Michael to rent them the space on July 25. Assume that the judge rules that Michael has breached his contract. Courts can have different approaches for how to resolve breach of contract cases.

Please give your estimate of the likelihood that the court would require Michael to rent the space.

*2. Noncompete*

Jamie is the coach of the basketball team at Hampson College. They are a Division 1 NCAA team. When Jamie joined the coaching staff three years ago, he signed a five year contract, including a non-compete agreement. This means he agreed that if he voluntarily left Hampson (i.e., quit) in the first five years of coaching there, he would not take another college basketball coaching job within one year of his departure. University accountants had given a presentation to the athletic department estimating the cost of losing the head coach of any major sport (football, men's basketball, women's basketball) to another school at over \$100,000.

After three years at Hampson, Jamie was recruited by a higher ranked school offering him a bigger salary and a bigger budget. Regardless of his contract, Jamie accepted the offer at the higher ranked school.

Imagine that Hampson took Jamie to court for failure to fulfill his five-year commitment. Hampson has asked the court to prohibit Jamie from working at another competitor school during final the two years of their five-year contract. Assume that the judge rules that Jamie has breached his contract. Courts can have different approaches for how to resolve breach of contract cases.

Please give your estimate of the likelihood that the court would prohibit Jamie from coaching at another school during the last two years of his Hampson contract.

### 3. *Merger*

Dave Jenkins owns a car dealership downtown in Richmond. Jenkins Auto Sales is across the street from Pruitt Euro Cars, a dealership specializing in luxury imports. Bill Jenkins and Jake Pruitt have talked on and off over the years about merging their businesses, and have recently come to an agreement: Jenkins will buy Pruitt's business for \$500,000, and Pruitt will retire. On September 1, they draft and sign an agreement for Jenkins to purchase all of the assets and rights to Pruitt's business, effective October 15. Jenkins's insurance company delivers an updated valuation estimating the increase in value of the business to be \$600,000.

During the month of September, Jenkins begins to have some regrets. He is worried that having both lots will dilute his brand rather than enhance it, and he is wondering if he is stretching himself too thin financially. On October 1, he tells his lawyer that his mind is made up and he cannot go through with the purchase.

Imagine that Pruitt took Jenkins to court for backing out of the purchase. Pruitt has asked the court to require Jenkins to purchase Pruitt Euro Cars, per their contract. Assume that the judge rules that Jenkins has breached his contract. Courts can have different approaches for how to resolve breach of contract cases.

Please give your estimate of the likelihood that the court would require Jenkins to purchase Pruitt Euro Cars under the terms of the contract.

### 4. *Used Car Sale*

John is selling his used 2015 Toyota Corolla. He advertised it on a local listserv, had several people come by to look at it and take it for a test drive, and he just accepted an offer of \$15,000 from a buyer named Bill. They signed an agreement of sale, and schedule a time for Bill to come back in a week with a check for the full amount, giving them time to sort out the title and registration.

Two days after they sign the agreement of sale, John gets a better offer for his car from his neighbors. They saw that he was selling it and they know he is a responsible car owner, and they are looking for a reliable car for their son to bring to college. They have offered \$18,000. John calls Bill to cancel their deal.

Bill has seen similar cars for sale in the area, but they are all at least \$17,000.

Imagine that Bill took John to court for backing out of the sale. Bill has asked the court to require John to sell him the car, per their contract. Assume that the judge rules that John has breached his contract. Courts can have different approaches for how to resolve breach of contract cases.

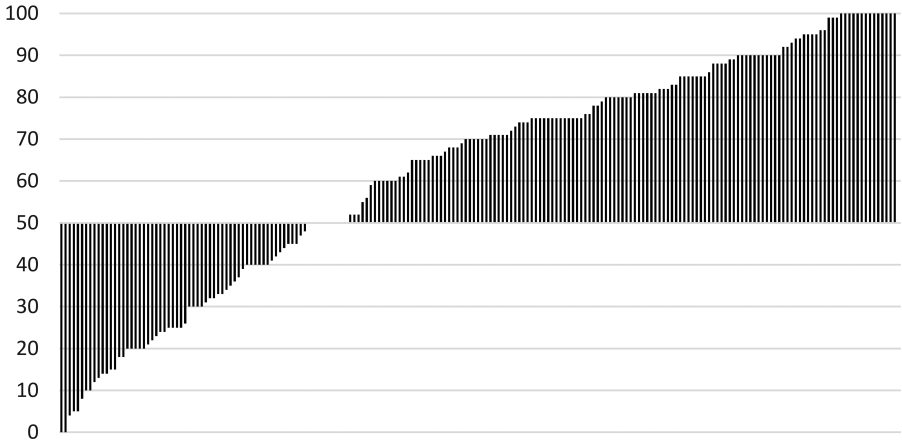
Please give your estimate of the likelihood that the court would require John to sell Bill his car at the agreed-upon price.

APPENDIX C

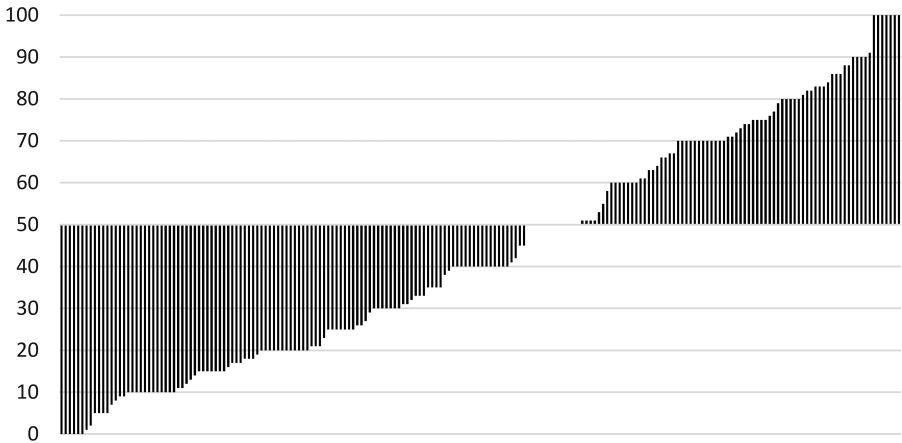
**Study 2: Scenarios by Condition**

ESTIMATED PROBABILITY OF SPECIFIC PERFORMANCE BY  
CONDITION, DECK SCENARIO

Deck Control

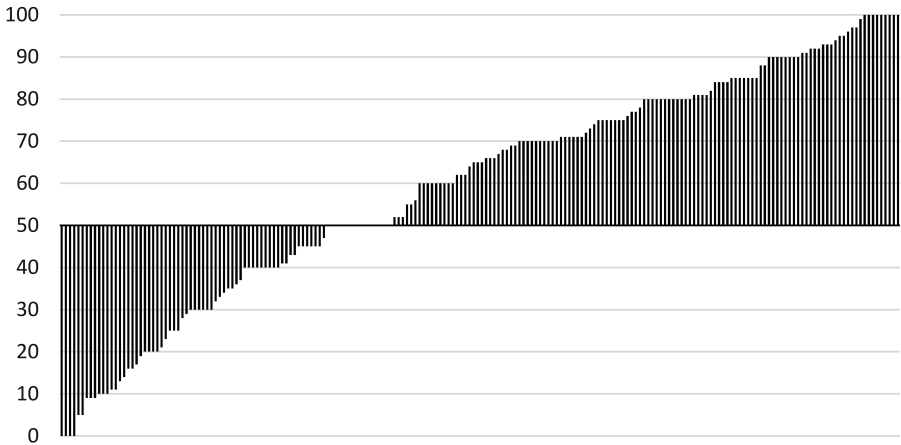


Deck Damages

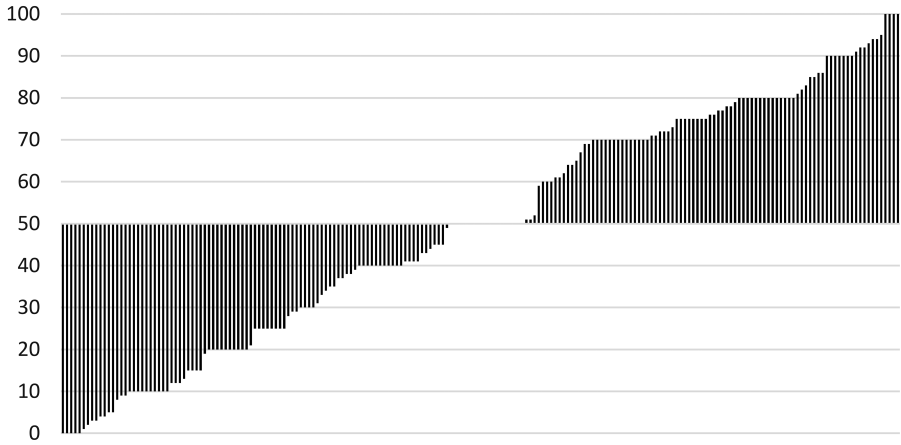


ESTIMATED PROBABILITY OF SPECIFIC PERFORMANCE BY  
CONDITION, SPACE RENTAL SCENARIO

Rental Control

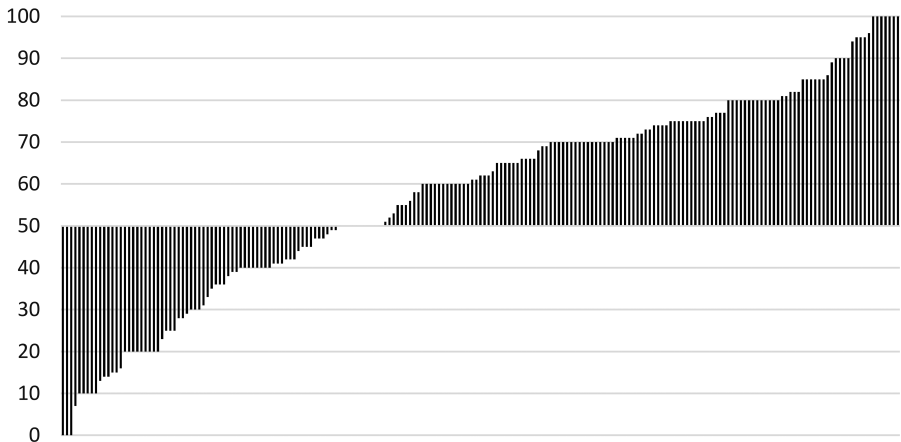


Rental Damages



### ESTIMATED PROBABILITY OF SPECIFIC PERFORMANCE BY CONDITION, MERGER SCENARIO

#### Merger Control



#### Merger Damages

