The Case for Specific Performance of Personal Service Contracts

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ABSTRACT: The per se rule against specific enforcement of personal service contracts is well established under Anglo-American contract law. At the same time, there is a well-developed literature suggesting that specific performance is often a superior remedy to money damages, and those arguments apply with equal or greater force to personal service contracts. We, therefore, argue that this per se rule is mistaken. The per se rule has been justified by the need to avoid involuntary servitude, preserve personal autonomy, and husband judicial resources. We argue that these claims cannot justify a per se rule against specific performance, particularly as at-will employees could not be subject to such a remedy and employees with definite term contracts who could be subject to an injunction are generally sophisticated, well-compensated, elite workers with specialized and often hard-to-replace skills. We argue that the traditional rule allowing specific performance where money damages are inadequate should be applied to personal service contracts in situations where the parties explicitly agree to such a remedy and there is rough equality of bargaining power, such as when employees are represented by counsel. We then apply our proposed rule to three cases, which we label The Coach, The Schoolteacher, and The Pop Star. These stylized examples represent typical employees with fixed term contracts, and we show why our proposal would award specific performance in some cases but not others.

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INTRODUCTION

Every American lawyer learns in 1L contracts class that personal service agreements will not be specifically enforced.[1] At most, a wronged plaintiff can

1. *See, e.g.*, ROBERT S. SUMMERS, ROBERT A. HILLMAN & DAVID A. HOFFMAN, CONTRACT AND RELATED OBLIGATION: THEORY, DOCTRINE, AND PRACTICE 418 (8th ed. 2021) ("Courts will not

obtain a negative injunction against a breaching party to such a contract.[2] More often, the promisor will be left with only a claim for money damages, a claim that is often undercompensatory and difficult to collect. Since the publication of Fuller and Perdue's landmark article, *The Reliance Interest in Contract Damages*, academic and policy debates over contract law have focused on the question of remedies.[3] In the last generation, this led to an intense debate over the desirability of specific performance as a remedy and the proper scope of

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grant specific performance of a contract to provide personal services."); E. ALLAN FARNSWORTH, CAROL SANGER, NEIL B. COHEN, RICHARD R.W. BROOKS & LARRY T. GARVIN, CONTRACTS: CASES AND MATERIALS 946–47 (10th ed. 2023) (discussing service contracts and specific performance).

2. *See, e.g.*, Lumley v. Wagner (1852) 64 Eng. Rep. 1209, 1210, 1216–17; 5 De G. & Sm. 485, 485, 501 (granting a negative injunction for breach of a personal service contract).

3. *See generally* L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52 (1936) (arguing that the law of contract damages cannot be fully understood or applied without considering the underlying purposes and policies that guide contract enforcement, specifically emphasizing the role of the "reliance interest" as a measure of recovery in breach of contract cases); L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 2*, 46 YALE L.J. 373 (1937) (exploring the judicial protection of the reliance interest in contract damages, focusing on situations where courts limit recovery to reliance damages rather than expectancy damages due to issues such as uncertainty, remoteness, or the perceived disproportionate liability of the defendant). The literature on contract remedies, particularly damages, is vast. Recent examples include Melvin A. Eisenberg, *Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law*, 93 CALIF. L. REV. 975 (2005) [hereinafter Eisenberg, *Actual and Virtual Specific Performance*] (discussing the tension between contract law principles and remedial doctrines, particularly in expectation damages and specific performance); Richard Craswell, *Contract Remedies, Renegotiation, and the Theory of Efficient Breach*, 61 S. CAL. L. REV. 629 (1988) (critiquing narrow economic views on efficient breach theory); William P. Rogerson, *Efficient Reliance and Damage Measures for Breach of Contract*, 15 RAND J. ECON. 39 (1984) (examining contract enforcement, investment inefficiencies, and damage measures); Dawinder S. Sidhu, *The Immortality and Inefficiency of an Efficient Breach*, 8 TRANSACTIONS: TENN. J. BUS. L. 61 (2006) (arguing efficient breach encourages immoral behavior, undermining law and societal trust); Melvin Aron Eisenberg, *The Principle of* Hadley v. Baxendale, 80 CALIF. L. REV. 563 (1992) (critiquing the principle established in *Hadley v. Baxendale*, which limits recovery for consequential damages in contract breaches to those damages foreseeable at the time the contract was made); Aaron S. Edlin, *Cadillac Contracts and Up-Front Payments: Efficient Investment Under Expectation Damages*, 12 J.L. ECON. ORG. 98 (1996) (discussing that combining up-front payments with expectation damages prevents inefficient breaches by aligning incentives); Melvin A. Eisenberg & Brett H. McDonnell, *Expectation Damages and the Theory of Overreliance*, 54 HASTINGS L.J. 1335 (2002) (arguing that, in practice, overreliance is rare due to institutional factors and that modifying the expectation measure to address residual issues is generally not cost-effective); George Triantis, *Promissory Autonomy, Imperfect Courts, and the Immorality of the Expectation Damages Default*, 45 SUFFOLK U. L. REV. 827 (2012) (explaining expectation damages may not always align with diverse contract motivations); Phyllis G. Coleman, *Punitive Damages for Breach of Contract: A New Approach*, 11 STETSON L. REV. 250 (1981) (discussing how Florida courts (and elsewhere) recognize exceptions to punitive damages for breach of contract); John H. Barton, *The Economic Basis of Damages for Breach of Contract*, 1 J. LEGAL STUD. 277, 277 (1972) ("[T]he common law of contract failed to survive the industrial revolution. It is now applied only in the interstices among specialized statutory and judge-made rules dealing with specific contract types."); Nathan B. Oman, *The Failure of Economic Interpretations of the Law of Contract Damages*, 64 WASH. & LEE L. REV. 829 (2007) [hereinafter Oman, *Failure of Economic Interpretations*] (discussing how economic theories fail to explain contract law damages); Michael B. Kelly, *The Phantom Reliance Interest in Contract Damages*, 1992 WIS. L. REV. 1755 (arguing for reliance damage replacement with a revised expectation interest approach); and Nathan B. Oman, *Why There Is No Duty to Pay Damages: Powers, Duties, and Private Law*, 39 FLA. ST. U. L. REV. 137 (2011) (arguing that the law grants plaintiffs power to extract wealth but does not impose compensatory duties).

its availability.[4] This work, however, has almost uniformly stopped short of endorsing the specific performance of personal service contracts.[5] Rather, commenters have tended to recite hoary shibboleths about involuntary servitude, problems of judicial administration, and the dangers faced by vulnerable workers without stopping to consider whether the arguments handed down in the first and second semesters of law school are actually correct.[6] In this Article, we argue that they are not. In some cases, we believe that specific performance should be available as a remedy for breach of personal service contracts when explicitly agreed to by the parties in writing.

The discussion—or rather lack of discussion—of specific performance of personal service contracts ignores two important facts. First, most employment agreements are at-will contracts.[7] Employees can generally quit at any time, for any reason, or for no reason at all without breaching their contracts. For most personal service contracts, then, the question of specific performance simply cannot arise. Furthermore, such at-will agreements govern the employment contracts of nearly all low-wage, low-skill workers, as well as the vast majority of middle-income earners.[8] Contracts in which employees actually promise to work for some specified period of time are rare. These are the corporate CEOs, professional athletes, and successful entertainers of the employment market.[9] They are generally not the huddled masses and prostrate

4. *See, e.g.*, Aaron S. Edlin & Stefan Reichelstein, *Holdups, Standard Breach Remedies, and Optimal Investment*, 86 AM. ECON. REV. 478, 492 (1996) (discussing how specific performance promotes efficient investment; expectation damages may not).

5. *See, e.g.*, Eisenberg, *Actual and Virtual Specific Performance*, *supra* note 3, at 1036 ("Where an employee breaches an employment contract, an employer will often be unable to achieve virtual specific performance because she will be unable to find an equivalent employee. Nevertheless, specific performance should not (and will not) be awarded to an employer because of a special moral problem: a decree ordering an employee to specifically perform an employment contract would seem too much like involuntary servitude or peonage.").

6. *See, e.g.*, JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 128(E)(2), at 823 (5th ed. 2011) ("It is clear that personal service promises will not be specifically enforced. While the original resistance to specific enforcement of such promises was based on the difficulties of judicial supervision, the prohibition of involuntary servitude under the Thirteenth Amendment to the Constitution of the United States may also be violated by such an equitable decree." (footnote omitted)).

7. This fact has been much lamented by commentators. *See, e.g.*, Michael J. Phillips, *Toward A Middle Way in the Polarized Debate over Employment at Will*, 30 AM. BUS. L.J. 441, 449 (1992) ("Since the late 1960s, at least, scholarly reactions to the developments just described generally have been positive, and evaluations of employment at will correspondingly negative."); Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 948 (1984) ("The judicial erosion of the older position has been spurred on by academic commentators, who have been almost unanimous in their condemnation of the at-will relationship, often treating it as an archaic relic that should be jettisoned along with other vestiges of nineteenth-century laissez-faire.").

8. *See, e.g.*, Charles J. Muhl, *The Employment-at-Will Doctrine: Three Major Exceptions*, MONTHLY LAB. REV., Jan. 2001, at 3, 3 ("[S]ince the last half of the [nineteenth] century, employment in each of the United States has been 'at will,' or terminable by either the employer or employee for any reason whatsoever.").

9. *See, e.g.*, Stewart J. Schwab & Randall S. Thomas, *An Empirical Analysis of CEO Employment Contracts: What Do Top Executives Bargain For?*, 63 WASH. & LEE L. REV. 231, 247 (2006) (examining a dataset of 375 CEO contracts at the largest U.S. corporations and finding that the bulk of contracts

proletariat of the legal imagination. They tend to be well-compensated, sophisticated parties that often have considerable bargaining power with their employers. To be sure, there are situations in which employment contracts for a specified term are used with less well-situated employees, but such contracts are sufficiently unusual that we should reconsider a per se rule based on a vision of powerful bosses and powerless employees.[10]

Second, the explosion of intellectual interest in contract remedies over the last few generations has produced a theoretical reassessment of specific performance, at least outside of the personal service realm.[11] Law and economics scholars have come to recognize the difficulty, if not impossibility, of creating optimal incentives for contracting parties using only money damages.[12] Some of these theorists have gone so far as to argue that the common law's presumption in favor of money damages is mistaken and specific performance should be the default remedy.[13] It seems relatively uncontroversial today to claim that in at least some situations specific performance is economically superior to money damages. Beyond the confines of law and economics scholarship, promissory and autonomy theorists have argued that the moral reasons underwriting our commitment to legal enforcement of contracts can also justify coercing parties into actually performing their obligations.[14] Indeed, some promissory theorists have gone so far as to argue that awarding money damages rather than specific performance is pernicious because it undermines promissory morality.[15]

Despite these developments, however, there has been a reflexive unwillingness to revisit Anglo–American law's per se rule against specific

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are for a definite term, with the most common term being three years and the second most common being five years); Stuart L. Gillan, Jay C. Hartzell & Robert Parrino, *Explicit vs. Implicit Contracts: Evidence from CEO Employment Agreements*, 64 J. FIN. 1629, 1643 (2009) (finding a median contract term of three years for CEOs in the S&P 500).

10. The most prominent examples, including schoolteachers, are discussed *infra* Part III.

11. *See, e.g.*, EDWARD YORIO, CONTRACT ENFORCEMENT: SPECIFIC PERFORMANCE AND INJUNCTIONS § 23, at 517–55 (1989) (addressing arguments against specific performance); Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 271 (1979) (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) ("[D]elineating the circumstances under which courts should simply enforce a stipulated remedy clause or grant relief to the innocent party in the form of damages or specific performance."); Anthony T. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 355 (1978) (skeptically examining "conventional explanations for the courts' refusal to enforce private contractual provisions purporting to grant the promisee a right to compel specific performance").

12. *See, e.g.*, Rogerson, *supra* note 3, at 39 ("[D]amage measures commonly used to enforce contracts are shown to produce inefficiently high levels of investment and to be Pareto-ranked from best to worst as follows: specific performance, expectation damages, and reliance damages.").

13. *See, e.g.*, Schwartz, *supra* note 11, at 274–98 ("Specific performance is the most accurate method of achieving the compensation goal of contract remedies because it gives the promisee the precise performance that he purchased."); Ulen, *supra* note 11, at 364–93 ("[S]pecific performance offers the most efficient mechanism for protecting subjective values attached to performance.").

14. *See, e.g.*, Margaret Gilbert, *Agreements, Coercion, and Obligation*, 103 ETHICS 679, 680–82 (1993) (discussing the obligation argument).

15. *See* Seana Shiffrin, *Could Breach of Contract Be Immoral?*, 107 MICH. L. REV. 1551, 1552–53 (2009); Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 727–28 (2007).

enforcement of personal service contracts.[16] In part the fault lies with constitutional law. In the United States, the Thirteenth Amendment, adopted in the wake of the Civil War, prohibits slavery and "involuntary servitude."[17] Because the rule against specific performance of personal service contracts has never been seriously questioned by American courts, the U.S. Supreme Court has never passed on the question of whether such a remedy would run afoul of the Thirteenth Amendment. However, many lawyers and academics casually assume that the prohibition on "involuntary servitude" reaches specific performance of such contracts.[18] However, as we argue below,[19] neither the history of the Thirteenth Amendment, the Court's case law on the topic, nor an analysis of the arguments justifying the abolition of slavery require a per se rule against specific enforcement of personal service contracts. To be sure, in some cases coercing performance of agreements might rise to the level of "involuntary servitude," but it cannot be plausibly argued that specific performance of *any* personal service contracts creates conditions akin to chattel slavery. If anything, there is something morally and constitutionally obtuse about equating the position of a wealthy, well-represented executive or entertainer—possessed of substantial bargaining power—required to perform a limited contract of personal service with the position of someone condemned by birth to a life of vicious subordination and unrequited toil. Executives and entertainers are not slaves.

There are also good reasons to believe that the absence of specific performance creates special problems in the context of personal service contracts. Contracts that involve the commitment to perform obligations over time exist to give parties assurances of performance.[20] Without such assurances, parties that promise to exchange quid for quo face a danger that promisors will abscond with quid and never deliver quo. Unless promisees can be protected from the risk of such opportunism, they will avoid transaction-specific investments that could potentially be lost in the event of breach.[21] Because fixed term personal service contracts inevitably involve obligations to perform over time, these concerns are present with special force in that setting. And, indeed, a sizable literature posits exactly this concern—an underinvestment in employees at both the general (think student loans and

16. *See* Nathan Oman, *Specific Performance and the Thirteenth Amendment*, 93 MINN. L. REV. 2020, 2022, 2030–34 (2009).

17. U.S. CONST. amend. XIII, § 1.

18. *See, e.g.*, Oman, *supra* note 16, at 2022 n.8.

19. *See* discussion *infra* Part II and accompanying notes.

20. *See* OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM 66–67 (1985) (discussing the problem of opportunism in joint economic activity).

21. Indeed, there is a sense in which contract as a legal institution is only economically necessary in situations involving transaction-specific investments. In situations where there are no such investments to be made, contracts are not necessary. Everyone can transact in a spot market.

unpaid internships) and specific (training, proprietary disclosures, or hiring of other employees and teams to create synergies) level.[22]

Lacking the remedy of specific performance, employers seek alternative devices that are less effective and may prove more intrusive for employees.[23] Prominent examples include everything from complex claw back provisions in executive compensation contracts to noncompete agreements signed by fast food employees. Such contractual provisions are a second-best effort to solve the problem created by the per se rule against specific performance of personal service contracts. In many cases, a credible commitment to work for a specified term would be preferable to baroque bonus rules or efforts to police behavior after the employment relationship has ended.

This Article lays out an analysis of the relationship between contract law remedies, negotiation, and contract law theory. It argues that in cases where it is relatively easy for parties to negotiate *ex post*, specific performance has a number of characteristics that may make it a more attractive remedy than liquidated or money damages. It then goes on to apply this analysis to the specific performance of personal service contracts.[24] It argues that there are special concerns in the case of such contracts that can mitigate against specific performance.[25] These concerns, however, do not justify the current per se rule against specific performance of employment contracts. Rather, we argue that courts should allow specific performance where these concerns are either absent or well mitigated. While this approach will cover only a small percentage of personal service contracts, given the dynamics of a labor market dominated by at-will employees, such a rule would be important in the minority of high-value employment contracts that might conceivably be specifically enforced.

We argue that the per se rule against the specific enforcement of personal service agreements should be dispensed with. This does not mean that there should be a per se rule in favor of their enforcement. Rather, we believe that the enforcement of personal service contracts should be analyzed under the ordinary rules governing equitable relief, buttressed by two protections specific to the personal services context.

First, consistent with existing law, specific performance should be treated as an extraordinary remedy, available only when the plaintiff can show that legal remedies such as money damages are inadequate.[26] Where employers can readily obtain substitute labor in the market or when a court (*ex post*) or the parties (*ex ante*, through a liquidated damages provision) can easily value

22. See *infra* Section I.D, discussing this literature in detail. As discussed in more detail in that Section, there is one place in our economy where the employer does have a robust right to specific performance of personal service contracts: the military.

23. *See infra* Section I.D.

24. *See infra* Part I.

25. *See infra* Part II.

26. *See, e.g.*, RESTATEMENT (SECOND) OF CONTS. § 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.").

an employee's performance under a contract, specific performance should not be available.[27]

Second, because personal service contracts raise special concerns about consent, it seems prudent to place additional limitations on the availability of the remedy. This is consistent with long-standing equitable principles. Specific performance has always been a discretionary remedy, and when sitting in equity, courts have retained the power to impose substantive requirements on contracts that were not necessarily applicable when awarding legal remedies.

Most dramatically, prior to the adoption of unconscionability as a general defense to contractual liability under the *Uniform Commercial Code* and the *Restatement (Second) of Contracts*, courts sitting in equity refused to grant specific enforcement of particularly harsh or inequitable terms, even though such terms might be enforceable at law.[28] In the same spirit, courts should ensure that there are no gross inequalities of bargaining power prior to awarding specific performance of a personal service contract. One set of easy indicia of such rough equality are employees who are represented by legal counsel or specialized agents. This is often the case with elite employees such as CEOs or athletes and entertainers represented by talent agencies.[29]

Specific performance of personal service contracts should also be confined to contracts in which the parties affirmatively agree that it will be the remedy in the event of breach. This would be a necessary and not a sufficient condition. Thus, such a rule would not allow parties to per se contract into specific performance. Rather, it would be a mechanism to safeguard employees against subsequent surprise.

Finally, as in the case of noncompete agreements, temporal limits should be placed on the specific enforcement of personal service contracts.[30] Borrowing state constitutional limits on contract enforcement designed to avoid involuntary servitude, we propose a rule that personal service contracts cannot be specifically enforced beyond one year.[31]

This Article proceeds as follows: In Part I, we lay out the advantages of the specific performance of at least some personal service contracts. In Part II, we respond to the standard objections to specific performance in such cases, arguing that whatever the merits of the counterarguments, they cannot justify a per se rule against specific performance. Finally, in Part III, we apply our

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27. *See id.* § 360 (setting forth the factors to be considered by a court in determining the adequacy of money damages).

28. *See, e.g.*, Campbell Soup Co. v. Wentz, 172 F.2d 80, 83 (3d Cir. 1948) ("The reason that we shall affirm instead of reversing with an order for specific performance is found in the contract itself. We think it is too hard a bargain and too one-sided an agreement to entitle the plaintiff to relief in a court of conscience.").

29. *See supra* note 9 and accompanying text.

30. *Cf.* 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 5.03, at 5-52 to -53 (4th ed. 2019) ("[T]he restraint may not cover a greater geographical area or a longer time than is necessary to protect the promisee's legitimate interests." (footnotes omitted)).

31. *Cf.* OHIO CONST. of 1802, art. VIII, § 2 ("Nor shall any indenture of any negro or mulatto, hereafter made and executed out of the State, or if made in the State, where the term of service exceeds one year, be of the least validity. . . .").

framework to three different kinds of personal service contracts that commonly deviate from the general rule of at-will employment—"The Coach," "The Schoolteacher," and "The Pop Star"—demonstrating how a nuanced approach would avoid overreaching while providing a remedy against sophisticated parties who seek to renege on their agreements at the expense of others.

I. THE ADVANTAGES OF SPECIFIC PERFORMANCE OF PERSONAL SERVICE CONTRACTS

The shortcomings of monetary remedies for breach of contract are well known and have formed the heart of the traditional case for specific performance. In this Section, we briefly review those shortcomings, arguing that they are particularly problematic in a subset of personal service contracts. Those shortcomings include the difficulty for courts *ex post* and the parties *ex ante* to accurately estimate damages, the undercompensatory nature of both money damages and negative injunctions, and the fact that money damages allocate all of the gains from breach to the breacher. As will be discussed, undercompensation of the breachee in personal service contracts also exacerbates the general phenomenon of employer underinvestment in employees. As a result, employers rely on a variety of second-best solutions, including noncompete clauses and clawback provisions, that are arguably greater infringements on employee autonomy than an order to specifically perform an obligation that one has explicitly contracted to complete. Thus, all of the arguments that justify specific performance of contracts in general apply with equal—if not greater—force to personal service contracts.

A. DAMAGES ARE OFTEN DIFFICULT TO CALCULATE AND UNDERCOMPENSATORY

Remedies for breach of contract have numerous functions. They provide compensation or some other repair for the wrong of breach. They enforce the underlying contractual obligation, coercing performance subject to institutional and normative side constraints. Inevitably, however, remedies allocate the costs and benefits of breach. The insight of the venerable efficient breach argument is that breach can present a net positive opportunity and that expectation damages divide the value of that opportunity between the breachee and the breacher, allocating all gains above the value of performance to the breachee to the breacher.[32] A key assumption of the efficient breach argument is that sometimes courts are in a good position *ex post* to determine what the value of performance would have been to the breachee, and that they are doctrinally and institutionally capable of delivering this value.[33] Neither

32. *See* A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 33–36 (4th ed. 2011) (detailing why the expectation remedy leads to an efficient outcome in breach of contract cases). An alternative formulation is the claim that expectation damages provide a rule that mirrors that which the parties themselves would have chosen had they been able to fully specify their contract. *See* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 307 (2004) ("[M]oderate damage measures lead to performance in circumstances resembling those . . . under mutually beneficial completely specified contracts.").

33. SHAVELL, *supra* note 32, at 301–04.

of these assumptions holds true in many cases. Often it will be very difficult for the court to determine the value of performance *ex post*, and various doctrines prevent the breachee from being fully compensated.[34]

For example, limiting doctrines such as requirements of certainty and the rule in *Hadley v. Baxendale* tend toward undercompensatory damages.[35] If the parties have the ability to accurately determine the value of performance *ex ante*, they may liquidate damages through contract.[36] As a functional matter, this alleviates the information problems faced by courts in valuing performance by harnessing the private information of the parties. Such clauses are not without risk, however. As a doctrinal matter, they must represent the parties' determination of the value of performance.[37] If the number appears to be set too high, as determined by a court *ex post*, then the agreement will be unenforceable as a penalty clause.[38]

In many instances, however, the value of performance will be uncertain both *ex ante* (undermining the ability to effectively liquidate damages) and *ex post* (undermining the ability of the court to accurately determine damages). In such a situation, money damages will not give the breachee the value of performance because under blackletter law, damages that cannot be calculated with certainty cannot be awarded.[39] This is the classic situation in which traditional equitable doctrine would award specific performance, an option not currently available in the case of personal service contracts.

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34. *See, e.g.*, Freund v. Wash. Square Press, Inc., 314 N.E.2d 419, 421 (N.Y. 1974) (holding that author could recover only nominal damages for publisher's breach of publication contract in the absence of a "reasonable estimate" of author's loss as a result of breach); Chi. Coliseum Club v. Dempsey, 265 Ill. App. 542, 550–52 (1932) (holding that promoter could not recover damages for boxer's breach of a contract to participate in a boxing match where promoter could not offer evidence proving its damages "to a reasonable degree of certainty").

35. The principle of *Hadley v. Baxendale* states that in the event of a contract breach, recoverable damages are limited to those that arise naturally from the breach or those that both parties could reasonably foresee at the time of the contract as the probable result of the breach. *See generally* Hadley v. Baxendale (1854) 156 Eng. Rep. 145; 9 Ex. 341 (holding that plaintiff could only recover consequential damages that were naturally foreseeable results of breach at the time of contracting). *See also* RESTATEMENT (SECOND) OF CONTS. § 351(1) (AM. L. INST. 1981) ("Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.").

36. RESTATEMENT (SECOND) OF CONTS. § 356(1) (AM. L. INST. 1981) ("Damages for breach by either party may be liquidated in the agreement . . . .").

37. *Id.* (explaining that liquidated damages must be "reasonable in the light of the anticipated or actual loss caused by the breach").

38. Many commenters have urged the enforcement of liquidated damages provisions that appear to be a penalty when the contracting parties are sophisticated. *See, e.g.*, Jody P. Kraus & Robert E. Scott, *The Case Against Equity in American Contract Law*, 93 S. CAL. L. REV. 1323, 1325–29 (2020). Although we agree with that proposal, it is not a substitute for specific performance for all of the reasons detailed throughout this Article.

39. RESTATEMENT (SECOND) OF CONTS. § 352 (AM. L. INST. 1981) ("Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty.").

B. NEGATIVE INJUNCTIONS ARE NOT A SUBSTITUTE FOR SPECIFIC PERFORMANCE

One might object that the practical impact of the rule against specific performance of personal service contracts is trivial because the expansion of the *Lumley* doctrine[40] and the ubiquity of covenants not to compete allow for a remedy that is just as good. Even if one cannot get a court to order specific performance, goes the argument, one can get a court order prohibiting a breaching promisor from providing such personal services elsewhere, which has the effect of forcing the party into performance.[41] This argument, however, misconceives the law surrounding the *Lumley* doctrine, as well as the economic realities of the personal service contracts our proposal is designed to address. Specifically, negative injunctions: (1) may not, as a matter of established doctrine, serve to coerce performance, and have limited effect against the specialized employees to which our proposal would apply who can, and often do, refuse to work at all in the face of a negative injunction; (2) are relevant only when a competing offer emerges; leaving ordinary opportunism and hold up problems untouched; and (3) fail to recognize the superiority of specific performance in facilitating renegotiation when the parties possess private information regarding the costs and benefits of performance, as will often be the case in personal service contracts.[42]

1. The *Lumley* Doctrine

The established American rule is that when the effect of a negative injunction would be "to compel a performance involving personal relations" it will not be issued.[43] As a doctrinal matter, this rule limits the availability of negative injunctions to those cases where they do not in effect force performance. For example, in *Paramount Pictures Corp. v. Davis*, a movie studio obtained a negative injunction from the lower court against Bette Davis, prohibiting her

40. The *Lumley* doctrine dictates that courts must refuse to issue affirmative injunctions for personal services but will issue negative injunctions to prevent competition. *See* Lumley v. Wagner (1852) 64 Eng. Rep. 1209, 1210, 1216–17; 5 De G. & Sm. 485, 485, 501 (granting a negative injunction for breach of a personal service contract).

41. 48 ELEANOR L. GROSSMAN, FLA. JURIS. 2D *Specific Performance* § 3, Westlaw (database updated Aug. 2024) ("[T]he enforcement of negative covenants in contracts by an injunction against their breach, may result in specific performance of the contract."); Geoffrey Christopher Rapp, *Affirmative Injunctions in Athletic Employment Contracts: Rethinking the Place of the* Lumley *Rule in American Sports Law*, 16 MARQ. SPORTS L. REV. 261, 281 (2006) ("[T]he law and economics line of thinking on specific performance does not distinguish between affirmative and negative injunctions and predicts bargaining will occur no matter what . . . .").

42. *See, e.g.*, Elliot Axelrod, *The Efficacy of the Negative Injunction in Breach of Entertainment Contracts*, 46 J. MARSHALL L. REV. 409, 419–24 (2013) (discussing these requirements in the context of entertainment contracts).

43. RESTATEMENT (SECOND) OF CONTS. § 367(2) (AM. L. INST. 1981) ("A promise to render personal service exclusively for one employer will not be enforced by an injunction against serving another if its probable result will be to compel a performance involving personal relations the enforced continuance of which . . . will be to leave the employee without other reasonable means of making a living.").

from working for any other studio.[44] On appeal, however, the higher court reversed on the grounds that "[i]t is clear that the injunctive order, although framed in prohibitory language, was intended to coerce or induce defendant into immediate affirmative action."[45] Hence, despite the *Lumley* doctrine, the strict adherence of the per se rule against specific performance in cases of personal service contracts takes remedial court orders off of the table in a large class of contract cases.

Leaving the doctrinal limits aside, there may be times when a negative injunction (such as a covenant not to compete or an injunction under *Lumley v. Wagner*) will be a reasonable substitute for specific performance because most of us cannot afford to take an extended period of time off from work. This is not the case, however, for many highly paid employees. For these contracting parties, a negative injunction is not the same as an order of specific performance for purposes of *ex post* bargaining, because such highly paid employees can afford to simply not work during the injunction period.

2. Opportunism

Moreover, negative injunctions are only beneficial in those cases when the employee threatens to breach to work for a competitor. It does not address opportunistic behavior such as holdout problems present among highly paid employees in some industries.[46]

Breach because of regret or opportunism creates inefficiencies by limiting the ability of workers to credibly commit to contracts, thereby disincentivizing employers to engage in transaction specific investments, such as worker training, that would otherwise boost productivity. Such situations are not simply a theoretical possibility. Opportunistic holdouts and contractual regret are considered significant problems in some industries, such as professional sports, that are characterized by long-term contracts and star players with substantial leverage.[47] As demonstrated in the following subsection, the

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44. *See* Paramount Pictures Corp. v. Davis, 39 Cal. Rptr. 791, 795 (Ct. App. 1964) (discussing the injunction issued in the lower court).

45. *Id.* at 798.

46. *See* Rapp, *supra* note 41, at 270; *see also infra* notes 48–58 and accompanying text (discussing holdout problems in more detail).

47. Cameron J. Turkzadeh, Note, *A Players' League: Short- and Long-Term Solutions to Contract Holdouts in the NBA*, 45 COLUM. J.L. & ARTS 525, 527 (2022) ("The Harden situation, however, is representative of a larger trend among players in the NBA who believe their contracts no longer reflect their worth, or who may simply wish to be traded. Many threaten to 'hold out' from performing their obligations until their demands are met."). Within the NFL, once rife with player holdout problems particularly during the preseason and training camp, it was once assumed that the severe penalties against player holdout incorporated in the 2020 collective bargaining agreement would end such episodes. Instead, it has given rise to the "hold-in" phenomenon, in which a player attends preseason or training camp obligations in order to avoid sanctions but refuses to practice or fully participate. Joel Corry, *Agent's Take: Inside Look at the Consequences and Dynamics Facing Nick Bosa, Zack Martin and Other Holdouts*, CBS SPORTS (Aug. 10, 2023, 10:36 AM), https://www.cbssports.com/nfl/news/agents-take-inside-look-at-the-consequences-and-dynamics-facing-nick-bosa-zack-martin-and-other-holdouts [https://perma.cc/96LL-R2JL]; *see also infra* notes 48–58 and accompanying text (discussing holdout and sit out problems).

current unavailability of specific performance may create incentives for workers to threaten breach opportunistically in order to extract additional payments from employers, even when a negative injunction or noncompete clause is available.

3. Specific Performance and Information Revelation

Such opportunism may exist even in the face of a competing offer, due to the parties' inability to credibly reveal private information to each other and to the court. As will be demonstrated, injunctions and noncompete agreements allow workers to breach regretted contracts without bearing the full costs of breach in a manner that specific performance avoids.

a. Benefit of Performance to the Employer Exceeds Cost of Negative Injunction to Employee

When the benefit of performance to the employer is significantly higher than the cost the negative injunction imposes on the employee, a negative injunction gives the breaching party a significantly better bargaining position than court-ordered specific performance. Such asymmetry between the value of performance and the cost of the negative injunction is likely in cases of employees with very high, idiosyncratic, and difficult to replace value, such as high-profile executives, athletes, and entertainers whose presence creates a valuable but difficult-to-price cachet. Moreover, because only the breaching employee, and not the employer, is aware of the true cost imposed by the negative injunction, the negative injunction does not force the same degree of information revelation as would an order of specific performance.[48]

Lemat Corp. v. Barry provides a good illustration.[49] *Lemat* involved professional basketball player Richard F. Barry III. Barry signed a contract to play with Oakland for the 1967–68 season, in violation of his contract with the San Francisco Warriors.[50] In the face of an injunction prohibiting him from playing for Oakland, Barry sat the season out, rather than perform under his contract with San Francisco.[51] San Francisco sued for money damages, as compensation for the loss of Barry's play, in addition to the negative injunction.[52] The trial court refused to award damages, despite finding that San Francisco suffered losses not compensated by the negative injunction:

> The court found . . . that if Barry had fulfilled his contract and played for the Warriors during the 1967–1968 season, their gate receipts would have grown by at least 25 percent (the average figure for growth of gate receipts in the NBA) to approximately $750,000, rather than the approximately $346,000 received that season. . . . *If Barry had*

48. *See infra* note 60 and accompanying text (providing a relevant example).

49. Lemat Corp. v. Barry, 80 Cal. Rptr. 240, 242–43 (Ct. App. 1969); *see also* DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 170–71 (1991) (discussing *Lemat*).

50. *Lemat*, 80 Cal. Rptr. at 241–42.

51. *Id.* at 243–44.

52. *Id.* at 243.

> *played for the Oaks during the 1967–1968 season, the Warriors' gate receipts for that season would have been even less.*[53]

In other words, the negative injunction reduced San Francisco's losses, but did not fully compensate it for Barry's breach. In the end, negative injunctions protect the nonbreaching party against losses from the breaching party performing for someone else. They don't compensate the nonbreaching party for the lost performance itself. This becomes particularly significant when the firm has made specific investments in the employee that it intended to recoup during the contracting period, as will be the case in many personal service contracts.

Consider a stylized version of the *Lemat* case.[54] In order to simplify the illustration, consider only net costs and benefits and imagine that the net benefit to San Francisco of Barry completing his contract is $400. Because Barry, however, dislikes playing for San Francisco for whatever reason, Barry values the cost of completing the contract at $500. Finally, if Barry breaches, San Francisco can obtain a negative injunction that will prohibit Barry from playing for Oakland, thereby imposing a $300 net loss on Barry. Because in this hypothetical (as in the actual case) San Francisco cannot credibly disclose information about its benefits from Barry's performance to the court, damages cannot be recovered.

In this situation, Barry has an incentive to breach.[55] By doing so, he avoids the $500 net cost he would incur from performance. San Francisco can impose a $300 net cost on him through the negative injunction, but this is insufficient to incentivize performance. Finally, San Francisco will be unable to make additional payments to Barry to induce him to return because Barry will demand at least $500, which San Francisco will be unwilling to pay. Barry has been able to avoid performance of a regretted contract. His breach imposes a $400 net loss on San Francisco, but he internalizes only $300 of that loss. In the case of this transaction, there is an efficiency loss. More importantly, employers will respond to uncertainty created by the current rule by reducing transaction-specific investments, thereby creating systemic inefficiencies.

Now consider the case where Barry values his cost of performance at $400 but the net benefit to San Francisco is $500. Again, under current law, Barry has an incentive to breach, not to avoid a regretted transaction but to opportunistically extract additional payments from San Francisco. San Francisco

53. *Id.* (emphasis added).

54. *See id.* at 242–43.

55. These examples assume that Oakland values Barry's performance at roughly the same as the $300 cost to Barry of the negative injunction. If this is not the case—in other words, if the value of Barry's performance to Oakland is higher than the value of Barry's performance to San Francisco—then specific performance is unnecessary. Oakland should bargain with San Francisco to obtain Barry's release. The fact that they do not do so suggests that Barry is capturing much of the value of his performance with Oakland. This is entirely plausible. When Barry and San Francisco bargained the value of Barry's future performance may have been uncertain. San Francisco took on the risk that Barry wouldn't turn out in return for the lion's share of the upside if he proved successful. *Ex post*, Barry's value becomes clear, giving him more bargaining power with Oakland than he had with San Francisco.

can obtain a negative injunction against Barry, thereby imposing a $300 net cost, but this will be insufficient to induce Barry to perform. Barry can then demand that San Francisco make a payment to him in excess of his $400 net cost in exchange for returning to work. San Francisco will make such a payment so long as it is between $400 and $500, because doing so allows San Francisco to recover at least part of the $500 it would otherwise lose from Barry's breach. This is a classic case of an opportunistic breach. As to the specific transaction, it has perverse distributional consequences, allowing Barry to capture part of the surplus that he bargained away when he entered into the original contract. It does not have immediate efficiency problems, as Barry's services are being rendered to their highest value user.

b. Benefit of Performance to the Employer Less than Cost of Negative Injunction to Employee

The two simplified hypotheticals in Section II.B.3.a illustrate the superiority of specific performance when the costs imposed on Barry by the negative injunction are lower than the benefits of performance to San Francisco. As illustrated in this Section, however, specific performance provides efficiency benefits even when this is not the case. To illustrate, suppose that the value of performing for Oakland to Barry is $1,000. If, as in the first example in Section II.B.3.a, above, the costs to Barry of performing for San Francisco are $500, then Barry would be willing to pay up to $500 in order to escape the negative injunction and play for Oakland. This payment would fully compensate San Francisco for its loss. Indeed, San Francisco might be able to benefit from Barry's breach by extracting a payment in excess of the $400 value of his performance. Likewise, in the second case in Section II.B.3.a, in which the costs to Barry of performing his contract with San Francisco are $400, Barry will again pay to be released from the negative injunction. He will have to pay at least $500 to do so, again fully compensating San Francisco for its loss and perhaps allowing them to capture some additional portion of the benefit of Barry's performing for Oakland. In other words, where the costs of the negative injunction to Barry are very high it will be functionally equivalent to an order of specific performance, *provided that the parties can credibly assess the costs and benefits to each other and renegotiate.*

But the facts of *Lemat* illustrate the complexity of discerning the cost of performance. Suppose that Barry wanted to leave Oakland, not only because of the superior Warriors offer, but because he really disliked working for Oakland—perhaps he hated the owner or coach, perhaps he hated one or more teammates. The case becomes even clearer if we assume the competitive offer is from a team in a different geographic region, perhaps the New York Knicks. Now, the breach with Oakland involves additional benefits and costs beyond the value of the contract—perhaps Barry's wife loves New York, perhaps the children don't want to leave their schools in Oakland. The point, though, is that in the real world any given employment decision involves a calculus beyond simply the monetary terms of the two offers and those costs and benefits are known only to the breaching party. Specific performance can encourage

the revelation of that private information in a way that neither money damages nor negative injunctions can.

The true prevalence of this type of fact pattern is, of course, ultimately an empirical question. But it is certainly plausible to suppose that there will be many cases where a negative injunction will not be the equivalent of specific performance. First, as already noted, negative injunctions are useful only when an alternative employer enters the picture, which is not the case in the standard employee-holdout problem.[56] Second, as detailed above, this will also be the situation any time that the costs that a negative injunction imposes on a breaching party are less than the costs that breach imposes on the promisee. The fact that there are numerous cases where breaching employees sit out for all or part of a season rather than perform for their current employer suggests that these possibilities are relatively common.[57] To be sure, transaction costs will sometimes prevent parties from renegotiation. But cases such as Vanderbilt and Larry DiNardo, discussed in Part III, suggest that often renegotiation is possible. In short, in all likelihood there are efficiency gains from specific performance that cannot be realized by a negative injunction.

C. Specific Performance and Renegotiation

As noted in Section I.A above, money damages divide the value of breach when courts can determine the value of performance *ex post* and liquidated damages perform the same role when the parties can determine the value of performance *ex ante*.[58] The goal, however, remains the same in both cases—to divide the benefit of breach between the breacher and the breachee, assigning to the former all of the surplus in excess of the value of the performance to the latter.

Specific performance avoids this outcome. An order of specific performance does more than simply give the breachee performance in a case of breach. Indeed, there is no reason to suppose that an order of specific performance will actually result in performance.[59] If the value of breach to the breacher exceeds the value of performance to the breachee, then the breacher has an incentive to split that benefit with the breachee in exchange for a release from the order of specific performance. For her part, the breachee will prefer

56. *See supra* note 49 and accompanying text (discussing this in detail).

57. *See supra* note 49 and accompanying text; *see also* Giancarlo Ferrari-King, *20 Infamous Sports-Contract Holdouts: Who Won?*, BLEACHER REP. (Oct. 3, 2015), https://bleacherreport.com/articles/2573085-20-infamous-sports-contract-holdouts-who-won [https://perma.cc/96ZV-VN5Z] (describing twenty such cases); Scott Lewis, *9 NHLers Who Famously Held Out for a Trade*, SPORTSNET (Jan. 20, 2016, 10:12 PM), https://www.sportsnet.ca/hockey/nhl/9-nhlers-who-famously-held-out-for-a-trade [https://perma.cc/U6EQ-PSYR] (discussing nine such cases in the National Hockey League).

58. *See supra* Section I.A.

59. Yonathan A. Arbel, *Contract Remedies in Action: Specific Performance*, 118 W. VA. L. REV. 369, 393–95 (2015) (explaining that sometimes "post-judgment renegotiation" occurs in specific performance cases); *see also* Richard Holden & Anup Malani, *Renegotiation Design by Contract*, 81 U. CHI. L. REV. 151, 157–60 (2014) (discussing the impact of *ex post* renegotiation on the initial bargaining relationship between a contracting parties).

payment to specific performance provided that payment exceeds the value of performance, after accounting for the costs of monitoring and enforcing performance. The precise division of the surplus will depend on the relative bargaining power of the parties, both of whom will threaten performance to extract a greater share of the breach opportunity. The breacher will threaten performance unless the breachee agrees to a smaller share of the surplus, while the breachee will threaten not to release her rights under the injunction thus forcing performance unless she is given a larger share.

By forcing negotiation over the division of the surplus generated by breach, specific performance differs crucially from both expectation and liquidated damages. Both of those approaches create a de facto option price for breach.[60] A breacher can perform or alternatively can choose to breach provided that he pays either damages or the liquidated sum in the agreement. There is no negotiation over how to split the benefit of breach because the division of the surplus has already been determined, often (and, in the case of court awarded damages, always) on terms largely favorable to the breaching party. In contrast, specific performance requires the breacher to give to the breachee some portion of the surplus in excess of the value of performance to the breacher as agreed to by the breachee.[61]

A world in which the law's response to breach is an order of specific performance followed by negotiation between the parties has a number of attractive features. First, it relieves courts of the difficult task of valuing performance. This husbands judicial resources and avoids error costs because ultimately performance will be valued by the parties, who will almost always have superior information as compared to courts.[62] Second, to the extent that our

60. *See, e.g.*, Robert E. Scott & George G. Triantis, *Embedded Options and the Case Against Compensation in Contract Law*, 104 COLUM. L. REV. 1428, 1456 (2004) (characterizing "termination provisions as options embedded in contracts and the termination fee as effectively the price paid for the option enjoyed by the promisor"); Avery Wiener Katz, *The Option Element in Contracting*, 90 VA. L. REV. 2187, 2189 (2004) (describing liquidated damages clauses as "economically equivalent to a high option premium and a low strike price"). The so-called "option theory of contract" goes back to the work of Oliver Wendell Holmes, Jr. *See* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897) ("The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else."); *see also* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 150 (8th ed. 2011) ("This dictum, though overbroad, contains an important economic insight. In many cases it is uneconomical to induce completion of performance of a contract after it has been broken.").

61. There is always the danger that because of high bargaining costs the parties will be unable to reach an agreement in the face of an order of specific performance. We address this possibility, and mechanisms to limit the judicial costs of monitoring performance when renegotiation fails, in the following Part II. *See infra* Section II.E.

62. *See* Richard Craswell, *Offer, Acceptance, and Efficient Reliance*, 48 STAN. L. REV. 481, 501–04 (1996) (discussing the limited information available to courts and suggesting that the parties' information, even if imperfect, will be more complete than courts'); *see also* Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 S. CAL. INTERDISC. L.J. 389, 409 (1993) ("The assumption that courts are informed about buyer valuations but sellers are not is poorly defended . . . and seems implausible."); Eric A. Posner, *A Theory of Contract Law Under Conditions of Radical Judicial Error*, 94 NW. U. L. REV. 749, 769–74 (2000) (arguing that contract law should be specified based on the assumption that courts have little power to discern accurately the details of surrounding formation, performance, and breach of contract).

goal is to compensate the victim of breach, specific performance will be superior to money damages or negative injunctions. In the event of performance under the injunction, the breachee will receive exactly what she was promised. In the event of negotiation, the breachee can demand the full value of performance. This is in contrast to money damages which, as already noted, rarely result in full compensation to the nonbreaching party.[63] Third, the object of the order can always avoid performance if he wishes by paying the breachee an agreed upon sum. This avoids forced performance in cases where breach presents an opportunity whose value exceeds that of performance to the breachee.[64] It also mitigates concerns about the freedom or autonomy of the breaching party. The breacher remains free to change his mind and form alternative plans. He simply must pay for the ability to do so when those plans conflict with the contractual rights of counter parties.

Finally, negotiation after an order of specific performance may have attractive distributional consequences. If one believes, as theorists such as Peter Benson have argued, that by agreeing to a contract the promisor transfers to the promisee the right to performance, then there is an important sense in which any benefit available as a result of breach belongs to the promisee rather than the promisor.[65] The option theory of contract teaches us that money damages allow promisors to capture the upside value of that entitlement.[66] In contrast, specific performance followed by negotiation allows the breachee to capture a greater share of the value to which she is entitled, and any value captured by the breacher will be with the consent of the right holder. In short, the distribution of the surplus from breach is arguably more just under a system of injunction and negotiation than under a system of money damages. While we do not believe that this argument would justify providing specific performance of personal service contracts as a default remedy, it is worth noting that from a distributional point of view, specific performance is more attractive than money damages.

D. PERSONAL SERVICE CONTRACTS AND THE UNDERINVESTMENT PROBLEM

As already noted, the arguments summarized in Section I.C may apply with special force to personal service contracts. Most employees have at-will employment contracts for which the question of specific performance cannot arise.[67] Those employees who do have personal service contracts for which specific performance might be a possibility are disproportionately likely to be

63. Craswell, *supra* note 3, at 637 ("[E]xpectation damages as awarded in law often fall short of a truly compensatory measure due to the exclusion of such items as attorneys' fees, unmeasurable subjective losses, and 'unforeseeable' damages.").

64. *See id.* at 634–35 (explaining that the promisor will find it profitable to breach if presented with an alternative opportunity more valuable than that offered by the original contract).

65. *See* PETER BENSON, JUSTICE IN TRANSACTIONS: A THEORY OF CONTRACT LAW 319–20 (2019) ("I shall argue here that the conception of contractual relation reflected in contract law can be understood as a form of acquisition involving ownership[] . . . as between the contracting parties.").

66. *Id.* at 324.

67. Muhl, *supra* note 8, at 3.

"elite[]" workers with high-value, specialized skills that make it particularly difficult to value their services.[68] In such cases, money damages will tend to be systematically undercompensatory and performance will be under incentivized. The problem here is not simply that there might be inefficiently high levels of breach of such contracts. Rather, the anemic remedies available to employers may lead them to underinvest in human capital associated with employees.

Economists have long recognized the problem of underinvestment in human capital, both general and specific.[69] General training results in employee skills that are transferable to a number of firms and settings (for example, college education) and are typically paid by the employee.[70] Many individuals "spend large amounts of time and money" acquiring such "general human capital through formal education."[71] Because the labor market provides suboptimal incentives for such investment, however, investments in general human capital are inefficiently low under real-world conditions of imperfect contracting, credit constraints, and information asymmetry, among others.[72] This underinvestment is particularly acute in credit-constrained individuals (that is, low-income high-ability students) and serves as the rationale behind many government programs subsidizing general education, such as college.[73]

Specific training raises the worker's value to a particular firm, but not elsewhere, creating a bilateral monopoly. This training is typically paid by the employer, but not at efficient levels.[74] Examples of specific training would include the learning of skills idiosyncratic to a particular firm or learning the relevant players and processes. Employees may be reluctant to invest in such firm-specific learning, however, because of information asymmetries or for fear of employer holdup or firm failure.[75]

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68. Oman, *supra* note 16, at 2099.

69. *See* Gary S. Becker, *Investment in Human Capital: A Theoretical Analysis*, 70 J. POL. ECON. 9, 9 (1962).

70. Becker argued that, when workers are not credit constrained, they will efficiently invest in general training, as they are able to capture the full value of the investment in the form of future wages. *Id.* at 9–10. Later work, however, demonstrated that the labor market fails to provide incentives for efficient investment in general training and that this has distributional consequences. Underinvestment in general human capital is most severe for high-ability, low-income individuals and long-term contracts can only partially eliminate this inefficiency. *See* Felipe Balmaceda, *A Failure of the Market for College Education and On-the-Job Human Capital*, ECON. EDUC. REV. 1 (Aug. 19, 2021), https://www.sciencedirect.com/science/article/pii/S0272775721000844 (on file with the *Iowa Law Review*); GARY S. BECKER, HUMAN CAPITAL 61–66 (1964).

71. Balmaceda, *supra* note 70, at 1.

72. Chun Chang & Yijiang Wang, *Human Capital Investment Under Asymmetric Information: The Pigovian Conjecture Revisited*, 14 J. LAB. ECON. 505, 506 (1996).

73. Balmaceda, *supra* note 70, at 1–3, 12.

74. More recent models adopt a broader view of specific training under which training is differentially valuable across firms because, although the skills learned may be general, the weighing of those skills will be different across employers. Edward P. Lazear, *Firm-Specific Human Capital: A Skill-Weights Approach*, 117 J. POL. ECON. 914, 915 (2009) ("[M]ost specific human capital is actually general human capital, where the uses are specific to the firm.").

75. *See generally* Joseph Raffiee & Russell Coff, *Micro-Foundations of Firm-Specific Human Capital: When Do Employees Perceive Their Skills to Be Firm-Specific?*, 59 ACAD. MGMT. J. 766 (2016) (summarizing these arguments).

This research is directly related to the inability of employers to fully recover from a breaching employee. A soldier, sailor, or airman who "quits" (normally referred to as desertion) before their contract is up will find him or herself in the brig.[76] As a result, the military need worry much less that its employees will quit opportunistically, and therefore, it invests enormous resources in both general and specific human capital. Soldiers need not take out student loans to purchase basic infantry combat training. Rather, that training is paid for by the employers. Perhaps more dramatically, the military will often pay the entire costs of advanced professional and graduate training because it is confident in its ability to recoup its investment in its employees.[77] The absence of any analogous level of training investment by the private sector or in those areas of the public sector that cannot take advantage of the Code of Military Justice suggests that remedies have a huge impact on investments in human capital.[78]

Such underinvestment can take the form of everything from a lack of employer-provided on the job training (think high student loans and unpaid internships) to employee-specific investments in advertising or team building (think of the professional sports team built around a star athlete).[79] In response to the problems created by the underenforcement of employment contracts, employers have turned to alternative mechanisms, such as draconian noncompete clauses, training program claw back agreements, and (in the case of professional sports) penalties against holdout to solve problems better solved by specifically enforceable personal service contracts.[80] Indeed, critics of noncompete agreements who have successfully lobbied federal regulators to ban such contracts acknowledge that a better response to employer concerns would be definite term, as opposed to at-will, employment agreements.[81]

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76. Udi Sagi, *Specific Performance of Enlistment Contracts*, 205 MIL. L. REV. 150, 150–51 (2010).

77. *Military Tuition Assistance*, USAGOV (Sept. 6, 2024), https://www.usa.gov/military-tuition-assistance [https://perma.cc/DLD6-NLGU].

78. Indeed, the inability to completely contract with employees (due, for example, to bankruptcy protection and rules against involuntary servitude and the specific performance of personal service contracts) is a standard assumption in models that predict underinvestment in human capital. Paul H. Rubin & Peter Shedd, *Human Capital and Covenants Not to Compete*, 10 J. LEGAL STUD. 93, 94–95 (1981); Stewart E. Sterk, *Restraints on Alienation of Human Capital*, 79 VA. L. REV. 383, 385 (1993).

79. *See* Sterk, *supra* note 78, at 390–95.

80. Sarah Lynch, *Training Repayment Agreements: What Employers Need to Know for 2024*, INC. (Oct. 16, 2023), https://www.inc.com/sarah-lynch-/training-repayment-agreements-what-employers-need-to-know-for-2024.html [https://perma.cc/S9UZ-WP9M] (discussing the growing use of training claw back provisions); *see also* Corry, *supra* note 47 (discussing holdout penalties in professional sports); *cf.* Alan Schwartz & Simone M. Sepe, Deregulating Contracts 5 (Oct. 28, 2024) (unpublished manuscript) (on file with the *Iowa Law Review*) (arguing that, because the law unnecessarily constrains sophisticated parties ability to contract efficiently, they must substitute baroque terms for the efficient term courts should permit).

81. Open Mkts. Inst. et al., Petition for Rulemaking to Prohibit Worker Non-Compete Clauses 46 (2021), https://www.regulations.gov/document/FTC-2021-0036-0001 [https://perma.cc/3EQY-2LXJ] ("Employers can protect their intangibles through trade secret law and non-disclosure agreements that prevent employees and former employees from sharing or publicizing protected information. In addition to these legal protections for intangibles, employers concerned about the loss of valuable intangibles due to employee departure can improve their retention policies *or*

It's difficult, however, to see such contracts as a meaningful substitute for noncompete agreements, so long as the law systematically underenforces them.

One way to see the problem of specific investment, and the cost of anemic contract remedies, is to imagine the mindset of Lionsgate during the production of the *Hunger Games* movie. At the time of casting, the choice of the actress playing Katniss Everdeen was, of course, important, yet many young actresses likely could have played the role, and indeed many auditioned for it.[82] At that time, Jennifer Lawrence was an up-and-coming actress, rather than the mega star she is today. Once Lionsgate cast Lawrence, however, it was imperative that she play in the sequels. She was the "Mockingjay" and "Girl on Fire" after all—a substitution would ruin the franchise.[83] Nonetheless, damages would have been extremely difficult to liquidate *ex ante*. The movie (and sequels) were huge hits, eventually making Lawrence the world's highest paid actress, but it would have been difficult to know this *ex ante*.[84] *Ex post* damages may have been more predictable, but still uncertain—sequels are often unpopular and less profitable, unlike the *Hunger Games* sequels.[85] And a negative injunction only does so much. Because they are limited in scope and duration, such an order is unlikely to prevent Lawrence from all work, and certainly not indefinitely. In other words, a negative injunction may have prevented her from working on *Divergent* but would not have fully compensated Lionsgate for her failure to perform. What Lionsgate would really like is an order of specific performance.

II. RESPONDING TO ARGUMENTS AGAINST SPECIFIC PERFORMANCE OF PERSONAL SERVICE CONTRACTS

The proposal in in this Article is controversial. The per se rule against the specific enforcement of personal service contracts is well-established in Anglo-American contract law.[86] Over the years, a number of arguments have been offered for this rule. Those arguments include the claim that nonenforcement is constitutionally required by the Thirteenth Amendment's prohibition on

offer workers employment contracts. These methods allow employers to protect intangibles without imposing a broad one-sided restraint on workers' mobility." (emphasis added)).

82. Kelsie Gibson, *17 Actors Who Were Almost in* The Hunger Games, PEOPLE (Nov. 13, 2023, 4:35 PM), https://people.com/actors-who-were-almost-in-the-hunger-games-8401182 [https://perma.cc/ZK9D-WDQ7].

83. Consider that Keanu Reeve's refusal to perform in *Speed 2* purportedly reduced the franchise value so much that it landed him in "movie jail" for a decade. Benjamin VanHoose, *Keanu Reeves on Why He Turned Down 'Speed 2: Cruise Control': 'I Loved 'Speed', But an Ocean Liner?,'* PEOPLE (Dec. 14, 2021, 2:04 PM), https://people.com/movies/keanu-reeves-explains-why-didnt-do-speed-sequel [https://perma.cc/G55W-7MUT].

84. *Jennifer Lawrence World's Highest Paid Actress, Deepika Padukone Tenth*, REUTERS (Aug. 25, 2016, 8:07 AM), https://www.reuters.com/article/world/jennifer-lawrence-worlds-highest-paid-actress-deepika-padukone-tenth-idUSKCN10Y1A2 [https://perma.cc/8FZ9-A6EW]; Will Leitch, *This Week in Genre History:* The Hunger Games*' Big Winner Was, No Question, Jennifer Lawrence*, SYFY (Mar. 23, 2021, 1:55 PM), https://www.syfy.com/syfy-wire/the-hunger-games-jennifer-lawrence-genre-history [https://perma.cc/G3DG-W2VL].

85. Leitch, *supra* note 84.

86. *See supra* notes 16–20 and accompanying text.

involuntary servitude or at the very least arises from an aversion to slave-like conditions of labor, an argument addressed in Section II.A. In Section II.B, we address the argument that specific performance raises special concerns with the future autonomy of contracting parties, especially in the case of personal service contracts. In Section II.C we address the traditional limitations on specific performance, along with two additional requirements that we impose (rough equality of bargaining power and an explicit agreement by the parties that the contract will be specifically enforced). These requirements ensure that the low-level employees likely to be of greatest concern to specific performance critics are not included in our rule. We also consider the possibility that these concerns may be particularly acute in the context of employment contracts, which could involve unsafe conditions, abusive supervisors, sexual, racial, or religious harassment, or unreasonable demands from employers. Section II.D addresses the concern that specific performance will lead to the over-enforcement of personal service contracts. Finally, Section II.E addresses the argument that injunctive relief for personal service contracts is beyond the institutional capacity of the courts. All of these arguments have some force, but for the reasons set forth in this Section, none of them justifies a per se rule against specific enforcement of personal service contracts. Rather, we argue that applying a modified version of the general principles of equitable remedies in such cases responds to these concerns while making specific performance available in cases where ordinary legal remedies are inadequate.

In considering these arguments it is also important to keep in mind the question is not whether or not such contracts should be enforced. There are many personal service contracts that raise deeply troubling questions of consent and workplace domination or safety.[87] Objections to these contracts exist even under the current rule, where plaintiffs can enforce agreements only through money damages.[88] If consent to employment is questionable or the working relationship involves unacceptable or degrading conditions, then the real problem lies in the contract as such not in the remedy by which rights are enforced. We are concerned with objections to a particular remedy—specific performance—of otherwise enforceable personal service contracts. We willingly concede that there are many personal service contracts that should not be enforced. The legitimacy of a contract—as opposed to the legitimacy of a remedy—is, however, simply beyond the scope of this Article.

The other issue that must be kept firmly in mind is that the alternative to specific performance is not no remedy at all. It is money damages. Hence, when weighing objections to specific performance, whether those objections are grounded in concerns with autonomy or practical problems of judicial enforcement, one must look not to a hypothetical world where such problems do not exist but to the actual world of current law. In that world, breach of an employment contract may give rise to massive claims for money damages.[89]

87. *See infra* Section II.C.

88. *See supra* notes 26–27 and accompanying text.

89. *See supra* Section I.B.3.a.

Those claims may constitute substantial interferences with individual freedom.[90] For many people, working at a disfavored job for a period of time is less disruptive than an economically devastating damages award.[91] Likewise, damages are not always paid without costs to the administrative machinery of the courts.[92] While damage awards generally operate in rem rather than in personam, the defendant's assets must still be located, seized, and sold.[93] In the case of real property this is a relatively easy process, but in a world where wealth often takes the form of complex, highly liquid, and often intangible personal property, levying on a judgment may be far more difficult.[94] Indeed, the somewhat facile assumption in the legal doctrine that damages are simple to administer but an order of specific performance is difficult and complex, may well be a product of a time when the main asset was real property which was easy to locate and seize. We no longer live, however, in an agrarian economy where real property is the dominant asset. In short, administering damages is expensive too.

A. SPECIFIC PERFORMANCE AND INVOLUNTARY SERVITUDE

It is often assumed that specific enforcement of a personal service contract would constitute involuntary servitude and would therefore be unconstitutional under the Thirteenth Amendment. The claim is repeated by commentators,[95] has been made in law school classrooms,[96] and occasionally appears as decorative dicta in judicial opinions applying the well-established, nonconstitutional

90. *See supra* Section I.B.3.a.

91. *See infra* notes 131–40 and accompanying text.

92. *See infra* note 140 and accompanying text.

93. *See infra* note 138 and accompanying text.

94. *See infra* notes 136–40 and accompanying text.

95. *See, e.g.*, 12 JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 65.25, at 531–32 (2012) ("A second reason [specific enforcement of personal-service contracts is not given] is that we have a strong revulsion against any kind of involuntary personal servitude. We insist upon liberty even at the expense of broken promises." (alteration in original)); MURRAY, *supra* note 6 ("It is clear that personal service promises will not be specifically enforced. While the original resistance to specific enforcement of such promises was based on the difficulties of judicial supervision, the prohibition of involuntary servitude under the Thirteenth Amendment to the Constitution of the United States may also be violated by such an equitable decree." (footnote omitted)); JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 16.5, at 557 (6th ed. 2009) [hereinafter CALAMARI AND PERILLO ON CONTRACTS] ("Such an order might well violate the involuntary servitude clause of the [T]hirteenth [A]mendment."); YORIO, *supra* note 11, § 14.2, at 358 ("At least one commentator has suggested that specific performance might violate the prohibition of involuntary servitude in the Thirteenth Amendment to the United States Constitution.").

96. *See, e.g.*, RANDY E. BARNETT & NATHAN B. OMAN, CONTRACTS: CASES AND DOCTRINE 153, 199–205 (6th ed. 2017) (discussing specific performance and the Thirteenth Amendment); CALAMARI AND PERILLO ON CONTRACTS, *supra* note 95, § 16.5, at 557–59 (same); 1 HOWARD O. HUNTER, MODERN LAW OF CONTRACTS § 13:17, at 784–89 (West 2012) (same); AMY KASTELY, DEBORAH WAIRE POST, NANCY OTA & DEBORAH ZALESNE, CONTRACTING LAW 676 (5th ed. 2015) (same).

equitable rule in such cases.[97] It has even appeared in the popular press.[98] Despite the persistence of this idea in the recesses of the lawyerly psyche, however, there are good reasons to conclude that it is false. Suitably limited, specific performance of personal service contracts would not run afoul of the Thirteenth Amendment.[99]

First, it must be understood that the rule against specific performance of personal service contracts predates the Thirteenth Amendment. It has its origins in the English equity courts of the early nineteenth century.[100] In actions on personal service contracts, the chancellor would refuse to grant an order of specific performance based on practical considerations such as the difficulty of monitoring performance. By the time of the Civil War, the rule was well established in American law.[101] In the United States it was only after the passage of the Thirteenth Amendment that courts applying the already well-established rule began mentioning involuntary servitude.[102] Likewise, English courts, while obviously not bound by the Thirteenth Amendment, have also discussed the rule in terms of freedom and slavery, but only starting in the late nineteenth century, long after the doctrine was well established.[103]

Second, the U.S. Supreme Court has never squarely held that specific performance of a personal service contract would violate the Thirteenth

97. *See, e.g.*, Woolley v. Embassy Suites, Inc., 278 Cal. Rptr. 719, 727 (Ct. App. 1991) ("There are a variety of reasons why courts are loathe to order specific performance of personal services contracts. . . . It would also run contrary to the Thirteenth Amendment's prohibition against involuntary servitude."); Beverly Glen Music, Inc. v. Warner Commc'ns, Inc., 224 Cal. Rptr. 260, 261 (Ct. App. 1986) ("An unwilling employee cannot be compelled to continue to provide services to his employer either by ordering specific performance of his contract, or by injunction. To do so runs afoul of the Thirteenth Amendment's prohibition against involuntary servitude.").

98. *See* Carliss Chatman, *Twitter Wants to Force Musk to Buy It. But There's a Hitch.*, BARRON'S (July 30, 2022, 9:51 AM), https://www.barrons.com/articles/twitter-elon-musk-thirteenth-amendment-516591013 63 [https://perma.cc/HL52-MD9W] (detailing the Thirteenth Amendment argument Elon Musk advanced after terminating his original deal to purchase Twitter).

99. The claim that the Thirteenth Amendment would prohibit specific performance of all personal service contracts is thoroughly discussed in Oman, *supra* note 16.

100. *See generally* Morris v. Colman (1812) 34 Eng. Rep. 382; 18 Ves. Jun. 437 (issuing a negative injunction against performance of plays in violation of contract); Clarke v. Price (1819) 37 Eng. Rep. 270; 2 Wils. Ch. 157 (holding that equity courts have no jurisdiction to specifically enforce personal service contracts); Kemble v. Kean (1829) 58 Eng. Rep. 619; 6 Sim. 333 (involving a contract by an actor to perform at a particular theater); Johnson v. Shrewsbury & Birmingham Ry. Co. (1853) 43 Eng. Rep. 358, 363; 3 De G.M. & G. 914, 926 ("We are asked to compel one person to employ against his will another as his confidential servant . . . .").

101. *See, e.g.*, Sanquirico v. Benedetti, 1 Barb. Ch. 315, 315–16 (N.Y. Ch. 1847) ("A court of equity will not enforce the specific performance of an agreement to sing, in concerts, [and] operas . . . ."); Cooper v. Pena, 21 Cal. 403, 404 (1863) ("Equity will not enforce specifically a contract for personal services . . . .").

102. *See, e.g.*, Arthur v. Oakes, 63 F. 310, 318 (7th Cir. 1894) ("One who is placed under such constraint is in a condition of involuntary servitude,—a condition which the supreme law of the land declares shall not exist within the United States, or in any place subject to their jurisdiction.").

103. *See* Whitwood Chem. Co. v. Hardman (1891) 64 LT 716, 721 (Eng.) (observing that requiring specific performance for a personal service contract would "do a good deal more harm than good"); J. Lewis Parks, *Equitable Relief in Contracts Involving Personal Services*, 66 U. PA. L. REV. 251, 253 (1918) (citing *Whitwood* for the proposition that English courts "[would] not become . . . slave-driver[s]" by "obligating the defendant to give . . . his labor").

Amendment.[104] This is because for the entirety of the Amendment's life the unavailability of the remedy under American law has been well-established and thus it has been impossible for the question to arise.[105] The courts have held that various forms of coerced labor do violate the Thirteenth Amendment, but those cases all involve extreme and abusive circumstances that are readily distinguishable from a limited equitable remedy for a freely entered into and well compensated employment contract.[106] For example, labor enforced by private violence violates the Amendment.[107] Laws that force people into unconsented to labor as a remedy for debt are unconstitutional.[108] Finally, penal laws that are pretextual efforts to create coerced labor arrangements constitute involuntary servitude.[109] None of these cases involve a limited employment contract negotiated by sophisticated individuals possessed of the bargaining power to protect themselves from abuse. For example, debt peonage often involved labor imposed as a criminal penalty for nonpayment of a loan.[110] This is very far from our proposed rule. None of these cases involve the use of ordinary equitable remedies for breach of contract.

Third, it is very unlikely that specific performance of personal service contracts would run afoul of the original meaning of the Thirteenth Amendment.[111] The term "involuntary servitude" was borrowed from the Northwest Ordinance of 1787 and was incorporated into numerous state constitutions before the passage of the Thirteenth Amendment.[112] Those states,

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104. Oman, *supra* note 16, at 2023.

105. *See id.* at 2026.

106. *See, e.g.*, Clyatt v. United States, 197 U.S. 207, 208 (1905) (discussing the Thirteenth Amendment in relation to involuntary servitude); Bailey v. Alabama, 219 U.S. 219, 227 (1911) (same); United States v. Reynolds, 235 U.S. 133, 138 (1914) (recognizing that the Thirteenth Amendment grants states authority to impose involuntary servitude as a punishment for crime).

107. *See* United States v. Kozminski, 487 U.S. 931, 938–39 (1988).

108. *See Reynolds*, 235 U.S. at 143.

109. *See Clyatt*, 197 U.S. at 215.

110. *See Reynolds*, 235 U.S. at 144.

111. *See* Oman, *supra* note 16, at 2038–71 (discussing the original meaning of "involuntary servitude").

112. *See* Ordinance of 1787: The Northwest Territorial Government, *reprinted in* 1 U.S.C. at LVII, art. VI (2018), *adopted and amended under the* U.S. CONST. *by* Act of Aug. 7, 1789, 1 Stat. 50 ("There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted: *Provided always*, That any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labor or service as aforesaid."); ILL. CONST. of 1818, art. VI, § 1 ("Neither slavery nor involuntary servitude shall hereafter be introduced into this State, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted . . . ."); IND. CONST. of 1816, art. XI, § 7 ("There shall be neither slavery nor involuntary servitude in this State, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted."); MICH. CONST. of 1835, art. XI, § 1 ("Neither slavery nor involuntary servitude shall ever be introduced into this state, except for the punishment of crimes of which the party shall have been duly convicted."); OHIO CONST. of 1802, art. VIII, § 2 ("There shall be neither slavery nor involuntary servitude in this state, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted . . . ."); ARK.

in turn, had to deal with numerous cases testing the boundaries of "involuntary servitude" as enslavers sought to retain control of African-American labor via contract when they took their slaves north of the Ohio River.[113] Through judicial decisions and glosses on the term in accompanying provisions of state constitutions, those states developed indicia of involuntary servitude.[114] First, contracts had to be entered into in a condition of perfect freedom.[115] "Consent" extracted from enslaved African Americans didn't count.[116] Second, employers could not exercise physical violence or otherwise dominate those with whom they contracted.[117] Third, contracts had to be limited in duration.[118] The Ohio Constitution, for example, placed a limit of one year.[119] Finally, unrequited toil was the *sine non qua* of slavery. Contracts had to include fair compensation.[120] Thus, when the Thirteenth Amendment was adopted the term "involuntary servitude" had a fairly well-established legal meaning marked by four conditions. None of these conditions would be present in the specific enforcement of a limited, freely entered into, and well-compensated employment contract.

Finally, there are well-developed philosophical theories that provide normative arguments against voluntary slavery.[121] Whatever their merits in the abstract, however, they cannot justify the conclusion that specific enforcement of

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CONST. of 1864, art. 5, § 1 ("Neither slavery nor involuntary servitude shall hereafter exist in this state, otherwise than for the punishment of crime whereof the party shall have been convicted by due process of law . . . ."); CAL. CONST. of 1849, art. 1 § 18 ("Neither slavery, nor involuntary servitude, unless for punishment of crimes, shall ever be tolerated in this state."); IOWA CONST. art. I, § 23 ("There shall be no slavery in this State; nor shall there be involuntary servitude, unless for the punishment of crime."); KAN. CONST. Bill of Rights, § 6 ("There shall be no slavery in this state; and no involuntary servitude, except for the punishment of crime whereof the party shall have been duly convicted."); LA. CONST. of 1868, art. III ("There shall be neither slavery nor involuntary servitude in this State, otherwise than for the punishment of crime, whereof the party shall have been duly convicted."); MINN. CONST. art. I, § 2 ("There shall be neither slavery nor involuntary servitude in the State otherwise there is the punishment of crime whereof the party shall have been duly convicted."); NEV. CONST. art. I, § 17 ("Neither Slavery nor involuntary servitude, unless for punishment of crimes, shall ever be tolerated in this State."); OR. CONST. art. I, § 34 ("There shall be neither slavery, nor involuntary servitude in the states, otherwise than as a punishment for crime, whereof the party shall have been duly convicted."); TENN. CONST. art. I, § 33 ("That slavery and involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, are forever prohibited in this State.").

113. Oman, *supra* note 16, at 2042.

114. *See id.* at 2040–49.

115. *See* OHIO CONST. of 1802, art. VIII, § 2.

116. *See id.*

117. *See, e.g.*, *In re* Clark, 1 Blackf. 122, 125 (Ind. 1821) ("Deplorable indeed would be the state of society, if the obligee in every contract had a right to seize the person of the obligor, and force him to comply with his undertaking. . . . We may, therefore, unhesitatingly conclude, that when the law will not directly coerce a specific performance, it will not leave a party to exercise the law of the strong, and coerce it in his own behalf. A state of servitude thus produced, either by direct or permissive coercion, would not be considered voluntary either in fact or in law.").

118. *See* Anderson v. Poindexter, 6 Ohio St. 622, 690–91 (1856) (discussing involuntary servitude provision of the Ohio Constitution).

119. *See* OHIO CONST. of 1802, art. VIII, § 2 (amended 1851).

120. *See id.* (requiring "bona fide consideration").

121. *See, e.g.*, John Stuart Mill, *On Liberty*, *in* THE ENGLISH PHILOSOPHERS FROM BACON TO MILL 949, 949 (Edwin A. Burtt ed., 1939) (discussing permissible limits on liberty).

personal service contracts constitutes involuntary servitude. In *On Liberty*, John Stuart Mill argued that, while generally speaking, contracts ought to be respected, a contract to sell oneself into slavery should be treated as a nullity.[122] This was because the man who does so "defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself."[123] The people who enter employment contracts, however, aren't voluntarily enslaving themselves. The duration and scope of the contract is limited. There is compensation. The employee retains all other legal rights and does not become a chattel. Consequentialist arguments against slavery also fail to justify a per se prohibition on specific performance. The utilitarian philosopher R.M. Hare, for example, has argued that voluntary slavery is inconsistent with welfarist principles because "[m]en are different from other animals in that they can look a long way ahead, and therefore can become an object of deterrent punishment."[124] In other words, slavery always results in human misery because a master has an incentive to threaten a slave with suffering in a way that he simply doesn't threaten other kinds of property. Hare's argument, however, cannot be extended to the case of specific performance of a personal service contract.[125]

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122. *Id.* at 1030.

123. *Id.* at 1031. Randy Barnett has tried to extend Mill's reasoning to explain the prohibition on the specific enforcement of contracts of personal service based on the inalienability of the rights in such cases. *See generally* Randy E. Barnett, *Contract Remedies and Inalienable Rights*, 4 SOC. PHIL. & POL'Y 179 (1986). Barnett offers four reasons why a right might be inalienable. First, alienation of a right might be logically inconsistent with the duties imposed on one by the rights of others. *Id.* at 186. Second, the alienation of the right may be physically impossible. *Id.* at 188 ("Another reason why some rights might be inalienable would be the literal impossibility of the commitments that certain rights transfers entail."). Third, rights "may also arise from duties owed to oneself." *Id.* at 191. Finally, "[a] fourth reason why some rights may be inalienable stems from a general skepticism that agreements to transfer rights amounting to the control of one's destiny would ever (or very often) be obtained in the absence of incompetence, fraud, duress, mistake, or some other recognized contract defense." *Id.* at 193. Barnett focuses on the extreme case of a contract to sell one's self into slavery, i.e., a promise to obey all the commands of another, but contracts for personal services constitute much more limited commitments. First, they generally relate only to employment and cannot be characterized as a "commitment to always obey all the commands of another." *Id.* at 191. Likewise, most contracts of employment can be understood as explicitly or implicitly limiting an employee's duty of obedience to an employer to reasonable and lawful requests. Accordingly, in all but the most extreme (and one might add wholly hypothetical) cases, Barnett's arguments about the inalienability of the will are beside the point.

124. R.M. Hare, *What Is Wrong with Slavery*, 8 PHIL. & PUB. AFFS. 103, 120 (1979). It is this fact that explains why an owner of a slave would inflict horrible punishments on a slave that he would never inflict, for example, on a horse. "A piece of human property . . . can be subjected to a sort of terror from which other kinds of property are immune; and, human owners being what they are, many will inevitably take advantage of this fact." *Id.*

125. Hare implicitly recognizes as much, writing:

> [S]lavery has to be distinguished from *indenture*, which is a form of contract. Apprentices in former times, and football players even now, are bound by contract, entered into by themselves or, in the case of children, by their parents, to serve employers . . . under fixed conditions, which were in some cases extremely harsh (so that the actual sufferings of indentured people could be as bad as those of slaves). The difference lies in the voluntariness of the contract and in its fixed term.

While some employers may exercise such overarching control of their employees that we might fear abuse in cases of specific performance, most employment relationships involve much more limited obligations. At best, such concerns could justify withholding an injunction in cases where there were special reasons for supposing that such a risk existed. They cannot justify a per se rule.

B. AUTONOMY AND SPECIFIC PERFORMANCE

One might believe that the purpose of contract law is to foster individual autonomy.[126] According to this theory, persons should be able to author their own lives. Contract law assists with this project by allowing individuals to make extended plans with others, including strangers. However, contractual enforcement risks losing sight of its basic justification if it is pursued as an end in itself. Rather, in providing remedies for breach, the law should be careful to ensure that contract law in its totality enhances rather than inhibits autonomy.[127]

Because any remedy places limits on the autonomy of promisors by making it costly for them to change their minds and author their lives in new ways, the law should choose the remedy that allows for the greatest autonomy *ex ante* while imposing the fewest restrictions on the autonomy of promisors *ex post*.[128] This accounts, so goes the argument, for the common law's preference for money damages over specific performance.[129]

These concerns apply with special force, it is argued, in the context of personal service contracts, where the restraints on autonomy *ex post* are

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Id. at 107–08 (footnote omitted). The implicit conclusion of Hare's observation seems to be that despite the fact that indentured servitude could be harsh, as an institution it did not create the same sorts of per se risks of abuse associated with slavery. Furthermore, there is nothing inconsistent about acknowledging the harshness of indentured servitude and the relaxation of the per se rule against specific performance. There are many employment agreements that do not involve anything like the harsh conditions of seventeenth- or eighteenth-century indentured labor.

126. *See* HANOCH DAGAN & MICHAEL HELLER, THE CHOICE THEORY OF CONTRACTS 41–47 (2017) (offering an autonomy theory of contract); Joseph Raz, *Promises in Morality and Law*, 95 HARV. L. REV. 916, 933 (1982) (reviewing P.S. ATIYAH, PROMISES, MORALS, AND LAW (1981)) ("The purpose of contract law *should* be not to enforce promises, but to protect both the practice of undertaking voluntary obligations and the individuals who rely on that practice."); *see also* Hanoch Dagan, *Autonomy, Pluralism, and Contract Law Theory*, 76 L. & CONTEMP. PROBS. 19, 20–23 (2013) [hereinafter Dagan, *Autonomy*] (agreeing with, though qualifying, Raz's theory of contract law as primarily about individual autonomy).

127. *See* Dagan, *Autonomy*, *supra* note 126, at 27–32 (discussing an autonomy-based theory of contract law).

128. Hanoch Dagan & Michael Heller, *Specific Performance: On Freedom and Commitment in Contract Law*, 98 NOTRE DAME L. REV. 1323, 1351 (2023) [hereinafter Dagan & Heller, *Specific Performance*] (arguing that "[e]xcessive remedi[es]" such as specific performance, which "go beyond what is required to empower the parties' current selves—are autonomy *reducing*"); *see also* Dagan, *Autonomy*, *supra* note 126, at 27–28 (arguing that contract law should provide parties the greatest number of options in the interest of personal autonomy).

129. *See* Dagan & Heller, *Specific Performance*, *supra* note 128, at 1351 (arguing that the baseline in contract law should be against specific performance).

particularly severe.[130] The risk of domination or exploitation within the workplace might raise analogous autonomy issues. All of these concerns have considerable substance but taken in total they do not justify a per se rule against the specific enforcement of personal service contracts. This is because personal service contracts encompass a massive variety of different kinds of relationships. The concerns sketched above are present in some of these contracts but by no means all of them. Thus, abstract concerns with autonomy do not justify a per se rule.

It is also important to remember that the comparison is not between specific performance and at-will employment. In such a comparison specific performance appears as a radically constraining remedy compared to a situation in which an employee can quit at any time for any reason or for no reason whatsoever. However, in cases of at-will employment the question of specific performance never arises because there simply is no personal service obligation to be specifically enforced. Rather specific performance arises in cases where the alternative is an award of money damages or the payment of a liquidated damages clause.

Furthermore, in some cases the money damages may be substantial, and the personal service may be of very limited duration. Consider, for example, a musician who promises to perform in a single very high-value concert.[131] In such a case, the money damages to which the musician is subject in the event of breach could be immense while specific performance of the contract might require a single evening of labor.[132] It's important to remember that in the autonomy argument the objection to specific performance does not lie in an

130. *See, e.g.*, Christopher T. Wonnell, *The Contractual Disempowerment of Employees*, 46 STAN. L. REV. 87, 133–40 (1993) (analyzing the connection between liberty and labor); Will Hendrick, *Pay or Play: On Specific Performance and Sports Franchise Leases*, 87 N.C. L. REV. 504, 509 (2009) ("Still, perhaps the most powerful argument against the remedy of specific performance is grounded in liberty and personal autonomy.").

131. *See, e.g.*, David Browne, *The Real Yacht Rock: Inside the Lavish, Top-Secret World of Private Gigs*, ROLLING STONE (Apr. 2, 2022), https://www.rollingstone.com/music/music-features/private-concerts-fees-performers-1324577 [https://perma.cc/4KEH-7APC] (stating that Jennifer Lopez received $1.25 million for a private concert and detailing other similar concerts by performers such as Alicia Keys and John Legend); Marisa Dellatto, *The Top-Earning Summer Concert Tours of 2023*, FORBES (Jan. 10, 2024, 3:30 PM), https://www.forbes.com/sites/marisadellatto/2023/10/13/the-top-earning-summer-concert-tours-2023-taylor-swift-beyonce [https://perma.cc/7C73-JUY8] (stating that Taylor Swift earned $305 million over fifty-six shows for her Eras Tour and detailing other similarly high-earning tours).

132. *See, e.g.*, Sharon F. Carton, *Damning with Fulsome Praise: Assessing the Uniqueness of an Artist or Performer as a Condition to Enjoin Performance of Personal Service Contracts in Entertainment Law*, 5 VILL. SPORTS & ENT. L.J. 197, 197–98 nn.2–5 (1998) (discussing breach of contract suits involving celebrities such as John Travolta); Nardine Saad, *Taylor Swift Sued over $2.5-Million Payout for Canceled Concert*, L.A. TIMES (Feb. 20, 2013, 12:00 AM), https://www.latimes.com/entertainment/la-xpm-2013-feb-20-la-et-mg-taylor-swift-sued-canada-concert-20130220-story.html [https://perma.cc/6Y8W-S3MP] (describing a lawsuit against Taylor Swift for a failure to appear at the 2012 "Capital Hoedown"); *Singer Mary J. Blige Sued for Breach of Contract over Concert*, DUNN LAMBERT, LLC (July 2, 2013), https://www.njbizlawyer.com/blog/2013/07/singer-mary-j-blige-sued-for-breach-of-contract-over-concert [https://perma.cc/2ELL-CCZH] (stating that Vision Entertainment Worldwide sued Mary J. Blige for breach of contract after she failed to perform a concert, seeking damages of at least $145,000).

absolutist conception of some right to be free of coercion.[133] In the language of such theories, it is not about the independence of the contracting party but rather it lies in concerns for preserving the party's ongoing capacity for self-authorship.[134] It is difficult to see why specific performance in such a case is a dramatic restriction on the musician's ability to author her life but the payment of a massive damage award is acceptable. Money damages can be extremely coercive. The breach of a high-value employment contract may give rise to economically devastating damage awards.[135] Furthermore, the enforcement of such awards may be highly coercive. There is no in personam duty to pay money damages. Rather, legal remedies operate in rem, allowing an agent of the court such as a marshal or sheriff to seize the defendant's assets and sell them to satisfy a judgment.[136] Traditionally, this was seen as less coercive than an injunction.[137] However, implicit in this judgment that legal remedies are less coercive than equitable remedies is the assumption that a defendant's assets can be easily located and seized by the court. This was true in an agrarian economy where real property was the dominant form of wealth. In a modern economy it is not true. Locating assets to be seized will often involve equitable orders to disclose the location of wealth.[138] Defendants facing economic devastation sometimes choose to resist such orders, resulting in contempt citations that are identical to those meted out to contemnors of specific performance orders.[139] Furthermore, in some rare instances, such as child support obligations, ordinary money debts will be enforced with an order specific performance, even when the effect of such an order will be to coerce a person to take employment that they would otherwise reject.[140] In short, it

133. *See* Dagan & Heller, *Specific Performance*, *supra* note 128, at 1340–45.

134. *See* Dagan, *Autonomy*, *supra* note 126, at 41–43 (discussing the idea of autonomy and independence).

135. *See 18 Famous Musicians Who Went from Rich to Bankrupt*, PLAYBACK.FM, https://playback.fm/musicians-bankrupt [https://perma.cc/GS75-DQRL] (explaining that Toni Braxton had to file for bankruptcy after health issues required her to cancel Las Vegas performance dates, resulting in financial liability).

136. *See* 1 DAN B. DOBBS, LAW OF REMEDIES § 1.3, at 13 (2d ed. 1993) (detailing the process of seizing property by attachment).

137. *See* Int'l Fin. Servs. Corp. v. Chromas Tech. Can., Inc., 356 F.3d 731, 736 (7th Cir. 2004) ("Equitable remedies, by contrast [to legal remedies], are typically coercive . . . .").

138. *See* 12 CHARLES ALAN WRIGHT, ARTHUR A. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3014, at 187–96 (3d ed. 2014) (explaining that courts can order discovery from a judgment debtor in aid of executing on that judgment); *see also* Koehler v. Bank of Berm. Ltd., 911 N.E.2d 825, 831 (N.Y. 2009) ("[A] . . . court may issue a judgment ordering the turnover of out-of-state assets" by judgment debtors and garnishees.).

139. *See, e.g.*, State *ex rel.* Klein v. Chorpening, 450 N.E.2d 1161, 1163 (Ohio 1983) (affirming contempt order against judgment debtor for failure to appear at deposition in aid of judgment); Fleming v. Etherington, 610 P.2d 592, 597 (Kan. 1980) (affirming contempt order against judgment debtor for failure to produce court-ordered documents in aid of execution).

140. *See, e.g.*, Nicholson v. Combs, 703 A.2d 407, 417 (Pa. 1997) ("The payee [of a child support order] may . . . choose to seek relief in equity through an order of specific performance . . . ."); Young v. Young, 736 S.E.2d 538, 545 (N.C. Ct. App. 2012) ("[The court] properly ordered Plaintiff's specific performance of his agreement to make mortgage payments [pursuant to] the Separation Agreement . . . .").

is important not to discount the level of coercion involved in the payment of money damages.

Finally, if one accepts the legitimacy of money damages—including very substantial money for breach of personal service contracts—the possibility of *ex post* negotiation blurs the distinction between damages and specific performance.[141] In the end, both situations will often be resolved by the payment of money or performance. The threat of damages may coerce performance, and defendants may pay for freedom from specific performance. In practical terms, the difference lies in whether the price of release from contractual performance is set by the court through adjudication or by the parties through negotiation. Indeed, to the extent that we see the authoring of legal obligations for oneself as an autonomy enhancing activity, negotiation seems a superior process to adjudication.

C. SPECIFIC PERFORMANCE LIMITATIONS AND EMPLOYMENT REALITIES

Many will worry that our proposal leaves vulnerable employees subject to the whims and control of their employer, envisioning low-wage Jimmy John's employees forced to labor against their will.[142] This fear is misplaced, however, because the vast majority of personal service contracts involve at-will employees.[143] Employees whose personal service contracts are for a defined term are overwhelmingly high-income, high-status workers with high levels of sophistication (we discuss exceptions, most notably schoolteachers, in Part III below).[144] These are the executives, celebrities, professional athletes, and college football coaches of the labor market. Such employees are frequently represented by agents or lawyers.[145] They are often seasoned negotiators. They have the resources to buy their way out of regretted contracts and to render their noncompete clauses ineffective by forgoing employment for long periods of time.[146] They are unlikely to be subject to dehumanizing working conditions.

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141. Douglas Laycock has argued that courts are also hostile to awards of money damages in cases involving personal service contracts. *See* LAYCOCK, *supra* note 49, at 170–71. In support of this claim, he cites to *Lemat Corp. v. Barry*, 80 Cal. Rptr. 240 (Ct. App. 1969). *Id.* at 170–71. That case, however, involved litigation over a negative injunction. *Lemat*, 80 Cal. Rptr. at 241. Furthermore, there are numerous examples of litigation involving personal service contracts that result in money damages. *See, e.g.*, *18 Famous Musicians Who Went from Rich to Bankrupt*, *supra* note 135 (explaining that Toni Braxton had to file for bankruptcy after health issues required her to cancel Las Vegas performance dates, resulting in financial liability).

142. The fast-food sandwich chain Jimmy John's infamously employed noncompete clauses for low-wage employees until an agreement with the New York State Attorney General's office halted the practice in 2016. Sarah Whitten, *Jimmy John's Drops Noncompete Clauses Following Settlement*, CNBC (June 22, 2016, 1:38 PM), https://www.cnbc.com/2016/06/22/jimmy-johns-drops-non-compete-clauses-following-settlement.html [https://perma.cc/C8SN-U6XS].

143. *See, e.g.*, Julia Tomassetti, *Power in the Employment Relationship*, ECON. POL'Y INST., Nov. 19, 2020, at 13–14, https://www.epi.org/unequalpower/publications/the-legal-understanding-and-treatment-of-an-employment-relationship-versus-a-contract [https://perma.cc/Y25E-8QDU] (discussing personal service contracts and at-will employment).

144. *See infra* Section III.B.

145. *See supra* text accompanying notes 28–29.

146. *See supra* text accompanying note 49; *infra* Part III (providing examples).

They are the members of our society who are most likely to be in a position more generally to autonomously author their life stories.

Concerns with workplace domination and abuse are poorly addressed by the law of contract remedies. Such problems can exist for at-will employees as well as those whose contracts require them to work for a specific period. Indeed, many scholars and policy makers assume that such problems are exacerbated, if not caused, by the rule of at-will employment.[147] Furthermore, such conditions may be wholly absent from personal service contracts that might be candidates for specific performance. Consider for example, the CEO of a publicly traded company. Such an employee may have complete control over their workplace and be more or less immune from employer domination. Yet the CEO's relationship with the corporation is a personal service contract. Indeed, far more than the contracts of low level—and vulnerable—employees, the CEO is likely not an at-will employee and thus potentially subject to the remedy of specific performance in the event of breach.[148] Furthermore, other bodies of law are likely to be better tools for getting at unacceptable working conditions. Labor law, employment law, the Occupational Safety and Health Act, other safety regulations, and in some cases ordinary tort law are better ways of dealing with these problems than are contract law remedies.

It is also important to realize that many of these objections to the specific performance of personal service contracts are objections to the contract as such rather than to the remedy. Consider the notorious case of Harvey Weinstein, the Hollywood tycoon whose behavior helped to launch the #MeToo movement. Over eighty-seven women have accused Weinstein of sexual assault and harassment.[149] All of these accusations came to a greater or lesser extent in

147. Phillips, *supra* note 7, at 449 ("Since the late 1960s, at least, scholarly reactions to the developments just described generally have been positive, and evaluations of employment at will correspondingly negative."); Epstein, *supra* note 7, at 948 ("The judicial erosion of the older position has been spurred on by academic commentators, who have been almost unanimous in their condemnation of the at-will relationship, often treating it as an archaic relic that should be jettisoned along with other vestiges of nineteenth-century laissez-faire.").

148. Schwab & Thomas, *supra* note 9, at 235, 247 tbl.2 (examining a dataset of 375 CEO contracts at the largest U.S. corporations and finding that the bulk of contracts are for a definite term, with the most common term being three years and the second most common being five years); Gillan et al., *supra* note 9, at 1643, 1653 (finding a median contract term of three years for CEOs in the S&P 500).

149. *See* Sara M. Moniuszko & Cara Kelly, *Harvey Weinstein Scandal: A Complete List of the 87 Accusers*, USA TODAY (June 1, 2018, 4:51 PM), https://www.usatoday.com/story/life/people/2017/10/27/weinstein-scandal-complete-list-accusers/804663001 [https://perma.cc/49UJ-CBHM] (describing how dozens of women came forward with claims of sexual harassment and assault against producer Harvey Weinstein following "bombshell reports" published by *The New York Times* and *The New Yorker*); *see also* Daniel Victor, *How the Harvey Weinstein Story Has Unfolded*, N.Y. TIMES (Oct. 18, 2017), https://www.nytimes.com/2017/10/18/business/harvey-weinstein.html (on file with the *Iowa Law Review*) (same); Brit Marling, *Harvey Weinstein and the Economics of Consent*, ATLANTIC (Oct. 23, 2017), https://www.theatlantic.com/entertainment/archive/2017/10/harvey-weinstein-and-the-economics-of-consent/543618 (on file with the *Iowa Law Review*) (same); Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html (on file with the *Iowa Law Review*) (same).

the context of negotiating, creating, or performing personal service contracts.[150] One might well object that even a sophisticated and well-compensated movie star represented by counsel ought not to be ordered to perform a contract formed amidst sexual exploitation that would require ongoing performance under demeaning conditions. This is a fair objection. However, the objection seems equally well taken in the case where the contract is enforced via money damages rather than an injunction. In short, in the Harvey Weinstein case what is objectionable is the contract as such rather than the remedy. We freely concede that many personal service agreements are objectionable.

Our proposal (as well as the common law governing specific performance) also includes requirements, such as rough equality of bargaining power and inadequacy of monetary damages, that further serve to exclude the employment contracts of ordinary workers as candidates for specific performance. These requirements would render the contracts of most, if not all, low-wage workers ineligible for specific performance, even when they include a fixed term. Specifically, the common law requires that specific performance is only available when monetary damages are inadequate.[151] We add the further requirements that the contracting parties have a rough equivalence of bargaining power and sophistication, and they specifically opt for the possibility of specific performance in the contract.

First, recall that the common law rule of contracts considers specific performance an extraordinary remedy, available only when monetary damages are deemed inadequate. The paradigmatic cases involve the sale of "unique" items, such as land, for which an absence of adequate substitutes is presumed, and long-term requirements contracts, for which monetary damages may be difficult to calculate.[152] This realization suggests the first two requirements for the specific performance of personal service contracts and also reveals why such a remedy will be routinely unavailable for the lower wage workers that pose the greatest concern to potential critics; monetary damages must be difficult to calculate and adequate substitutes must be unavailable. These conditions will not be met for the vast majority of run of the mill employees.

Consider again the case of Jimmy John's employees, who were required to sign noncompete agreements barring their employment by a Jimmy John's competitor for two years after leaving Jimmy John's employment.[153] Such contracts were standard for many Jimmy John's employees until the New York Attorney General's Office put an end to the practice.[154] Suppose that Jimmy John's did not learn its lesson from these events and begins employing cashiers for fixed terms, say one year, and inserting specific performance clauses into

150. *See* sources cited *supra* note 149.

151. *See* RESTATEMENT (SECOND) OF CONTS. § 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.").

152. Schwartz, *supra* note 11, at 272–74. In addition, promisors can raise a variety of defenses when specific performance is sought that are unavailable in the case of purely monetary damages. *Id.*

153. *See supra* note 142 and accompanying text.

154. *See supra* note 142 and accompanying text.

their contracts. Courts following our proposal would not specifically enforce such agreements. Front-line wage employees are easily replaceable and the damages, if any, caused by their unexpected departure are generally easy to calculate and fully compensated through monetary damages.

Second, our proposal includes additional requirements to protect against the possible exploitation and coercion of breaching employees. Parties must have specifically contemplated the possibility of specific performance against the employee by including such a provision in their agreement. It is important to note that we are not arguing that parties should be able to "contract into" specific performance. One might be concerned that aggressive employers would be tempted to "over draft" contracts, including stipulations and opt in clauses that would force employees into specific performance of their contracts.[155] The purpose of requiring explicit consent to specific performance is to eliminate the possibility of employees being surprised by such a remedy. However, we contemplate the ordinary equitable rules governing the availability of the remedy in other cases as continuing to apply, including the rule that the availability of the remedy is within the discretion of the court sitting in equity, not the parties. In addition, the contracting parties must have some rough equivalence of bargaining power and sophistication. This requirement may be met because the employee herself is a sophisticated, repeat negotiator (for example, a CEO) or because she is represented by counsel, agents, or others negotiating on her behalf. In many cases, both of these will be true. Needless to say, the Jimmy John's cashier does not meet this requirement.

Were labor markets to shift dramatically so that lower-wage employees were regularly employed under fixed term contracts and thus vulnerable to orders of specific performance, we would, perhaps, need to revisit our support for specific performance as a remedy broadly available in personal service contracts. However, we consider such a development unlikely. Unlike noncompete clauses, which have (controversially) found their way into the employment contracts of lower wage employees, fixed term employment contracts provide benefits for both the employer and the employee in terms of stability and predictability.[156] Currently in the United States, with some exceptions, such benefits are only available to in-demand employees with specialized skills and bargaining power.[157] Should fixed term contracts expand

155. *See* Tomassetti, *supra* note 143, at 8 (discussing restrictive employment contracts).

156. *Id.*

157. Other countries are more likely to provide employment protections, particularly within the European Union, although many European countries reduced worker protections (though not as much as the United States) amid concerns of "Eurosclerosis"—the phenomenon of high unemployment even in the face of economic growth, due to labor market rigidities and strong worker protections. *See* Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment at Will*, 58 UCLA L. REV. 1, 11–12 (2010); John O. McGinnis, *The Decline of the Western Nation State and the Rise of the Regime of International Federalism*, 18 CARDOZO L. REV. 903, 921 (1996) (asserting that the economic situation in Europe "is now so notorious that a new word—'Eurosclerosis'—has been coined to describe the high unemployment and slow growth engendered by excessive regulation and taxation"); Tito Boeri & Pietro Garibaldi, *Beyond Eurosclerosis*, 24 ECON. POL'Y 409, 412 (2009) (discussing regulatory changes to employment protections in the wake of Eurosclerosis concerns).

to protect lower-wage employees, we are not convinced that such an outcome is negative as a matter of public policy, even *with* the threat of specific performance, but fully exploring that issue is beyond the scope of this paper.

One possible objection to our proposal is that imposing specific performance in publicly salient cases could undermine the legitimacy of the law because ordinary people will see the defendants in such cases as being mistreated or coerced. However, the best empirical research suggests that most lay people assume (incorrectly) that specific performance is the default remedy for breach of contract.[158] Other studies show that lay jurors probably believe that money damages undercompensate the victims of breach.[159] Certainly, when high-status performers breach their contracts, fans are willing to sue and at times will ask for more generous remedies than those provided by current law.[160] Furthermore, in many high-profile contract disputes between athletes and teams, fans are frequently hostile to the athlete who is trying to escape liability on his or her contract.[161] Far from seeing the law as being too harsh, many laypeople appear to see it as too easy for high-status workers to breach their contracts. As one irate fan told the press in the wake of a highly publicized breach of contract by NHL player Alexei Yashin, "If you get people who don't honor their contracts, I think you've got a problem."[162]

158. *See* Tess Wilkinson-Ryan, David Hoffman & Emily Campbell, *Expecting Specific Performance*, 98 N.Y.U. L. REV. 1633, 1655–67, 1680 (2023) (showing that study participants assumed that specific performance was the default contract remedy).

159. *See* David A. Hoffman & Alexander S. Radus, *Instructing Juries on Noneconomic Contract Damages*, 81 FORDHAM L. REV. 1221, 1252 (2012) (studying mock jurors and concluding that mock jurors awarded more damages than just what compensates economic harm); Marc Galanter, *Contract in Court; Or Almost Everything You May or May Not Want to Know About Contract Litigation*, 2001 WIS. L. REV. 577, 604–06 (indicating that people are willing to impose punitive damages on contract-breachers).

160. *See, e.g.*, Emlyn Travis, *Morgan Wallen Sued by Concertgoer After Canceling Show Minutes Before Showtime*, ENT. WKLY. (Apr. 25, 2023, 6:27 PM), https://ew.com/music/morgan-wallen-sued-by-concertgoer-after-canceling-show [https://perma.cc/5XBK-VXBX] (recounting a lawsuit in which a fan sought refund of all of her concert related expenses). Fans brought a similar claim against Madonna after she started a concert several hours late. Bill Donahue, *Madonna & Live Nation Fire Back at Lawsuit over Concert Delays, Say They Will 'Defend This Case Vigorously,'* BILLBOARD (Jan. 24, 2024), https://www.billboard.com/business/business-news/madonna-live-nation-respond-lawsuit-over-concert-delays-1235588415 [https://perma.cc/QM47-CX6H].

161. *See, e.g.*, David Naylor, *Yashin Is Star Some Love to Hate*, GLOBE & MAIL (Apr. 13, 2001), https://www.theglobeandmail.com/sports/yashin-is-star-some-love-to-hate/article760691 [https://perma.cc/MK44-BW4S] ("[Alexei Yashin] is, without a doubt, the franchise's greatest player and its most reviled, the only 40-goal scorer in hockey who is jeered at home games. That Ottawa's hopes for the Stanley Cup rest on someone whom fans resent is one of the many contradictions about a player who violated his contract last season and demanded more money but insists now that the team's fate is his only concern."); *Yashin Reaches Out to Sens' Fans*, HARTFORD COURANT (Sept. 2, 2021, 6:58 AM), https://www.courant.com/2000/05/07/yashin-reaches-out-to-sens-fans [https://perma.cc/5RQ3-WY93] (recounting fan hostility to Yashin over his attempt to escape his contract with the Ottawa Senators).

162. *Suit Alleges Breach of Contract*, ESPN (Oct. 5, 1999), https://www.espn.com/nhl/s/1999/1005/98457.html [https://perma.cc/Y2B4-PMUC].

D. EFFICIENCY AND SPECIFIC PERFORMANCE

The traditional economic defense for the common law's preference for money damages over specific performance is that it avoids over-incentivizing performance.[163] If the cost of performance, including opportunity costs, to the promisor exceeds the benefits of performance to the promisee, then breach is preferable to performance from an economic perspective. Legal theorists have long recognized that fines or damages in effect create a call option for promisors, allowing them to breach provided they pay for the privilege.[164] Thus, Jeremy Bentham wrote that "[a] *fixed* penalty is a *license* in *disguise*" and Oliver Wendell Holmes insisted 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."[165] Provided that the price of the option is set by the law at the right level, so goes the argument, we can ensure that performance will occur only when the benefits of performance exceed its costs. In this argument, specific performance appears problematic because it allows a promisee to compel the promisor to incur the costs of performance.[166] Because the promisor internalizes those costs, but the promisee does not, there is a mismatch between the private incentives of the promisee and social incentives, which should consider costs and benefits to all parties.

There are a number of responses to this argument. First, as a threshold matter it must be acknowledged that we are considerably less confident today than we were in the first dawn of the efficient breach argument that money damages can in fact create efficient incentives.[167] Stated in the simplest terms, the efficient breach argument looks only to the incentives faced by promisors.[168]

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163. *See* POLINSKY, *supra* note 32, at 33–36 (detailing why the expectation remedy leads to an efficient outcome in breach of contract cases). An alternative formulation is the claim that expectation damages provide a rule that mirrors that which the parties themselves would have chosen had they been able to fully specify their contract. *See* SHAVELL, *supra* note 32, at 307 ("[M]oderate damage measures lead to performance in circumstances resembling those . . . under mutually beneficial completely specified contracts.").

164. SHAVELL, *supra* note 32, at 306–07.

165. JEREMY BENTHAM, *Last Epigrams and Sayings*, *in* A BENTHAM READER 359, 363 (Mary Peter Mack ed., 1969); Holmes, *supra* note 60, at 462; *see also* POSNER, *supra* note 60, at 150 ("This dictum, though overbroad, contains an important economic insight. In many cases it is uneconomical to induce completion of performance of a contract after it has been broken.").

166. *See* Ben Depoorter & Stephan Tontrup, *How Law Frames Moral Intuitions: The Expressive Effect of Specific Performance*, 54 ARIZ. L. REV. 673, 677 (2012) ("We posit that specific performance as a legal default may create aversion against breach even when performance is inefficient."); Richard R.W. Brooks, *The Efficient Performance Hypothesis*, 116 YALE L.J. 568, 582–83 (2006) ("[G]iving the promisee the option of compelling performance or getting expectation damages—does not generate the same allocatively efficient outcomes as Holmes's call option for promisors (with expectation damages).").

167. *See generally* Oman, *Failure of Economic Interpretations*, *supra* note 3 (discussing some ways in which economic accounts of the current doctrine governing contract damages have failed).

168. *See, e.g.*, Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 CALIF. L. REV. 1, 11–19 (1985) (arguing that the expectation measure provides an incentive to a promissee to over rely or rely on promises to a greater extent than is efficient); Edlin, *supra* note 3, at 98–101

Money damages, however, are always paid from promisors to promisees. This bilateral structure means that the availability of damages will alter the behavior of promisees, encouraging them to rely on the contract based not only on its probability of actual performance but also on the probability of obtaining compensation through money damages in the event that it is breached.[169] This latter possibility creates a moral hazard problem, leading to inefficient levels of reliance. The scope of this problem in the real world is difficult to measure, but formal economic models suggest that it is impossible to create a perfectly efficient set of incentives within the bilateral structure of money damages.[170] Thus, we have no a priori reason to assume that money damages create more efficient incentives than specific performance.

Second, even if we grant the validity of the efficient breach argument, it is important to remember that we are not defending specific performance as a default remedy. Rather, we are defending specific performance as an extraordinary remedy limited by traditional equitable doctrines. At the heart of those doctrines is the so-called irreparable injury rule. Specific performance is only available if money damages are an inadequate remedy.[171]

This will most often be the case when damages cannot be calculated with certainty. In the language of the efficient breach argument, this means that specific performance is available only when the benefit to the promisee cannot be known and it is thus not possible to set the efficient option price for breach.[172] Furthermore, in situations where courts cannot determine the value of breach *ex post* but the parties can determine that value *ex ante*, we would expect them to include a liquidated damages clause in their agreement. Thus, specific performance will be an issue only in the relatively rare cases where the value of performance is unknown to the parties *ex ante* and indeterminable by the court *ex post*. In such cases, there is every reason to believe that money damages

(discussing the phenomenon of expectation damages causing overinvestment); Edlin & Reichelstein, *supra* note 4, at 487–91 (offering economic proof that expectation damages do not promote efficiency); Lewis A. Kornhauser, *Reliance, Reputation, and Breach of Contract*, 26 J.L. & ECON. 691, 693 (1983) (arguing that without reliance, the rule of law produces damages that are not Pareto optimal); Rogerson, *supra* note 3, at 47–49 (noting that expectation and reliance damages produce inefficient results); Steven Shavell, *Damage Measures for Breach of Contract*, 11 BELL J. ECON. 466, 472 (1980) (discussing the problems of breach in reaching Pareto efficiency); Steven Shavell, *The Design of Contracts and Remedies for Breach*, 99 Q.J. ECON. 121, 124–27 (1984) (describing the relationship between efficient breach and the Pareto efficient production contract).

169. *See* Oman, *Failure of Economic Interpretations*, *supra* note 3, at 851–53 (explaining that "bilateralism is a basic problem for the economic explanation of the expectation measure of damages," resulting in overreliance by promisees).

170. *See, e.g.*, Rogerson, *supra* note 3, at 47–49 (noting that expectation and reliance damages produce inefficient results); Eisenberg & McDonnell, *supra* note 3, at 1336 ("In most cases, overreliance normally cannot or is highly unlikely to occur.").

171. RESTATEMENT (SECOND) OF CONTS. § 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.").

172. *See* Brooks, *supra* note 166, at 577 (discussing the promisee's entitlement to an option price calculated by the court in the event of breach); Paul G. Mahoney, *Contract Remedies and Options Pricing*, 24 J. LEGAL STUD. 139, 140 (1995) (explaining that specific performance denies the option to "buy back" performance).

will lead to inefficiently low levels of performance. Finally, in situations where specific performance would lead to excessive resources devoted to performance, we would expect *ex post* bargaining to alleviate the problem. If the cost of performance exceeds the benefits of performance, then the welfare of both parties can be increased if the promisor refrains from performance and splits the savings with the promisee.[173]

E. MONITORING CONCERNS

An additional justification for the doctrinal preference for money damages over specific performance is that courts are ill-equipped to provide such a remedy. The argument was succinctly summarized thus by the first *Restatement*:

> The refusal of affirmative specific enforcement in these cases is based in part upon the difficulty of enforcement and of passing judgment upon the quality of performance, and in part upon the undesirability of compelling the continuance of personal association after disputes have arisen and confidence and loyalty are gone.[174]

Whatever the force of these concerns, however, they cannot justify a per se prohibition on specific performance. Indeed, in other areas of the law where precisely the same concerns are present, court orders are often available.[175]

The first set of concerns goes to the issue of monitoring and administering specific performance. The fear is that parties forced to perform on pain of contempt of court are likely to render half-hearted performance while promisees will demand enthusiastic performance, involving the courts in litigation over the quality of what has been done.[176] There are at least two reasons why this concern is overblown. First, litigation over the quality of performance is already

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173. There may be high transaction costs in this situation caused by a bilateral monopoly. The promisor can only purchase freedom from the order of specific performance from the promisees and often the only party interested in purchasing such freedom will be the promisor. This situation can create bargaining pathologies that prevent mutually beneficial exchanges. However, experience suggests that this problem can often be surmounted in practice. More importantly, perhaps, in the case of personal service contracts there will often be no bilateral monopoly. This is because often the promisor will wish to breach because she has an attractive offer from another potential employer. Thus, both the promisor and the potential employer may bid on a release from the promisee. In effect the promisee can "check" a promisor's bid against an employer's bid.

174. RESTATEMENT (FIRST) OF CONTS. § 379 cmt. d (AM. L. INST. 1932); *see also* RESTATEMENT (SECOND) OF CONTS. § 367 cmt. a (AM. L. INST. 1981) ("The refusal is based in part upon the undesirability of compelling the continuance of personal association after disputes have arisen and confidence and loyalty are gone . . . . The refusal is also based upon the difficulty of enforcement inherent in passing judgment on the quality of performance.").

175. *See, e.g.*, First Nat'l State Bank of N.J. v. Commonwealth Fed. Sav. & Loan Ass'n of Norristown, 455 F. Supp. 464, 469–70 (D.N.J. 1978) (listing reasons why courts have found specific performance to be appropriate and collecting cases).

176. *See, e.g.*, Lord & Taylor, LLC v. White Flint, L.P., 780 F.3d 211, 218 (4th Cir. 2015) (denying specific performance of contract for White Flint to provide a "first class high fashion regional [s]hopping [c]enter" because it would be infeasible for the court to adequately monitor performance); Edison Realty Co. v. Bauernschub, 62 A.2d 354, 358 (Md. 1948) ("[S]pecific performance will not be decreed if the performance is of such a character as to make effective enforcement unreasonably difficult or to require such long-continued supervision by the court as is disproportionate . . . .").

a common part of contract disputes. Certain doctrines, such as the implied condition of reciprocal substantial performance in every contract, routinely involve courts in judging whether the quality of performance is good enough.[177] The implied duty of good faith in the performance of contracts likewise requires that courts make determinations about the quality of performance.[178] Nor does the award of damages eliminate this problem, as calculating the value of a promisee's expectation necessarily requires courts to compare actual conduct with some hypothetical performance that would comply with the contract.[179] Such an inquiry necessarily requires that the court determine what quality of performance is demanded by the contract.

Second, there are reasons to believe that, in many cases, monitoring is both less difficult and less necessary than the traditional equitable arguments assume. Perhaps most importantly, reputational concerns provide independent motivation for high quality performance, particularly in the sports, corporate, and entertainment industries where such contracts are most common and where performance is widely observed.[180]

In many situations there are also readily available and objective measures of quality for performance. Because most employment contracts are at-will, the issue of specific performance cannot arise. But in some contexts where affirmative promises to work are for a specified time, common observable measures are already employed as a matter of contract. Take the example of professional sports, where performance is quantified with exacting detail.[181] As one writer on sports law has noted, "A sudden drop in performance post-relief would be easily proved up, and while there might be other explanations for a downturn, proceedings would be far simpler than in other contexts."[182] Similarly, performance-based metrics are common in corporate CEO and other executive contracts.[183] Granted, such measures have been the subject of

177. *See* RESTATEMENT (SECOND) OF CONTS. § 237 (AM. L. INST. 1981) ("[I]t is a condition of each party's remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time."); *cf.* Taylor v. Johnston, 539 P.2d 425, 433 (Cal. 1975) (considering whether delays and frustrations in performance constituted an actual breach or repudiation of a contract).

178. *See* RESTATEMENT (SECOND) OF CONTS. § 205 (AM. L. INST. 1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.").

179. *See id.* § 347 (setting forth the factors necessary to calculate a disappointed promisee's damages).

180. *See* 3 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 12.06, at 12-57 n.23 (4th ed. 2020) ("Most of the cases involve contracts of entertainers or athletes.").

181. *See, e.g.*, BERT RANDOLPH SUGAR, THE BASEBALL MANIAC'S ALMANAC, at xxxii–iv (2d ed. 2010) (discussing the prevalence of statistics in baseball); THE BASEBALL ENCYCLOPEDIA 29–54 (Rick Wolff et al. eds., 9th ed. 1993) (same); *see also* Rapp, *supra* note 41, at 274 ("First, professional sports is characterized by better indicators of performance than any other industry.").

182. Rapp, *supra* note 41, at 274.

183. *See* David De Angelis & Yaniv Grinstein, *Performance Terms in CEO Compensation Contracts*, HARV. L. SCH. F. ON CORP. GOV. (Apr. 25, 2014), https://corpgov.law.harvard.edu/2014/04/25/performance-terms-in-ceo-compensation-contracts [https://perma.cc/Y3LK-N4Q3] (discussing

sustained criticism and many have questioned their effectiveness.[184] But such observables provide some guidepost to courts, easing their task in the most extreme cases (for example, such metrics could create a rebuttable presumption that a defendant was ignoring the injunction). And, as with other criticisms of specific performance and monitoring difficulties, these objections work in our favor—to the extent wronged parties view the remedy as imperfect, they are unlikely to request it except in cases in which monetary damages are truly inadequate. In other words, rational parties will take these limitations into account when seeking remedies against a breaching party.

The claim that equity courts lack the ability to engage in complex monitoring is an artifact of the early nineteenth-century equity jurisprudence from which the per se rule against specific performance emerged.[185] However, it is simply no longer true that courts sitting in equity are unwilling or unable to craft complex injunctive remedies that involve extensive monitoring. The most dramatic examples of this modern shift are equitable remedies in complex civil rights cases, which often involve decades of judicial monitoring of large institutions such as prison systems or school districts.[186] One way that this massive expansion in equitable remedies can be reconciled with the need to conserve judicial resources is delegating the monitoring to outside experts and shifting the cost of such monitoring onto the parties to the litigation.[187] Hence, in a situation where monitoring contractual performance would require resources and expertise that the court lacks, a special master with the necessary expertise could be appointed and her expenses could be charged to the breaching party.

It also simply isn't true that specific performance will always require more post-trial involvement by the court than damages. An award of damages creates a

performance metrics in CEO compensation contracts); Radhakrishnan Gopalan, John Horn & Todd Milbourn, *Comp Targets that Work*, HARV. BUS. REV. (2017), https://hbr.org/2017/09/comp-targets-that-work (on file with the *Iowa Law Review*) (discussing the same).

184. Gopalan et al., *supra* note 183.

185. *See* Clarke v. Price (1819) 37 Eng. Rep. 270, 273; 2 Wils. Ch. 158, 164–65 (explaining that the court could not enforce specific performance of a contract that required the defendant to write reports for the plaintiff); Kemble v. Kean (1829) 58 Eng. Rep. 619, 620; 6 Sim. 333, 335–38 (holding that the court could not enforce specific performance of a contract by an actor to perform at a particular theater); Johnson v. Shrewsbury & Birmingham Ry. Co. (1853) 43 Eng. Rep. 358, 362; 3 De G.M. & G. 914, 924 ("[I]t cannot be said that [a personal service contract] belongs to a class in which the exercise of the jurisdiction for specific performance has been habitual or familiar.").

186. *See, e.g.*, Brown v. Plata, 563 U.S. 493, 512, 545 (2011) (endorsing judicial monitoring of California's prison system after prisoners brought successful Eight Amendment claims); Swann v. Charlotte–Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971) (approving plan for judicial administration of school desegregation).

187. *See, e.g.*, United States v. ITS Fin., LLC, 592 Fed. App'x 387, 391 (6th Cir. 2014) (affirming the appointment of a third-party monitor "to monitor Appellants' compliance with the stipulated preliminary injunction"); Microsoft Corp. v. Does 1-2, No. 16-cv-00993, 2017 WL 3605317, at *12–14 (E.D. Va. Aug. 22, 2017) (instituting a court monitor system to administer a permanent injunction).

debt.[188] In most cases, the debt is voluntarily paid.[189] In theory, however, the defeated party can refuse to cut a check for the victorious promisee. In that case, the plaintiff must apply for a writ of *fieri facias*, directing the sheriff to attach the assets of the defendant and sell them to raise money to satisfy the judgment.[190] The defendant, however, has the ability to mount a court challenge to the attachment and sheriff's sale on various grounds.[191] Likewise, a defendant can conceal assets from attachment, which can lead to post-remedy discovery in aid of execution and associated litigation.[192] Finally, in extreme cases, a frustrated plaintiff can sue an unhelpful sheriff for a writ of amercement requiring her to pay the defendant's judgment.[193]

Another possible route for satisfying a judgment for damages is a writ of garnishment.[194] Federal statutes, however, sharply limit the amount of a debtor's income subject to garnishment, which can necessitate extended monitoring until the entire debt is paid.[195] In short, a defendant who chooses to resist payment of a judgment can precipitate a great deal of additional judicial involvement in the remedy. On the flip side of the argument, once faced with the prospect of contempt sanctions, most defendants can be counted on to perform, just as most defendants voluntarily pay their judgments.

Finally, there is the claim that courts ought not to issue injunctions forcing unwilling parties to work with one another. As long ago as 1853, one judge insisted that "enormous mischief may be done" if a court were "to compel one person to employ against his will another . . . for duties with respect to the due

188. *See* 1 DOBBS, *supra* note 136, § 1.4, at 14–15 ("Ordinary money judgments reflect an adjudication of liability but they do not enter any command to the defendant.").

189. *See id.* § 1.4, at 15 (discussing enforcement of remedies in cases where defendants do not voluntarily comply).

190. *Id.* § 1.4, at 15–16 (discussing writs of execution and sheriff's sales).

191. *See, e.g.*, Ledgedale of Pa., Inc. v. Carroll, 478 F. Supp. 711, 711–12 (M.D. Pa. 1979) (discussing extensive litigation challenging a sheriff's sale, which ultimately led to an attempted removal from state to federal court).

192. *See, e.g.*, State *ex rel.* Rowland Grp., Inc. v. Koehr, 831 S.W.2d 930, 932 (Mo. 1992) (en banc) ("The principal purpose of a judgment debtor examination is to discover assets, to compel the defendant . . . to disclose under oath all the assets of his estate, and, after this discovery, to authorize the court to say whether or not the debtor has assets that may be levied . . . . A related purpose is to disclose fraudulently concealed property so that it may properly be subjected to the payment of a just debt."); *Ex parte* Burchinal, 571 So. 2d 281, 283 (Miss. 1990) ("[T]he judgment creditor should be given the freedom to probe the deponent for the purpose of discovering any hidden or concealed assets of the debtor."); Brunet v. Magnolia Quarterboats, Inc., 711 So. 2d 308, 314 (La. Ct. App. 1998) (discussing a company's failure to produce documents and the resulting proceedings).

193. *See, e.g.*, Vitale v. Hotel Cal., Inc., 446 A.2d 880, 883–84 (N.J. Super. Ct. L. Div. 1982) (describing a successful suit for amercement against a sheriff who refused to vigorously levy against a recalcitrant defendant).

194. *See* 1 DOBBS, *supra* note 136, § 1.4, at 17–18 (discussing garnishment to satisfy a judgment).

195. *See, e.g.*, 15 U.S.C. §§ 1671–1677 (discussing disadvantages of garnishment and exempting much of a person's income from garnishment); *see also* Lancaster v. Am. & Foreign Ins. Co., 272 F.3d 1059, 1061 (8th Cir. 2001) (discussing extensive garnishment-related litigation).

performance of which the utmost confidence is required."[196] The problem with this argument is that it has been rejected in a variety of other contexts.[197] Hence, an order of reinstatement is a fairly standard remedy in the case of labor disputes, even when relations between management and workers have been strained by strikes and other disputes.[198] Likewise, in the context of employment law, courts routinely order employers to reinstate employees who have been wrongly fired.[199] Although these remedial devices can be criticized in some instances, under current law, a concern for forcing unwilling parties to work together does not justify a per se ban on equitable relief in other areas regulating personal services.[200]

III. THREE EXAMPLES

In this Part, we detail our approach to the specific enforcement of personal service contracts through three examples that illustrate the rule's application in practice. Recall that, before a court can order specific performance under our proposed rule, a number of conditions must be met. First, consistent with the current law governing specific performance, monetary damages must be an inadequate remedy, either because the performance is unique and lacks adequate substitutes or because damages are difficult to calculate.[201] Second, recall the additional protections added by our proposal: The contracting parties must explicitly opt for specific performance in the contract and have rough equality of bargaining power or should be represented by counsel or agents.[202] Finally, the proposal has temporal limits—even unusual talents can be replaced with a reasonable substitute within one year's time. In addition,

196. Johnson v. Shrewsbury & Birmingham Ry. Co. (1853) 43 Eng. Rep. 358, 363; 3 De G.M. & G. 914, 926.

197. *See generally* Oman, *supra* note 16 (arguing the Thirteenth Amendment does not prohibit specific performance of personal service contracts).

198. *See, e.g.*, Sunrise Senior Living, Inc. v. NLRB, 183 F. App'x. 326, 330, 337 (4th Cir. 2006) (upholding an order reinstating a worker after a strike); Ahearn *ex rel.* NLRB v. Jackson Hosp. Corp., 351 F.3d 226, 238–39 (6th Cir. 2003) (upholding an order to reinstate employees fired for participating in a strike); NLRB v. Midw. Pers. Servs., Inc., 322 F.3d 969, 980 (7th Cir. 2003) (upholding an order to reinstate striking employees).

199. *See, e.g.*, Squires v. Bosner, 54 F.3d 168, 170 (3d Cir. 1995) (ordering reinstatement of an employee wrongfully terminated in violation of his first amendment rights); Banks v. Burkich, 788 F.2d 1161, 1162 (6th Cir. 1986) (ordering reinstatement of an employee wrongfully dismissed for exercising his First Amendment rights, even when the employee's supervisor stated he could no longer work with the employee); State Div. of Hum. Rts. *ex rel.* Cecconi v. Chi. Pneumatic Tool Co., 489 N.Y.S.2d 29, 29–30 (App. Div. 1985) (reinstating a wrongfully fired employee after eight years and a major structural reorganization of the employer's company).

200. *See, e.g.*, Standley v. Chilhowee R-IV Sch. Dist., 5 F.3d 319, 322 (8th Cir. 1993) (finding that reinstatement of a teacher was "ill-advised" when there was extreme animosity between the teacher and employer); Maxfield v. Sinclair Int'l, 766 F.2d 788, 796 (3d Cir. 1985) (recognizing that "the relationship between the parties may have been so damaged by animosity that reinstatement [was] impracticable").

201. *See* RESTATEMENT (SECOND) OF CONTS. § 359(1) (AM. L. INST. 1981); *supra* text accompanying notes 152–55 (discussing the common law doctrine of specific performance).

202. *See supra* notes 155–59 and accompanying text (discussing the additional protections added by our rule).

although the likelihood of renegotiation or ease of monitoring performance are not explicit factors in our proposed rule, these illustrative cases demonstrate that, in the cases most likely to warrant specific performance, renegotiation is, in fact, quite likely. When it is not, monitoring should not prove prohibitive.

We illustrate the application of these conditions to three types of contracts that commonly stipulate a fixed term performance of personal services. Through these examples, it is easy to see how these requirements limit application of the specific performance rule to a limited set of personal service contracts in which monetary damages are likely to be inadequate and the breaching party is unlikely to be exploited or treated unfairly through an order of specific performance.

First, in Section III.A, we discuss the paradigmatic case for specific performance, "The Coach." Using the actual case of *Vanderbilt v. DiNardo*,[203] we illustrate the application of our proposed specific performance rule to a set of definite term employees that includes high-level athletes, coaches, and corporate executives.[204]

In such cases, the requirements of rough equality of bargaining power and/or representation will likely be satisfied, leaving only the question of whether remedies other than specific performance are inadequate. Second, in Section III.B, we discuss the most common fixed term employment contract, "The Schoolteacher," illustrating that, absent highly unusual circumstances, specific performance would not be available in such cases. Third, in Section III.C, we discuss the intermediate case—"The Pop Star." These are fixed term contracts of limited duration—for example, a set number of shows on a music tour. Such cases must be decided on a case-by-case basis. Although damages will frequently be easily calculable and wholly compensatory to the nonbreaching party, there may be instances in which specific performance would be the better remedy.

A. THE COACH

In this Section, we analyze the case of *Vanderbilt v. DiNardo*,[205] arguing that it is the paradigmatic case for specific performance: monetary damages are likely to be an inadequate remedy; the parties are represented by counsel or agents and have roughly equal bargaining power; renegotiation is likely and, in the event that renegotiation doesn't occur, monitoring should be straightforward and undertaken at the expense of the parties.

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203. *See generally* Vanderbilt Univ. v. DiNardo, 174 F.3d 751 (6th Cir. 1999).

204. *See* Schwab & Thomas, *supra* note 9, at 235, 247 tbl.2 (examining a dataset of 375 CEO contracts at the largest U.S. corporations and finding that the bulk of contracts are for a definite term, with the most common term being three years and the second most common being five years); Gillan et al., *supra* note 9, at 1643, 1653 (finding a median contract term of three years for CEOs in the S&P 500).

205. *DiNardo*, 174 F.3d at 753–55.

Gerry DiNardo, a successful college football coach, entered into a contract with Vanderbilt University in 1990 to coach their team for five years.[206] The contract was subsequently extended for an additional two years.[207] Under the terms of the contract, DiNardo's base salary was $100,000 per year with various bonuses based on the performance of the team.[208] After coaching at Vanderbilt for four years, DiNardo accepted a much more lucrative offer from Louisiana State University.[209] Vanderbilt sued for breach of contract, and, unable to ask for specific performance, sought payment under a liquidated damages clause.[210] After Vanderbilt's victory at the district court was partially overturned on appeal, DiNardo and the University settled for an undisclosed amount.[211] Imagining the counterfactual scenario in which Vanderbilt sought specific performance of the contract, rather than liquidated damages, helps to illustrate when and why the specific performance of personal service contracts may be useful under some circumstances.

We note at the outset that both parties are sophisticated, repeat players with substantial bargaining strength and that DiNardo is represented by his brother, an attorney.[212] In addition, as will be shown, money damages are difficult to calculate and thus likely to be inadequate and DiNardo is the type of specialized, high-value employee in which employers are likely to make substantial investments, provided they can be given some assurance of compensation in the event of breach.

1. The Inadequacy of Other Remedies

Awarding specific performance rather than damages would solve the thorny problem of valuing DiNardo's performance, which is not an easy task for either the court *ex post* or the parties *ex ante*. The *DiNardo* district and appeals courts recognized this when holding that the liquidated damages provision was reasonable "given the nature of the *unquantifiable damages* in the case."[213] As the District Court found: "The potential damage to [Vanderbilt] extends far beyond the cost of merely hiring a new head football coach . . . . It is impossible to estimate how the loss of a head football coach will affect alumni relations, public support, football ticket sales, contributions, etc."[214]

Although the liquidated damages provision present in the DiNardo contract substitutes the parties' judgement about damages for the court's, this amount is also difficult for the parties to estimate *ex ante* and presents the danger that a

206. *Id.* at 753.

207. *Id.* at 754. This fact was disputed, and ultimately remanded to the district court for further fact finding. *Id.* at 760.

208. Vanderbilt Univ. v. DiNardo, 974 F. Supp. 638, 640 (M.D. Tenn. 1997).

209. DiNardo's salary from LSU was $585,000. *See* Michael Smith, *SEC Coaches' Salaries Reflect Competitive Times Schools Paying More, Adding Perks to Keep Up*, STATE, June 18, 1999, at C1.

210. *DiNardo*, 174 F.3d at 753.

211. *See DiNardo Settles Suit with Vanderbilt*, ADVOCATE, May 11, 2000, at 7C.

212. *DiNardo*, 174 F.3d at 754.

213. *Id.* at 755 (emphasis added) (quoting *DiNardo*, 974 F. Supp. at 642 (district court opinion)).

214. *DiNardo*, 974 F. Supp. at 642.

court reviewing the provision *ex post* will consider it an unenforceable penalty (as argued by DiNardo with sympathy from at least one member of the appellate court).[215] After all, the coach may be successful or unsuccessful, a good recruiter or a poor one, and popular with alumni or not, regardless of the expectations of the parties at the time of contracting.

Moreover, the noncompete clause included in the agreement was also insufficient to fully compensate Vanderbilt. As recognized by the court, "'a long-term commitment' by DiNardo was 'important to the University's desire for a stable intercollegiate football program,'" and Vanderbilt reasonably expected to suffer losses from DiNardo's departure due to the possible effects on recruiting, retention of coaching staff, alumni relations, and ticket sales, among others.[216] These losses would be incurred (although perhaps at a lower rate) regardless of whether DiNardo worked for a competitor.[217] Indeed, this very argument was noted by the concurrence as evidence that the liquidated damages provision was actually an unenforceable penalty:

> Section eight does not make Coach DiNardo liable for any liquidated damages at all, interestingly enough, unless, during the unexpired term of his contract, he "is employed or performing services for a person or institution other than the University . . . ." But how the coach spends his post-resignation time could not reasonably be expected to affect the university's damages; should the coach choose to quit in order to lie on a beach somewhere, the university would presumably suffer the same damages that it would suffer if he quit to coach for another school. The logical inference, therefore, would seem to be that section eight was intended to penalize the coach for taking another job, and was not intended to make the university whole by liquidating any damages suffered as a result of being left in the lurch.[218]

The two opinions of the *DiNardo* courts also illustrate the problem of undercompensation to a nonbreaching employer that has made specific investments in an employee that it intended to recoup during the contracting period, as was evidently the case with Vanderbilt and DiNardo. As previously noted in Part I, the specific performance of personal service contracts can encourage relationship-specific investment in an employee with specialized skills.[219] This point is well-illustrated by the *DiNardo* case and recognized by the court. According to the court:

> The contract language establishes that Vanderbilt wanted the five-year contract because "a long-term commitment" by DiNardo was "important to the University's desire for a stable intercollegiate football program," and that this commitment was of "essence" to the contract. Vanderbilt offered the two-year contract extension to DiNardo

215. *DiNardo*, 174 F.3d at 760 (Nelson, J., concurring in part and dissenting in part).
216. *Id.* at 756 (majority opinion).
217. *Id.*
218. *Id.* at 760 (Nelson, J., concurring in part and dissenting in part).
219. *See supra* Section I.B.

> well over a year before his original contract expired. Both parties understood that the extension was to provide stability to the program, which helped in recruiting players and retaining assistant coaches.[220]

It later concluded: "Vanderbilt hired DiNardo for a unique and specialized position, and the parties understood that the amount of damages could not be easily ascertained should a breach occur."[221]

These difficulties are common to a number of contracts in the sports and entertainment industries. As stated by one commenter:

> Since it would be virtually impossible to determine with any degree of certainty the financial harm caused by a player's breach of contract, an action at law for damages would be difficult to maintain. Without a doubt, if a baseball team lost a twenty-game winning pitcher, a football team lost its quarterback, or a basketball team lost its leading scorer, the team would be hard-pressed to repeat the success of a preceding year. A decline in league standings in any professional sport is usually paralleled by a decline in attendance, resulting in a monetary loss to the club. There are too many variables involved, however, for a club to directly relate the breach of contract to a specified amount of damages, thus virtually eliminating an action at law for damages.[222]

2. Renegotiation and Court Monitoring

In cases like *DiNardo*, an order of specific performance is likely to result in negotiation and release, with the coach paying a portion of his increased salary from his new employer to his old employer in return for a release from the injunctive remedy. We know that issues of bilateral monopoly and other bargaining pathologies can be overcome because in DiNardo's case that is exactly what happened. After remand from the court of appeals, there was a bilateral monopoly involving the sale of Vanderbilt's rights under the contract and DiNardo's purchase of those rights, yet the parties were able to reach a negotiated settlement.[223] Furthermore, the fact that universities are willing to offer substantial end-of-contract bonuses suggests that they put a high value on complete performance of their coaching agreements.[224] In other words,

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220. *DiNardo*, 174 F.3d at 756 (majority opinion).

221. *Id.* at 757.

222. Peter J. Bosch, Comment, *Enforcement Problems of Personal Service Contracts in Professional Athletics*, 6 TULSA L.J. 40, 58–59 (1969); *see also* Sterk, *supra* note 78, at 394–95 (discussing challenges in assessing damages incurred from breach after investment in a specific worker); Long Island Am. Ass'n Football Club, Inc. v. Manrodt, 23 N.Y.S.2d 858, 860 (Sup. Ct. 1940) (noting the special difficulties of organizing a football team, including training players as a team and building a cohesive unit around certain players and skill sets).

223. *See DiNardo Settles Suit with Vanderbilt*, *supra* note 211 (reporting the settlement between DiNardo and Vanderbilt).

224. *See* Pam Louwagie, *Contract Provisions Favor College Coaches – Brenda Oldfield's Departure from the University of Minnesota Highlights the Power Elite that Coaches Wield in the Marketplace*, STAR TRIB., Apr. 4, 2002, at 01A (discussing various bonus structures in college coaching contracts).

the value of complete performance of the contract is likely high relative to the costs of bargaining over specific performance rights. Once the scope of Vanderbilt's remedial rights against DiNardo were made clear by litigation, the two parties settled.[225] There is every reason to suppose that the same result would have happened had the court awarded an order of specific performance. The main difference would have been that Vanderbilt would have been in a better position to capture a portion of the economic benefits created by DiNardo's breach of contract.

Had renegotiation failed, however, a court would have been able to craft a workable order of specific performance. First, DiNardo's performance for Vanderbilt would have occurred in the public glare of a college football season. Given that his continuing economic livelihood depended upon his reputation and demonstrated abilities as a college football coach, he would have had ample incentives outside of the threat of judicial punishment not to shirk. Second, sports are an activity where performance along every conceivable metric is quantified and recorded. Based on past performance, the court could create benchmarks of performance that a failure to meet would create a presumption of shirking.[226] Alternatively, the parties could themselves create such benchmarks when they stipulate specific performance as a remedy in the contract. If DiNardo failed to meet those benchmarks, then DiNardo could be given an opportunity to show to the court why failure was the result of factors beyond his control.

Finally, the court could appoint outside experts, such as a panel of retired football coaches to make an independent judgement as to the quality of DiNardo's performance. In short, crafting an order of specific performance and a mechanism for determining whether DiNardo was shirking is well within the competence of modern courts. To be sure, no such mechanism would be perfect and the ultimate decision as to whether to ask the court for such a remedy would lie with the wronged party, after taking into account these costs and complexities. However, Vanderbilt would be well positioned to decide whether or not such an injunction was worth the hassle. As to DiNardo,

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225. *See DiNardo Settles Suit with Vanderbilt*, *supra* note 211.

226. *See, e.g.*, Jason Belzer, *Making Sense of College Coaching Contracts*, ATHLETICDIRECTORU, https://athleticdirectoru.com/articles/making-sense-of-college-coaching-contracts [https://perma.cc/2CZW-S5CK] ("There are literally hundreds of incentives and escalators that can be given to coaches, but a few of the more popular and worthwhile ones include bonuses related to: *Total Wins, Conference Championships, Bowl Game, NCAA Tournament Appearances and Postseason Wins, Academic Performance (APR, GSR, Grade Point) Thresholds, Poll Rankings, Recruiting Rankings, Coach of the Year or Player Recognition, as well as Increases in Game Attendance and/or Season Ticket Purchases.*"). We note that another category of contracts likely to be the subject of specific performance orders under our proposal—corporate CEO contracts—also widely employ observable performance metrics. *See generally* MARTHE VAN HOVE & XAVIER BAETEN, EXEC. REMUNERATION RSCH. CTR., WHAT TO REWARD EXECUTIVES FOR? A TAXONOMY OF PERFORMANCE METRICS IN EXECUTIVE INCENTIVES SUPPLEMENTED BY AN OVERVIEW OF BUSINESS PRACTICE (2021) (discussing an array of performance metrics used to evaluate corporate executives' contracts); Lize-Mari van Wyk & Nicolene Wesson, *Alignment of Executive Long-Term Remuneration and Company Key Performance Indicators: An Exploratory Study*, 14 J. ECON. & FIN. SCIS. 62 (2021) (same).

he has a very simple way of avoiding an intrusive injunction: simply performing his contractual obligations.

3. Fair Division of Surplus

This Article has argued that specific performance provides efficiency benefits. First, it provides incentives to reveal private, unverifiable information. Second, because it fully compensates the nonbreaching party, it encourages investment in employees. For those concerned with fairness, this latter point also means a more normatively desirable division of the surplus from breach because an order of specific performance allocates more of the value created by DiNardo's breach to Vanderbilt rather than to DiNardo.

The current rule allows the breaching party to capture most of the value of their breach. Specific performance, on the other hand, would allow the victim of breach to capture more of the benefits of DiNardo's alternative performance for LSU. If we believe that Vanderbilt acquires a legitimate right to DiNardo's services under the original contract, then a remedy that gives Vanderbilt a greater claim on any alternative performance by DiNardo as a result of breach ought to be normatively attractive. As between Vanderbilt and DiNardo, Vanderbilt *deserves* DiNardo's performance while DiNardo *deserves* only the promised payment from Vanderbilt. By breaching, DiNardo is taking something that by right belongs to Vanderbilt. The normative attraction of specific performance on this argument is precisely that it prevents DiNardo from capturing an economic benefit that he has already bargained away to Vanderbilt. The distribution between DiNardo and Vanderbilt—even after renegotiation in Coasian conditions—is fairer than the distribution that DiNardo can obtain under the current remedial rule.

B. THE SCHOOLTEACHER

One of the most significant exceptions to the U.S. norm of at-will employment is schoolteachers.[227] A long-standing practice at many elementary and secondary schools, both public and private, is the use of one-year fixed term contracts for teachers.[228] The rationale typically given is the relatively unusual need of both teachers and schools for stability and predictability during any given school year.[229] A teacher let go during the middle of the term would likely find alternative employment difficult. Similarly, fixed term contracts may reduce teacher turnover during the school year.[230] Do such contracts meet the standards for specific performance in the event of breach by the teacher? We think it unlikely, although there may be exceptions.

227. Stephen Roppolo, *At-Will Employment v. One-Year Teacher Contracts in Independent Schools*, NAT'L ASS'N INDEP. SCHS., https://www.nais.org/articles/pages/at-will-employment-v-one-year-teacher-contracts-in-independent-schools [https://perma.cc/M735-4TWY].

228. *Id.*

229. *Id.*

230. *Id.*

1. Monetary Damages Are Likely to Be Adequate and Employee-Specific Investment Is Unlikely

Although it's possible to imagine a scenario in which a school has substantially invested in a difficult to replace teacher with special skills, this will not normally be the case. Instead, most of the time, the damages to the school will equal the amount required to find a replacement, which is generally set through a liquidated damages provision.[231] Except in unusual circumstances, this amount should be relatively easy to establish based on past experience.

Moreover, most teachers have skills that are transferable to another employer and are easily replaced by an alternate teacher (except perhaps in the middle of the school year, as noted above). As such, monetary damages should adequately compensate either party in the event of breach and should be calculable *ex ante* in a liquidated damages provision, which in fact is currently the norm.

Naturally, there may be exceptions, though we think it likely to be quite rare.[232] But it is conceivable that a school or university could invest heavily in a particularly unusual or high-profile talent and then admit students, build a program or concentration, or hire complementary staff in expectation of that employment. Such a case would be a candidate for specific performance if specific performance is specified as a potential remedy in the contract and the other criteria for specific performance outlined in this Article have been met.

2. Many Teachers Will Not Have Independent Representation and May Not Be Sophisticated Contract Negotiators

Many teachers are represented by unions and some may be sophisticated negotiators in their own right or be able to hire representation.[233] Nonetheless, we assume this will not be universally true. Moreover, the purposes and content of union representation are different from those of independently retained counsel. Union representatives owe a duty to union members as a whole and not to any specific member, at least not in the same way that a fiduciary such as a lawyer owes loyalty to a client.[234] Hence, in many cases a union representative's incentives will be less closely aligned with individual teachers than are those of a lawyer representing a CEO in negotiations over an employment contract or a talent agency representing an athletic star or an

231. Ann Blankenship-Knox, *Penalty or Damages? Are There Limits to Liquidated Damages Provisions in Teacher Employment Contracts*, 14 FLA. A&M U. L. REV. 79, 79–81 (2019); Ruder Ware, *Liquidated Damages: A Tool for Teacher Retention?*, JDSUPRA (Feb. 7, 2017), https://www.jdsupra.com/legalnews/liquidated-damages-a-tool-for-teacher-54700 [https://perma.cc/NBU2-PWBU].

232. *But see* Mission Indep. Sch. Dist. v. Diserens, 188 S.W.2d 568, 569 (Tex. 1945) (finding school district entitled to a negative injunction against a "music teacher of extraordinary and unique talents").

233. *National Teacher and Principal Survey*, NAT'L CTR. FOR EDUC. STATS., https://nces.ed.gov/surveys/ntps/tables/ntps1718_20111201_t1s.asp [https://perma.cc/C7S9-VNHC] (finding nearly seventy percent of public schoolteachers report union membership in 2017 and 2018).

234. *Right to Fair Representation*, NLRB, https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/employees/right-to-fair-representation [https://perma.cc/VMA3-X6MB].

entertainer. Finally, in some cases the teacher will have very limited ability to choose, control, or even opt-out of a relationship with a union representative.[235] In short, the mere fact that a teacher is represented by a union is insufficient to assure a court that there is rough equality of bargaining power between the teacher and her employer.

C. THE POP STAR

We consider this the intermediate case where monetary damages will sometimes be adequate and sometimes will not, depending on the specifics of the contract, the parties involved, and the timing of breach. In such cases, the parties are likely to be sophisticated and represented by counsel or agents. As such, provided that the contract calls for specific performance as a remedy, the only question for the court is whether alternate remedies are adequate.

Successful pop stars such as Michael Jackson or more recently Taylor Swift provide good examples of such intermediate cases. Often promoters will expend significant amounts in anticipation of a performance or tour.[236]

For example, in 2009, when Michael Jackson died suddenly less than a month before the start of his fifty-show English tour, AEG, the company running the tour, had spent more than $20 million in preparation for the tour.[237] Artists' contracts thus routinely anticipate the potential cancellation of an event by the promoter, the artist, or circumstances beyond either party's control and attempt to allocate such risks through insurance and contractual provisions.[238]

Neither insurance nor existing contractual tools are perfect solutions, however. For example, because of uncertainty regarding Michael Jackson's health and his history of cancelling concerts, AEG was able to obtain insurance for fewer than half of the scheduled concerts and even that coverage was incomplete.[239] AEG decided to self-insure, bearing the risk of uninsured cancellations.[240] According to one industry observer: "They are taking a big hit. They will be able to re-book some of those shows. But those in July, the

235. *But see* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. 878, 884, 887 (2018) (finding an Illinois law requiring public employees to pay "agency fee" to AFSCME unconstitutional).

236. *See, e.g.*, Axelrod, *supra* note 42, at 409 ("Many aspects of the entertainment business are highly speculative and entertainment firms are known to invest heavily in developing and marketing the various products they create."); Sterk, *supra* note 78, at 394–95 ("Employers and agents also invest in employees (or principals) by providing promotional services. Suppose, for instance, a record company enters into a long-term exclusive recording contract with a singer. If the company promotes the singer's reputation, much of the effort spent on the singer's behalf will be wasted, from the company's perspective, if the singer is free to record for another company.").

237. Ray Waddell, *Exclusive: AEG's Randy Phillips Talks About Michael Jackson Fallout*, BILLBOARD (July 2, 2009), https://www.billboard.com/pro/exclusive-aegs-randy-phillips-talks-about-michael-jackson-fallout [https://perma.cc/JEQ3-ZRV2].

238. *Id.*

239. Jon Swaine & Jamie Dunkley, *Michael Jackson's Death Leaves AEG Live Facing £300m Bill*, TELEGRAPH (June 26, 2009, 3:26 PM), https://www.telegraph.co.uk/culture/music/michael-jackson/5650210/Michael-Jacksons-death-leaves-AEG-Live-facing-300m-bill.html (on file with the *Iowa Law Review*).

240. *Id.*

building will probably be dark."[241] Although some industry insiders predicted that the losses would bankrupt the firm, AEG is still in business and gained valuable intellectual property in the form of video footage of rehearsals the week of Jackson's death, which it claimed more than compensated for those large losses.[242] Of course, Jackson's death is not the same as a breaching artist, but the example highlights the full extent of losses a promoter may face when confronted with unexpected tour cancellations.

Contractual provisions are intended to fill any insurance gap but may not always do so effectively. Popular artists frequently have detailed (and quite favorable) cancellation provisions and also require upfront payment of much of their appearance fee.[243] Despite careful contractual language in Rod Stewart's contract requiring him to "refund the payment made by . . . Rio," "[i]n the event Stewart is ill or incapacitated for any reason, and as a result incapable of performing," Stewart refused to refund the $2 million paid by Rio, precipitating extended and expensive litigation that spanned many years.[244] Damages could also prove inadequate in the event of a judgement-proof defendant—after all, the number of successful rock and pop stars who have filed for bankruptcy is lengthy.[245] Finally, damages may simply be difficult to calculate in some instances.[246] This is more likely to be true when the tour is longer, has more performances, and requires investment and promotion from the promoter that may be difficult to fully anticipate or calculate *ex ante*.

Even in the case of a single performance, however, money damages may be inadequate or incalculable, as illustrated by the case of *Chicago Coliseum Club v. Dempsey*.[247] Chicago Coliseum Club entered into a contract with William Harrison ("Jack") Dempsey in March 1926 to promote a boxing match to take place in September.[248] When Dempsey repudiated the contract, Chicago Coliseum brought suit, seeking a negative injunction and damages.[249] Coliseum sued for both its alleged lost profits and the substantial expenses incurred in

241. *Id.*

242. Ray Waddell, *Promoter's Show Must Go On*, BILLBOARD, July 11, 2009, at 16.

243. Victor P. Goldberg, *Excuse Doctrine: The Eisenberg Uncertainty Principle*, 2 J. LEGAL ANALYSIS 359, 368 (2010) (discussing the contracts of Michael Jackson, Paula Abdul, and Rod Stewart).

244. *Id.* at 368–69 (discussing the Rod Stewart contract and Rio litigation and quoting the contract language); Rio Props., Inc. v. Stewart Annoyances, Ltd., 420 F. Supp. 2d 1127, 1130 (D. Nev. 2006).

245. *See, e.g.*, Kathy Benjamin & Brian Boone, *Rappers Who Lost All Their Money*, GRUNGE (Feb. 21, 2023, 12:43 AM), https://www.grunge.com/151067/rappers-who-lost-all-their-money [https://perma.cc/M2P6-9YXM] (listing rappers who filed for bankruptcy).

246. Axelrod, *supra* note 42, at 409–10 ("While the typical legal response to contract breach in most situations is damages for loss incurred, it can be very difficult if not impossible to measure the loss of a star attraction."); Alex M. Johnson, Jr., *The Argument for Self-Help Specific Performance: Opportunistic Renegotiation of Player Contracts*, 22 CONN. L. REV. 61, 78 (1989) ("Damages are an ineffective remedy because they cannot be recovered by the promisor due to the speculative nature of the loss incurred by the club as a result of the player's breach.").

247. Chi. Coliseum Club v. Dempsey, 265 Ill. App. Ct. 542, 550 (1932).

248. *Id.* at 544–45.

249. *Id.*

preparation for the match.[250] Although the Coliseum alleged that the fight would bring in gross receipts of $3,000,000, and that the expense incurred would be $1,400,000, leaving a net profit of $1,600,000, the court rejected such an award as too speculative.[251] As stated by the court:

> The character of the undertaking was such that it would be impossible to produce evidence of a probative character sufficient to establish any amount which could be reasonably ascertainable by reason of the character of the undertaking. The profits from a boxing contest of this character, open to the public, is dependent upon so many different circumstances that they are not susceptible of definite legal determination. The success or failure of such an undertaking depends largely upon the ability of the promoters, the reputation of the contestants and the conditions of the weather at and prior to the holding of the contest, the accessibility of the place, the extent of the publicity, the possibility of other and counter attractions and many other questions which would enter into consideration. Such an entertainment lacks utterly the element of stability which exists in regular organized business.[252]

The court also denied recovery of most of the expenses on a variety of grounds.[253]

We concede the possibility that our proposed rule may simply put an end to repudiations and advance cancelations, such as Dempsey's. We consider this a feature rather than a bug, however. Close in breaches are more likely to have calculable damages and may result in reputational harm to the breaching party rather than the promoter. For example, fans—not knowing the full circumstances—may blame the promoter when it cancels a performance scheduled for next year but know to blame Dempsey if everyone but him shows up for the boxing match.

CONCLUSION

It is time to reconsider Anglo-American law's per se rule against the specific enforcement of personal service contracts. There are powerful arguments in favor of specific performance in general and there is no reason to suppose that these arguments don't apply in the personal services context. Indeed, we have good reasons for supposing that in some cases they apply with special force. Furthermore, the arguments that have traditionally been offered in favor of the per se rule do not stand up to close scrutiny. In some cases—such as the chestnut that specific enforcement of personal service contracts would be unconstitutional under the Thirteenth Amendment—the arguments are simply wrong. In other cases, they fail to reckon with the radical transformations in the law that have occurred since the per se rule was first articulated in the

250. *Id.* at 549.
251. *Id.* at 549–50.
252. *Id.*
253. *Id.* at 552–54.

early nineteenth century. In no case do they justify a per se rule against the specific performance of personal service contracts in all cases.

We have not argued that all employment contracts should be specifically enforced. Rather, we make the more modest claim that the ordinary rules of equitable remedies should be applied to personal service contracts. Specific performance should be treated as an extraordinary, discretionary remedy when applied to personal service contracts. It should only be available when legal remedies such as money damages are inadequate and when the court can be confident that specific performance will not involve overreaching or abuse. This latter requirement justifies special prophylactic rules in the formation of personal service contracts that might be specifically enforced. Such contracts should contain explicit agreements for specific performance in order to avoid surprise. There should be rough equality of bargaining power between the two parties, and the employee should be represented by counsel or some other expert unless the court is convinced that the party has the ability to negotiate in a highly sophisticated manner on their own behalf. Such a rule would allow for the specific enforcement of personal service contracts involving high-income, sophisticated, high-status employees where money damages will be undercompensatory. It would exclude enforcement of even the contracts of such well-situated employees where a high-quality substitute performance is readily available or where damages can be calculated with confidence. It would also exclude specific enforcement of those rare contracts by ordinary employees that are not at-will agreements.

Hedged about with so many limitations, one might think that even if persuasive in theory the case for limited specific performance of personal service contracts is irrelevant in practice. This is not true. In brute demographic terms, the types of personal service contracts that are likely candidates for specific performance are not a significant part of the workforce. They are, however, legally and economically significant. The contracts of such elite employees involve huge sums of money. They are also disproportionately the kind of labor contracts that will be litigated and find themselves before the courts. We understand that our proposal is paternalistically protective of lower wage employees, at least some of whom may be savvy bargainers who would prefer the ability to negotiate for a fixed terms contract in exchange for the possibility of specific performance. Although we are sympathetic to that objection, we believe that it makes sense to start slowly, with the types of contracts for which monetary damages are least likely to fully compensate nonbreaching parties, and the types of employees who are most likely to enter such arrangements as fully informed contracting parties.