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**CONTRACT LAW AND THE SECOND-PERSON  
STANDPOINT: WHY EFFICIENCY-  
MAXIMIZATION PRINCIPLES CAN  
NEITHER EXPLAIN NOR JUSTIFY  
THE EXPECTATION DAMAGES REMEDY**

*Robin Bradley Kar\**

Do the deep principles that govern the relationships between private individuals under the law differ from those that govern the relationships between private individuals and the government in our legal system? One of the subtle, if sometimes unnoticed, effects that the law and economics movement has had on our legal culture is to suggest an affirmative answer to this question. This answer is, however, not only wrong, but it has also helped to produce a distorted—and even alienated—conception of what our relationships with one another consist in, both in the marketplace and in many other areas of private interaction.

In this article, I will begin to challenge this conception. The conception at issue arises most fundamentally from facts about the relative explanatory success that the law and economics paradigm has had in accounting for traditional areas of private as opposed to public law. Before describing my specific strategy of argumentation here, it will therefore help to clarify what precisely this targeted conception is, and how facts about the law and economics movement have contributed to it.

Consider, in this regard, the traditional distinction between “private law” and “public law.” Although a number of people have

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questioned the importance of this distinction,<sup>1</sup> the distinction is itself easy to draw. Black's Law Dictionary defines the "private law" as that "body of law dealing with private persons and their property and relationships."<sup>2</sup> Core areas of private law thus include contract law, property law, and tort law.<sup>3</sup> The term "public law," by contrast, refers to "[t]he body of law dealing with the relations between private individuals and the government, and with the structure and operation of government itself."<sup>4</sup> The term therefore refers most conspicuously to "constitutional law, criminal law, and administrative law taken together."<sup>5</sup>

In my view, this distinction is critically important for an accurate appraisal of the large-scale impact that the law and economics movement has had on our collective understanding of the law. The law and economics movement has sometimes claimed rather imperial explanatory objectives for itself,<sup>6</sup> and its explanatory success in any given area of the law has typically been controversial.

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1. See, e.g., CHALLENGING THE PUBLIC/PRIVATE DIVIDE: FEMINISM, LAW AND PUBLIC POLICY (Susan B. Boyd ed., 1997) (collecting essays that challenge the public/private divide); Susan Moller Okin, *Justice and Gender: An Unfinished Debate*, 72 *FORDHAM L. REV.* 1537, 1552 (2004) (discussing feminist critiques of the public/private distinction); see also Amir N. Licht, *Stock Exchange Mobility, Unilateral Recognition, and the Privatization of Securities Regulation*, 41 *VA. J. INT'L L.* 583, 604–17 (2001) (questioning distinction in areas of the law apart from the family); Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 *GEO. L.J.* 779, 807 (2004) ("While the Realists carefully worked out analytic demonstrations of the incoherence of liberal social theory built upon the public/private distinction, what post-Realist thinkers took from Realist work was not the substantive conclusion that liberal social theory was intellectually empty, but rather a more general, pluralist idea that the choice between, say, free markets and economic regulation was political and therefore not amenable to neutral, principled resolution. To emphasize this point: The Realists showed that there was, analytically, simply no such thing as an unregulated, free market. The post-Realist thinkers, ignoring the most critical dimension of Realist work, interpreted the 'holding' of Realism to be that the choice between markets and regulation was political, and therefore it was illegitimate for the Court to impose the choice as a matter of constitutional law.").

2. BLACK'S LAW DICTIONARY 1234 (8th ed. 2004) ("Private Law").

3. See, e.g., Maimon Schwarzschild, *Keeping It Private*, 44 *SAN DIEGO L. REV.* 677, 679 (2007) ("In a common law country, private law would translate, more or less, to the law of tort, contract, property, inheritance, as well as many aspects of family and commercial law.").

4. BLACK'S LAW DICTIONARY, *supra* note 2, at 1267 ("Public Law").

5. *Id.*

6. Richard Posner has, for example, displayed incredibly broad explanatory ambitions in this regard. See Francesco Parisi & Ben W.F. Depoorter, *Private Choices and Public Law: Richard A. Posner's Contributions to Family Law and Policy*, 17 *J. CONTEMP. HEALTH L. & POL'Y* 403, 404 (2001) ("Richard Posner's contribution to the field of law and economics is exceptional, not in the least for the boundless scope of its applications, ranging from the history and evolution of legal systems to the study of substantive, procedural, and constitutional doctrines.").

Still, there is no doubt that—at least in broad strokes—the paradigm has had much greater relative success in explaining areas of private as opposed to public law. To date, there are robust and penetrating economic accounts of contract law,<sup>7</sup> property law,<sup>8</sup> and tort law,<sup>9</sup> and these accounts not only vie with, but often purport to outperform, the leading alternative rights-based accounts of these doctrinal areas. Attempts to articulate economic accounts of constitutional law, criminal law, and administrative law have, by contrast, typically proven far less successful. In these areas of the law, principles of justice and fairness often appear to trump considerations of efficiency. Accordingly, these relations are often better understood as reflecting a more basic social contract between individuals and the government—i.e., one that guarantees that some measure of justice and fairness constrains these relations.<sup>10</sup>

It would be impossible to know in advance whether some or all of our legal doctrines can be explained in terms of any one deep principle, whether contractualist or consequentialist. When we find ourselves able to account for broad swatches of doctrine in terms of one or another such principle, that fact will, however, typically tell us something important about the basic commitments that are at play in our modern legal culture. The present state of affairs can thus contribute to the following conception. Principles of justice and fairness significantly, and perhaps ineliminably, govern the legal relations that individuals have with government in our modern legal system, in part because these relations are themselves reflective of a more basic social contract. Principles of justice and fairness have no primary application, however, when we turn to areas of the private law, which govern the relationships that private individuals have with one another. These relationships are instead governed by a principle of efficiency maximization, which has a number of distinctive properties.

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7. See generally ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS (3d ed. 2000) (providing an exposition of basic microeconomics with applications to property, contracts and torts); A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (2d ed. 1989) (same).

8. See sources cited *supra* note 7.

9. *Id.*

10. It is for this reason that John Rawls' basic account of justice as fairness has, on the whole, provided a much more penetrating account of our basic constitutional liberties than the law and economics movement has been able to articulate. See JOHN RAWLS, A THEORY OF JUSTICE (1971) [hereinafter RAWLS, A THEORY OF JUSTICE].

*First*, the principle of efficiency maximization is consequentialist in nature:<sup>11</sup> it identifies the right rules for governing our private relationships with one another by assessing the typical consequences that these rules will have for the production of a particular stated end, namely, efficiency. *Second*—and as a corollary—the principle treats private persons as merely fungible means to this stated end. It thereby fails to respect the separateness of persons, and fails to respect what is special about our distinctive relationships with one another.<sup>12</sup> *Third*, the principle excludes considerations of justice and fairness from the relevant legal calculus, thereby suggesting that any legal doctrines that reflect concern for these principles represent alien intrusions into the basic subject matter of the private law. The domain of private law marches to the beat of a very different drum, on this view, and our private relations simply are not appropriately governed by the same considerations of justice and fairness that typically govern our relationships with the state.

This, then, is the conception that I will be challenging. It views the legal landscape as containing an important divide, with the law that governs our private relationships on one side, and the law that governs our relationships with the government on the other. The divide is, moreover, one of fundamental principle. The deep principles that animate the public law are viewed as having a decidedly contractualist bent to them, whereas the deep principles that animate the private law are viewed as fundamentally consequentialist in nature.

Before continuing, I should stress that my claim here is emphatically *not* that this conception has garnered anything like widespread consensus, or even that it is particularly plausible in the final analysis. To my mind, the conception would, in fact, appear extraordinarily difficult to defend from any plausible normative

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11. "Consequentialism, as its name suggests, is the view that normative properties depend only on consequences. This general approach can be applied at different levels to different normative properties of different kinds of things, but the most prominent example is consequentialism about the moral rightness of acts, which holds that whether an act is morally right depends only on the consequences of that act or of something related to that act, such as the motive behind the act or a general rule requiring acts of the same kind." Walter Sinnott-Armstrong, *Consequentialism*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Spring ed. 2007), <http://plato.stanford.edu/archives/spr2007/entries/consequentialism>.

12. For the classic discussion of this feature of consequentialist accounts of the right, see RAWLS, A THEORY OF JUSTICE, *supra* note 10, at 23–25, 163–64.

perspective. For those who take principles of efficiency-maximization to be normatively foundational, there should, for example, be no obvious reason to limit application of this principle to the traditional areas of private law. Theorists in this vein should presumably decide instead whether private individuals or the government should have the standing to enforce any particular legal rule by simply determining which rule (here, of standing) would be more conducive to efficiency maximization.<sup>13</sup> For modern liberal theorists, on the other hand, who espouse a fundamentally contractualist account of justice, there might be a number of plausible grounds to distinguish between the so-called public and private domains, and to resist governmental regulation of the private domain.<sup>14</sup> No such rationales could, however, support the particular conception under discussion here, because this conception deems the relations that are governed by the private law not as appropriately free from governmental regulation but rather as appropriately regulated by a distinctive, consequentialist conception of the right. In addition, there are a number of deontological accounts of specific areas of the private law—such as tort law<sup>15</sup> and property law<sup>16</sup>—that are quite compelling in themselves.

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13. For a particularly helpful discussion of these points, see Benjamin Zipursky, *The Philosophy of Private Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW § 2.1, at 624–25 (Jules Coleman & Scott Shapiro eds., 2002) (“These theorists recognize, of course, that our system is set up so that private parties initiate the proceedings that culminate in this imposition of a fine, and they are the recipients of the payment of these fines, which are entitled ‘damages’ awards. But these are contingent facts of our system. . . . [T]he plaintiff-driven structure of private litigation is a contingent feature of private law, on this view. It is often the case that the persons who suffer injuries as a result of the violation of liability rules are the most efficient sources of evidence with regard to the violation. Hence, there is value in providing such persons with an incentive to attempt to enforce the liability rule. The prospect of being the recipient of the defendant’s liability provides the incentive. That is the primary reason why, at least in torts, victims are permitted to sue.”).

14. *Symposium on the Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982) (using “private” in reference to subjects that lie beyond government regulation); Morton J. Horowitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1424–27 & nn.14–15, 17 (1982) (noting that liberals draw a public/private distinction and tend to favor expansive private sector); Robert H. Mnookin, *The Public/Private Dichotomy: Political Disagreement and Academic Repudiation*, 130 U. PA. L. REV. 1429, 1429–34 (1982) (noting that liberalism insists upon distinction as means of protecting private spheres from regulation).

15. See e.g., JULES L. COLEMAN, RISKS AND WRONGS (1992) (offering theory of corrective justice and arguing that tort law implements this theory); Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349 (2002) (offering theory of corrective justice and arguing that private law, including tort law, embodies that theory). For a summary of contemporary corrective justice theories, see Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 449–50 (1992).

The fact nevertheless remains that the law and economics paradigm has had relatively greater explanatory success in accounting for the traditional areas of private as opposed to public law. This explanatory asymmetry has, moreover, lent plausibility and credibility to the basic conception under discussion. Even when the conception is neither explicitly held nor held in its entirety, it has thus had an important, if underappreciated, influence on legal discussions: it has tended to alter our conception of who bears the burden of persuasion when deciding the relevance of fairness considerations to the private law. In my view, the most direct way to challenge this particular kind of influence would thus be to articulate a head-on challenge to the explanatory asymmetry under discussion. One could mount such a challenge by identifying a particularly robust and pervasive feature of the private law that both resists economic explanation and is better accounted for from within a fundamentally contractualist framework.

In this article, I will begin to mount such a challenge. In Part I, I will begin by focusing attention on a specific private law doctrine: namely, the expectation damages remedy, which is the standard remedy for a breach of contract in modern contract law. Economists have articulated a powerful, and well-known, account of the expectation damages remedy in terms of so-called “efficient breach,”<sup>17</sup> and this account is often touted as one of the law and

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16. There are a number of historical treatments of property law in terms of natural property rights. See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 9–10 (1985) (discussing Locke’s view of inherent property rights in response to Hobbes). More contemporaneously, some have tried to account for special features of modern property law in terms of natural property rights. See, e.g., Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1566–68 (2003) (suggesting that property rights may emanate from sources outside of politics and the law); Eric R. Claeys, *Public-Use Limitations and Natural Property Rights*, 2004 MICH. ST. L. REV. 877, 892–901 (2004) (arguing that the narrow “public use” limitation for eminent domain actions was an essential assumption of natural rights theory’s conception of property).

17. See, e.g., Robert E. Scott & George G. Triantis, *Embedded Options and the Case Against Compensation in Contract Law*, 104 COLUM. L. REV. 1428, 1447 (2004) (“*Expectation Damages and Efficient Breach*.—The principal economic justification for expectation damages is that it compels the promisor to internalize the costs that her breach inflicts on the promisee. The promisor consequently has the incentive to make the efficient breach decision. By internalizing the promisee’s loss, the promisor also has the incentive to take the efficient precautions against contingencies that threaten to increase the cost of performance.”) (citations omitted); see also Jody S. Kraus, *A Critique of the Efficient Performance Hypothesis*, 116 YALE L.J. POCKET PART 423, 423 (2007), <http://yalelawjournal.org/2007/07/23/kraus.html> (“The classic economic justification of contract law’s default remedy of expectation damages is grounded on the efficient

economics movement's clearest successes over promise-based accounts. Economic accounts of contract law have also proven far more successful and robust than leading deontological alternatives, which have typically been framed in terms of principles of autonomy or the ordinary morality of promise-keeping.<sup>18</sup> If ever there was an instance of economic explanation that best exhibits the power and need for economic reasoning, the economic account of this remedy would therefore appear to be a prime candidate. In Part I, I will nevertheless argue that there are important features of this remedy that can neither be explained nor justified in terms of efficiency maximization. This argument will thus present a direct challenge to the explanatory power of economic reasoning in an area where this reasoning purportedly exhibits its greatest success.

Part II will then argue that one can account for those very same features of the law, both easily and directly, with the aid of contemporary advances on the nature of obligation, owing primarily to Stephen Darwall's recent work on the so-called "second-person standpoint."<sup>19</sup> This work suggests that in order to give rise to a genuine obligation, a rule must typically give some person or group the second-personal standing to make demands on others' wills or conduct.<sup>20</sup> This standpoint is a distinctive standpoint, and when we take it up, we implicitly presuppose a contractualist account of the right, on Darwall's view.<sup>21</sup> The relevant account of the right can be made more precise by extending Rawls' contractualist account of justice as fairness to questions of private right.<sup>22</sup> The remainder of Part II thus develops a contractualist account of contractual remedies that is—I will argue—more robust and more powerful than existing economic alternatives. The arguments in Part II will thus suggest that the very same features of contract law remedies that evade

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breach hypothesis: that promisors should be permitted and encouraged to breach when the net gains from breach exceed the net gains from performance.”).

18. For a representative account of such a deontological account, see CHARLES FRIED, *CONTRACT AS PROMISE* (1981). For an illuminating discussion of the many distinctions between contract law and the ordinary morality of promise-keeping, see Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708 (2007).

19. See generally STEPHEN DARWALL, *THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY* (2006).

20. *Id.* at 3–10.

21. *Id.* at 213–320 (arguing that when we take up the second-person standpoint, we are implicitly committing ourselves to a form of contractualism).

22. See generally *id.* (discussing how commitment to contractualism can be cashed out in Rawlsian terms).

economic analysis can be better understood from within a fundamentally contractualist framework; and that this framework allows for a more robust account of other nuances of remedial doctrine as well.

The main arguments in this article will focus on contractual remedies, but the features of these remedies that evade economic analysis are pervasive to the private law. The arguments presented in the first two parts will thus illustrate a much broader challenge to the law and economics paradigm. By way of conclusion, I will suggest that the arguments presented here are, in fact, best understood as suggesting that the law and economics movement cannot account for the very features of private legal obligations that make them genuine *obligations*. The arguments in this article will thus give rise to a direct challenge to the explanatory asymmetry under discussion, and will suggest the promise and importance of developing contractualist accounts of a broader range of private law doctrine.

#### I. WHY EFFICIENCY CONSIDERATIONS CAN NEITHER EXPLAIN NOR JUSTIFY THE EXPECTATION DAMAGES REMEDY

As noted earlier,<sup>23</sup> efficiency theories are generally thought of as providing a particularly powerful explanation of the standard remedy in modern contract law: the expectation damages remedy. This Part will scrutinize that claim. In the course of the discussion, I hope to establish that there are important aspects of this remedy that cannot ultimately be explained or justified in terms of efficiency maximization.

To begin the analysis, it will help to canvass the standard economic account of expectation damages in terms of “efficient breach.” The transition from one state of affairs to another is said to be “Pareto-efficient” if at least one person would prefer the new state of affairs to the old one and no one would prefer the old one to the new.<sup>24</sup> A transition is said to be “Kaldor-Hicks efficient” if, hypothetically, it could be rendered Pareto-efficient if the ‘winners’ in the new state of affairs were to compensate the ‘losers’ for their losses.<sup>25</sup> Employing these definitions, efficiency theorists can

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23. See *supra* Introduction.

24. See, e.g., Jules L. Coleman, *The Grounds of Welfare*, 112 YALE L.J. 1511, 1516 (2003) (reviewing LOUIS KAPLOW & STEVE SHAVELL, *FAIRNESS VERSUS WELFARE* (2002)).

25. *Id.* at 1517.

provide a straightforward explanation of why courts would enforce purely executory and unrelieved-upon contracts in the first place,<sup>26</sup> at least assuming the parties have entered into them voluntarily. According to the economist, we reveal our preferences in voluntary choice,<sup>27</sup> and enforcing voluntary exchanges should therefore tend to produce states of affairs in which both parties will have more of their expected preferences satisfied.<sup>28</sup> Because the enforcement of voluntary agreements tends to foster exchanges that are preferred by both parties to the relevant exchanges, enforcement should produce gains under both efficiency standards in the standard economic view.

The duty to keep a contract does not, however, typically include a strict duty to perform it under the common law. Rather, as Oliver Wendell Holmes has starkly put the issue: “[t]he duty to keep a contract at common law means . . . that you must pay damages if you do not keep it,—and nothing else.”<sup>29</sup> The damages in question are, moreover, expectation damages, or the expected value (at the time of breach) of what the victim of the breach would have obtained had both parties fully performed.<sup>30</sup> So why would a set of rules fashioned to promote efficiency allow contracting parties to breach and pay expectation damages? Why would the remedy be *only* expectation damages, rather than something larger like punitive damages?

When a party voluntarily breaches a contract and is forced to pay expectation damages, two consequences are often said to follow. First, by virtue of obtaining expectation damages, the victims of breaches are said to be left in the same position they would have been in if the contracts had been fully performed.<sup>31</sup> Second, by

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26. This is because there has not yet been any harm caused to the victim of the breach. See generally Lon L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52 (1936) (discussing the purposes behind awarding contract damages, which especially include protection of a reliance interest, or protection from harm caused by reliance on a breached contract).

27. See, e.g., KENNETH ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 9–11 (2d ed. 1963).

28. See Shiffrin, *supra* note 18, at 730–31 nn.43–44.

29. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897). In his full description of this duty to keep contracts, Holmes inserts a particular account of duty in terms of predictions of court reactions. This part of his account is controversial, and I have therefore abstracted from it to present the uncontroversial part of his description in the main text.

30. RESTATEMENT (SECOND) OF CONTRACTS § 344(a) (1981); see also E. ALLAN FARNSWORTH, *CONTRACTS* 188–226 (2d ed. 1990).

31. See Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273, 281 (1970) (citing 5 SAMUEL WILLISTON, *A TREATISE OF*

requiring *nothing more than* expectation damages, parties who find new opportunities to increase their personal welfare by breaching are given the ability to capitalize on these new opportunities, at least when these gains are larger than the costs that the victim of the breach would face absent compensation.<sup>32</sup> It is thus sometimes said, even by critics, that

the program of expectation damages, if faithfully implemented, satisfies not only the Kald[o]r-Hicks standard of hypothetical compensation but the more restrictive Pareto standards of efficiency as well: not only is there a net social gain for the contracting parties, but no one is left worse off after breach than before.<sup>33</sup>

There is something very powerful about this line of argument. Efficiency principles would appear to provide a unifying explanation of both why we enforce voluntary exchanges and why we typically allow for only the recovery of expectation damages. Because the explanation is consequentialist in nature, it might also appear to harmonize well with certain features of modern markets, such as their tendencies to produce vast increases in social wealth and average per capita income.<sup>34</sup> Explanations like this can thus encourage the view that markets operate in ways that are distinctive from, and that serve different purposes than, the basic structure of society.<sup>35</sup>

There is, however, another feature of the expectation damages remedy that has received insufficient attention in the literature and that is critical to a full understanding of modern contract law. In

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THE LAW OF CONTRACTS § 1338 (rev. ed. 1937)); Richard Craswell, *Contract Remedies, Renegotiation, and the Theory of Efficient Breach*, 61 S. CAL. L. REV. 629, 636 n.9 (1988).

32. Craswell, *supra* note 31, at 636–37.

33. Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. LEGAL STUD. 1, 3 (1989), reprinted in PERSPECTIVES ON CONTRACT LAW 52, 53 (Randy Barnett ed., 3d ed. 2005). Pareto efficiency can be distinguished between Pareto optimality and Pareto superiority.

A state of affairs *S*, is Pareto superior to another, *A*, if and only if no one prefers *A* to *S* and at least one person prefers *S* to *A*. The notion of Pareto optimality is then defined with respect to Pareto superiority. A state of affairs *S* is Pareto optimal provided there is no state of affairs *S<sub>n</sub>* that is Pareto superior to it.

Coleman, *supra* note 24. Kaldor-Hicks efficiency differs more. “One state of affairs, *S*, is Kaldor-Hicks efficient to another, *A*, if and only if the winners under *S* could compensate the losers such that, after compensation, no one would prefer *A* to *S* and at least one person would prefer *S* to *A*.” *Id.* at 1517.

34. JEFFREY B. SACHS, THE END OF POVERTY 27–28 (2005).

35. See Shiffrin, *supra* note 18, at 713.

particular, the expectation damages remedy—and, indeed, the law of contract remedies more generally—reflects a conception of contractual obligation that is fundamentally “agent-centered” (rather than “agent-neutral”) in form. Under orthodox definitions, a principle is said to be “agent-centered” if it sometimes gives different persons different aims or goals, and “agent-neutral” if it gives all persons the same aim or goal.<sup>36</sup>

To illustrate, an agent-neutral version of a rule prohibiting people from breaching their contracts would give all people the same aim: namely, to act so as to reduce the number of contractual breaches in the world, regardless of who is doing the breaching. This rule would not only permit but also require people to breach their own contracts if by doing so they could prevent two or more others from breaching theirs in equally weighty circumstances. A facially similar rule prohibiting people from breaching their contracts would be *agent-centered*, on the other hand, if—as is the case in the modern law of contracts—it were to require each person either to fulfill *his or her own* contracts or to pay damages to the victims of *his or her own* breaches. This latter rule would not allow people to breach their own contracts in circumstances where they can thereby cause two or more others to keep theirs in equally weighty circumstances. Given these descriptions, it should be clear that the modern law of contracts imposes agent-centered, rather than agent-neutral, obligations on persons.

The distinction under discussion might seem slight at first, but the agent-centered features of contractual obligations raise an important challenge to efficiency theorists. It is widely accepted in value theory that one cannot easily square the agent-centered features of rules or obligations with a thoroughgoing consequentialist account of the right.<sup>37</sup> The problem arises because consequentialists take the

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36. See, e.g., DEREK PARFIT, REASONS AND PERSONS 27 (1984); see also Stephen Darwall, *Agent Centered Restrictions from the Inside Out*, 50 PHIL. STUD. 291 (1986), reprinted in DEONTOLOGY 112 (Stephen Darwall ed., 2003).

37. See, e.g., PARFIT, *supra* note 36, at 54–55 (1984); SAMUEL SHEFFLER, THE REJECTION OF CONSEQUENTIALISM 80 (1982); see also Diane Jeske, *Special Obligations*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Spring ed. 2007), <http://plato.stanford.edu/archives/spr2007/entries/special-obligations> (“Common sense morality seems to understand us as having special obligations to those to whom we stand in some sort of special relationship, e.g., our friends, our family members, our colleagues, our fellow citizens, and those to whom we have made promises or commitments of some sort. Special obligations are often appealed to in arguments against consequentialism, because consequentialism is unable to accommodate agent-relative reasons and genuinely special obligations are agent-relative reasons.”).

values of states of affairs to be fundamental and define the right in terms of the production of these valuable states of affairs.<sup>38</sup> Often, however, there is nothing in principle to distinguish the disvalue inherent in one breach of contract from that of another. If the fundamental reason we prohibit breaches of contract is to minimize these disvaluable states of affairs, then it will therefore make no sense to require a person to perform her own contracts in circumstances where a breach might prevent two or more equally disvaluable breaches by others.

Efficiency-maximization principles are consequentialist in nature,<sup>39</sup> so some version of this problem should arise for efficiency-based accounts of contract law as well. Indeed, the problem does arise, and one way to see it is to ask the following question: what efficiency-based reasons might there be to require people who breach their contracts to pay expectation damages to the victims of *their own breaches* rather than to the victims of other breaches that would otherwise go uncompensated?<sup>40</sup> If the efficiency theorist cannot answer this question, then there will be an important and highly robust feature of the expectation damages remedy that she can neither explain nor justify.

Here, then, is the central dilemma for efficiency-based accounts of the expectation damages remedy: these accounts will have a difficult time explaining why courts would require breaching parties to pay expectation damages to the specific victims of their own

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38. Sinnott-Armstrong, *supra* note 11 (“Consequentialism, as its name suggests, is the view that normative properties depend only on consequences. This general approach can be applied at different levels to different normative properties of different kinds of things, but the most prominent example is consequentialism about the moral rightness of acts, which holds that whether an act is morally right depends only on the consequences of that act or of something related to that act, such as the motive behind the act or a general rule requiring acts of the same kind.”); Larry Alexander & Michael Moore, *Deontological Ethics*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2007), <http://plato.stanford.edu/entries/ethics-deontological> (“Consequentialists . . . must specify initially the states of affairs that are intrinsically valuable—the Good. They then are in a position to assert that whatever choices increase the Good, that is, bring about more of it, are the choices that it is morally right to make and to execute. (The Good in that sense is said to be prior to the Right.)”).

39. See, e.g., Stephen A. Smith, *The Structure of Unjust Enrichment Law: Is Restitution a Right or a Remedy?*, 36 LOY. L.A. L. REV. 1037, 1044 (“The best known contemporary group of consequentialist theories, ‘efficiency’ theories, regard private law as promoting the welfare, understood subjectively, of all members of society.”); see also RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 101–54 (5th ed. 1998).

40. There are plenty of breaches that will likely go uncompensated. Think of cases in which a company has filed for bankruptcy, and all of its debts to its creditors have been discharged, or instances in which it is not feasible to enforce a contract for practical reasons.

breaches rather than to the victims of other breaches that would otherwise go uncompensated. This dilemma can be sharpened by explicitly factoring in the issue of transaction costs. Then the relevant question would be: why would courts require that breaching parties pay the specific victims of their own breaches *even when transaction costs would favor payment to third party victims instead?* In the remainder of this Part, I will discuss three main responses that efficiency theorists might give to this question. The failures of these responses will suggest that the problem posed here to the economist is real.

One initial idea might be to insist that the relevant aim of contract law rules is to maximize Pareto-efficiency, rather than Kaldor-Hicks efficiency. The efficiency theorist might then point out that while a rule allowing damages to third parties might be justified on Kaldor-Hicks efficiency grounds, it cannot plausibly be justified on Pareto-efficiency grounds. This is because the state of affairs in which a third party were to receive expectation damages after a breach would leave at least one person (namely, the particular victim of that breach) worse off than if the contract had been performed, thus revealing that the transition to this new state of affairs would not be Pareto-efficient.<sup>41</sup> The more orthodox remedial rule—which requires breaching parties to pay expectation damages to the specific victims of their breaches—would, by contrast, leave no party worse off—or so goes the argument—than in the non-breaching situation and would still allow the breaching party to move to a state of affairs that is even more preferable to the breaching party. Unlike the unorthodox rule, this orthodox rule would thus promote Pareto-efficient results. If the aim of modern contract law were to maximize Pareto-efficiency rather than Kaldor-Hicks efficiency, then the efficiency theorist might therefore rule out the unorthodox remedy requiring breaching parties to pay expectation damages either to the specific victims of their breaches or to other third party victims of breaches that would otherwise go uncompensated.

Naturally, this first response is only as strong as its central premise: namely, that the relevant aim of modern contract law is to

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41. Of course, the third party who received the expectation damages might hypothetically fix this situation by compensating the original victim of the breach; but this just means that the remedial rule would produce Kaldor-Hicks efficient, rather than Pareto-efficient, results.

maximize Pareto-efficiency rather than Kaldor-Hicks efficiency. What should we think of this premise? Certainly, there are some reasons to favor the view. Perhaps the most important one arises from the fact that we can fashion rules that promote Pareto-efficiency even if we lack the ability to make interpersonal utility comparisons. In particular, we can rely on the weak epistemic premise that we reveal our preferences in voluntary choice and then recommend rules that allow all and only those transitions to new states of affairs in which at least one person would voluntarily choose this new state of affairs over the old and no one would voluntarily choose the old over the new. Rules that require the enforcement of voluntary exchanges appear to fit this basic description, whereas one must typically be able to make interpersonal utility comparisons to identify Kaldor-Hicks efficient results.<sup>42</sup> For those who believe that we cannot make interpersonal utility comparisons,<sup>43</sup> it might thus make sense to insist that the appropriate aim of modern contract law is to maximize Pareto-efficiency.

There are, on the other hand, a number of equally compelling reasons to reject this view. As an initial matter, economists have acknowledged the need to employ Kaldor-Hicks rather than Pareto criteria to account for every other area of the private law.<sup>44</sup> To insist on the use of Pareto criteria in this one area of the law would therefore result in a view that is at odds with the larger economic project of accounting for private law. In addition, one must typically be able to make interpersonal utility comparisons to identify Kaldor-

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42. Coleman, *supra* note 24, at 1517 (“If the worries about interpersonal comparability are legitimate, Kaldor-Hicks reintroduces them; it does not solve them.”).

43. A number of people have questioned our ability to make interpersonal utility comparisons. See, e.g., Pierre Lemieux, *Social Welfare, State Intervention, and Value Judgments*, 11 INDEP. REV. 19, 21 (2006), available at [http://www.independent.org/pdf/tir/tir\\_11\\_01\\_02\\_lemieux.pdf](http://www.independent.org/pdf/tir/tir_11_01_02_lemieux.pdf) (“The impossibility of interpersonal comparisons of utility immediately raises a major problem: How can we talk of ‘social welfare’ if we can’t add the utility of the individuals who gain . . . and deduct the utility of those who lose . . . ?”); Julian Lamont & Christi Favor, *Distributive Justice*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Spring ed. 2007), <http://plato.stanford.edu/archives/spr2007/entries/justice-distributive> (“Critics have argued that such interpersonal utility comparisons are impossible, even in theory, due to one or both of the following: (1) It is not possible to combine all the diverse goods into a single index of ‘utility’ which can be measured for an individual; (2) Even if you could do the necessary weighing and combining of the goods to construct such an index for an individual, there is no conceptually adequate way of calibrating such a measure between individuals.”).

44. Coleman, *supra* note 24, at 1517, 1519.

Hicks efficient outcomes.<sup>45</sup> This larger economic project thus presupposes a clear rejection of one of the main grounds for limiting our attention to Pareto criteria. The view that we cannot make interpersonal utility comparisons is, in any event, highly controversial, and probably wrong in the final analysis.<sup>46</sup> Once the view has been rejected, it is hard to imagine any satisfying consequentialist justification for insisting on the maximization of Pareto rather than Kaldor-Hicks efficiency. After all, a Kaldor-Hicks efficient transition from one state of affairs to another will produce more overall welfare, even if the transition is not Pareto efficient. To insist that the relevant aim of modern contract law is to maximize Pareto efficiency might therefore allow for a straightforward account of the agent-centered features of the expectation damages remedy, but it would do so while undermining the prospects, the presuppositions and the plausibility of the larger economic project of accounting for private law.

There is also a more immediate problem for the economist who would claim that the relevant aim of modern contract law is to promote Pareto efficiency in the present context. For reasons to be discussed, the economist must ultimately rely on Kaldor-Hicks criteria to justify use of the expectation damages remedy itself. Hence, the economist cannot consistently argue for the use of this remedy and for the view that the aim of modern contract law is to maximize Pareto-efficiency. It is to that argument that I now turn.

To understand why the economist must implicitly rely on Kaldor-Hicks criteria to justify the expectation damages remedy, notice that the standard economic account of this remedy rests on a critical assumption. It assumes that, at the time of the breach, a party will be strictly indifferent between obtaining performance of the contract and obtaining the market value of that performance. Let us call this the “Strict Indifference Assumption.” This assumption can

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45. *Id.* at 1517 (“If the worries about interpersonal comparability are legitimate, Kaldor-Hicks reintroduces them; it does not solve them.”).

46. *See, e.g.*, David Pozen, *Remapping the Charitable Deduction*, 39 CONN. L. REV. 531, 583 (2006) (“Interpersonal utility comparisons may be taboo in modern economic theory, but philosophers since Rawls have acknowledged that we inevitably make at least approximate.”); *see also* Leo Katz, *Choice, Consent, and Cycling*, 104 MICH. L. REV. 627, 632 n.9 (2006) (describing assumption that it is impossible to make interpersonal utility comparisons as “controversial”); *cf.* Grant M. Hayden, *Resolving the Dilemma of Minority Representation*, 92 CAL. L. REV. 1589, 1625 (2004) (“The lesson, though, is not that objective interpersonal utility comparisons cannot be made, but that they necessarily involve normative decisions.”).

be broken down into two further ones. First, there is a *fungibility* assumption, according to which contracting parties deem performance of the contracts fungible for the market value of that performance. Second, there is a *temporal stability* assumption, according to which contracting parties' valuations of these performances do not change over time. Importantly, neither of these assumptions can be derived either from pure economic theory or from the weak epistemic premise that we reveal our preferences in voluntary choice. This is because economic theory purports to be neutral about what people's utility functions look like and to identify these functions based on voluntary choice. But while the parties to these contracts may have entered into them voluntarily, the victims of efficient breaches typically have no choice but to accept expectation damages as a remedy at the time of breach.<sup>47</sup> Hence, if we believe that parties are indifferent between performance and the receipt of expectation damages at the time of breach, that belief cannot be based solely on facts about the parties' voluntary choices. The belief must be based, at least in part, on additional intuitions about how people's utility functions typically operate.

Once we acknowledge the need to rely on intuitions like these, however, it should be clear that the Strict Indifference Assumption is not even true in all cases. There is, after all, nothing obvious about the fact that two parties have entered into a contract voluntarily that would guarantee that the parties will value what they have bargained for exactly as much once the parties have begun performance.<sup>48</sup> If

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47. Specific performance is limited to special circumstances. See *Weathersby v. Gore*, 556 F.2d 1247, 1257–59 (5th Cir. 1977); *Duval & Co. v. Malcom*, 214 S.E.2d 356, 359 (Ga. 1975); *Roberts v. Spence*, 209 So. 2d 623, 625–26 (Miss. 1968). Punitive damages are generally unavailable in contract cases. *Strum v. Exxon Co.*, 15 F.3d 327, 330 (4th Cir. 1994); *Hardin, Rodriguez & Boivin Anesthesiologists, Ltd. v. Paradigm Ins. Co.*, 962 F.2d 628, 638–40 (7th Cir. 1992); *Harris v. Atl. Richfield Co.*, 17 Cal. Rptr. 2d 649, 653–54 (Ct. App. 1993); see also 3 FARNSWORTH, *supra* note 30, § 12.8. Finally, agreed-upon (or liquidated) remedies are generally only binding when they reflect reasonable estimations of expectation damages. See *Southpace Props., Inc. v. Acquisition Group*, 5 F.3d 500, 505–06 (11th Cir. 1993); *A.V. Consultants, Inc. v. Barnes*, 978 F.2d 996, 1001 (7th Cir. 1992); *Atel Fin. Corp. v. Quaker Coal Co.*, 132 F. Supp. 2d 1233, 1241 (N.D. Cal. 2001).

48. Valuation changes over time can be linked to an individual's utility function changing over time. This issue has been discussed extensively in sociological and psychological happiness research. See Posting of Bryan Caplan, *Goods, Bads, Marginal Utility, and Happiness Research*, to EconLog (Mar. 10, 2006), [http://econlog.econlib.org/archives/2006/03/goods\\_bads\\_marg.html](http://econlog.econlib.org/archives/2006/03/goods_bads_marg.html). The issue has also been raised in computer science modeling for artificial intelligence research. See Thomas D. Nielsen & Finn V. Jensen, *Learning a Decision Maker's Utility Function from (Possibly) Inconsistent Behavior*, 160 ARTIFICIAL INTELLIGENCE 53, 53 (2004), available at <http://dx.doi.org/10.1016/j.artint.2004.08.003> (follow "PDF" hyperlink under "This Document");

the victimized party no longer values the performance as much as when the party entered the contract, a payment of expectation damages may thus overcompensate the party, and a rule requiring expectation damages as a remedy might deter some Pareto-efficient breaches. If, on the other hand, the victimized party ends up valuing the performance more than at the time of contracting, then expectation damages may end up undercompensating this party, thereby making this party worse off and establishing that the breach is not Pareto-efficient. Additionally, our intuitions tell us that people sometimes begin to value items—even ones they have obtained through market transactions—in ways that surpass the market value, either because people have formed special attachments to the items or because people no longer deem them to be commodifiable.<sup>49</sup> Hence, people may not always be strictly indifferent, even from the start, between performance and expectation damages.

My purpose in raising these points is not to suggest that the economist can provide no plausible rationale for the expectation damages remedy. To provide such a rationale, the economist must, however, apparently rely on considerations that differ in some ways from those canvassed in the Strict Indifference Assumption. The implicit argument needed to make the account work would appear to go something like this: although people's utility functions might change over time, people's evaluations of contractual performances are likely to change in approximately equal amounts, such that the typical increases for one party will—at least *statistically speaking*—be offset by the typical decreases of the other. (Let us call this the "Statistical and Interpersonal Temporal Indifference Thesis.") Hence, requiring the payment of expectation damages and nothing more to the victim of a breach will tend to promote gains in overall

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see also Robert F. Bordley, *An Intertemporal Utility Function Concave in Gains and Convex in Losses*, 19 ANNALS OPERATIONS RES. 171, 171 (1989) (discussing the utility function and its relation to expectations).

49. See Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1906 (1987) ("To understand [particulars of personhood] as monetizable or completely detachable from the person—to think, for example, that the value of one person's moral commitments is commensurate or fungible with those of another, or that the 'same' person remains when her moral commitments are subtracted—is to do violence to our deepest understanding of what it is to be human."); cf. *Lane v. Oil Delivery, Inc.*, 524 A.2d 405, 408 (N.J. Super. Ct. App. Div. 1987) (discussing "the actual or intrinsic value of the property to the owner"); *Landers v. Municipality of Anchorage*, 915 P.2d 614, 620 (Alaska 1996) (declining to adopt the standard "which allows damages for loss of items of personal property to be based on sentimental and emotional value").

preference-satisfaction, even if in some cases one party is left worse off than in the non-breaching situation.

Notice that this argument has a number of special properties. It is probabilistic in nature; it depends upon a capacity to make credible interpersonal utility comparisons of a kind; and it relies on intuitions about people's utility functions that cannot be derived strictly from facts about their voluntary actions. Properly construed, the argument thus suggests that allowing for expectation damages as a remedy will promote *Kaldor-Hicks* rather than *Pareto*-efficiency. But this means that the economist cannot consistently account for the basic expectation damages remedy (as needed to promote Kaldor-Hicks efficiency) and for the agent-centered features of the remedy (as needed to promote Pareto-efficiency).

This brings us back to the main question in this section: how, if at all, might the efficiency theorist account for the fact that courts require breaching parties to pay expectation damages *to the specific victims of their breaches* rather than to the victims of other breaches that might otherwise go uncompensated? The economist's first response rested on the view that the relevant aim of modern contract law is to maximize Pareto rather than Kaldor-Hicks efficiency. For reasons just discussed, however, the economist cannot plausibly maintain this view in the present context.

The economist might nevertheless try a second response, which grants the need to employ Kaldor-Hicks criteria, along with everything else that has been said thus far. In particular, she might argue that the orthodox rule, which requires breaching parties to pay expectation damages to the specific victims of their breaches, is *more likely* to produce Kaldor-Hicks efficient results than its unorthodox competitor. For reasons already discussed, the efficiency theorist must assume that we have more knowledge about the routes to human preference satisfaction than is derived solely from observations of people's voluntary choices. The efficiency theorist might nevertheless argue that voluntary exchanges produce information about the routes to human preference satisfaction that cannot easily be reproduced in other manners.<sup>50</sup> This is presumably

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50. See F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 524-26 (1945); see also Posting of Elizabeth Anderson, How Not to Complain About Your Taxes (III): "I deserve my pretax income," Left2Right (Jan. 26, 2005), [http://left2right.typepad.com/main/2005/01/how\\_not\\_to\\_comp\\_1.html](http://left2right.typepad.com/main/2005/01/how_not_to_comp_1.html) (proposing that taxation builds social insurance).

why centralized state planning has proven far less workable than modern market economies for the distribution of resources.<sup>51</sup> The voluntariness of an original transaction, when combined with the very minimal intuitions about people's utility functions discussed above, can thus support an inference that a rule requiring breaching parties to pay the specific victims of their breaches will very likely produce Kaldor-Hicks efficient results. There has, however, been no analogous voluntary exchange between a breaching party and any given third party to a transaction, and there is thus less evidence—on this view—that payment to a third party would produce these same Kaldor-Hicks efficient results. If this argument were valid, then the orthodox expectation damages remedy might therefore be more likely to produce Kaldor-Hicks efficient results than the unorthodox one.

It is quite plausible, in my view, that voluntary market transactions produce information about the routes to human preference-satisfaction that cannot easily be reproduced in other manners.<sup>52</sup> In at least some circumstances, the evidence generated by voluntary market transactions will thus be more credible than other evidence we might have about the routes to human preference satisfaction. Yet, even granting these propositions, there is nothing in principle to distinguish the evidentiary value inherent in one voluntary exchange from that of another similarly situated exchange. These same considerations should therefore equally support a very different doctrine of "efficient breach," which requires breaching parties to pay expectation damages either to the other party to the contract, or to some other person who is the victim of a similar breach that would otherwise go uncompensated. Because this different doctrine of "efficient breach" is nothing other than the unorthodox remedy that the economist is trying to rule out, this second response by the economist is equally unavailing.

A third and final response that the efficiency theorist might try relates to the importance of trust for modern markets to flourish. Parties must presumably trust that they will obtain what they expect from a contract if they are to enter into the typical contract.<sup>53</sup> The

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51. Anderson, *supra* note 50.

52. *Id.*

53. See Menachem Mautner, *Contract, Culture, Compulsion, or: What Is So Problematic in the Application of Objective Standards in Contract Law?*, 3 THEORETICAL INQUIRIES L. 545, 558

efficiency theorist might therefore argue that only a rule requiring breaching parties to pay expectation damages *to the specific victims of their breaches* will produce this particular kind of trust.<sup>54</sup> This is because a person deciding whether to enter into a contract must trust that *he* or *she* will obtain a relevant remedy in case of a breach, and a rule allowing damages to be paid to third parties would not produce this particular kind of trust. Given the undeniable fact that markets tend to produce vast increases in social welfare and average per capita income,<sup>55</sup> the more orthodox rule governing expectation damages might therefore be thought to conduce to Kaldor-Hicks efficiency by helping to produce the relevant kind of trust needed for modern markets to operate.

This last argument from trust will, however, also prove unhelpful for the efficiency theorist at this stage. The argument rests on two propositions: *first*, that markets depend on trust to function, and *second*, that this trust is undermined when a person who is deciding whether to enter into a contract cannot count on a personal remedy for its breach. There is, however, nothing yet inherent in these propositions that would distinguish the overall effects on trust that arise from the breach of one contract from that of another similarly situated contract. Hence, there will presumably be some circumstances in which it would undermine people's trust in markets even more to require a person to pay the specific victim of his breach rather than to compensate two or more others who are victims of similar breaches that would otherwise go uncompensated. What matters for markets to flourish is the overall amount of trust that

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(2002) ("Trust, like contract-making, is future-oriented. '[T]o trust is to act as if the uncertain future actions of others were indeed certain.' 'In trusting, one engages in action as though there were only certain possibilities in the future.' Contract-making, therefore, is a *functional equivalent* of trust." (alteration in original) (citations omitted)); Kenneth J. Arrow, *Gifts and Exchanges*, 1 PHIL. & PUB. AFF. 343, 357 (1972) ("Virtually every commercial transaction has within itself an element of trust, certainly any transaction conducted over a period of time. It can be plausibly argued that much of the economic backwardness in the world can be explained by the lack of mutual confidence . . ."). For more information on the phenomenon of trust in general, see BARBARA A. MISZTAL, TRUST IN MODERN SOCIETIES: THE SEARCH FOR THE BASES OF SOCIAL ORDER *passim* (1996); FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY 152–53 (1995); JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY 91–116 (1990); DOUGLAS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE 55 (1990).

54. See Simon Deakin et al., *Contract Law, Trust Relations, and Incentives for Co-Operation: A Comparative Study*, in CONTRACTS, CO-OPERATION, AND COMPETITION 105, 122–23, 125 (Simon Deakin & Jonathan Michie eds., 1997).

55. See *supra* note 34 and accompanying text.

people have in the market, and the efficiency theorist's third response will therefore also prove unhelpful.

Apart from these three main responses, there are, undoubtedly, a number of other ways that an efficiency theorist might try to rule out the unorthodox remedy under discussion. The failures of the above responses nevertheless illustrate a more general point. In each case, the efficiency theorist has tried to justify the orthodox remedial rule by identifying specific features of the contracting situation that would appear to favor the orthodox remedy. Consequentialists do not, however, respect the *separateness of persons*, and the typical consequences that flow from one contracting situation are therefore evaluatively indistinguishable for them from the typical consequences that flow from any other similarly situated contracting situation. The efficiency theorist will therefore find it very difficult—if not impossible—to provide consequentialist reasons to reproduce the standard concern for the separateness of private relations that is found in the modern law of contracts.

What the above considerations show is that efficiency considerations very likely *cannot*—as is commonly supposed both by efficiency theorists and many of their critics—either explain or justify important features of our standard contractual remedies. They cannot explain why contractual remedies are owed to specific people, who are the specific victims of the contractual breaches. This aspect of contractual remedies is, however, so widespread and so basic that it would be almost unthinkable to reject it. Yet on closer scrutiny, there is nothing relating to efficiency maximization that would recommend that this particular feature of contractual remedies remain so robust.

## II. CONTRACTUAL OBLIGATION, CONTRACTUAL REMEDIES, AND THE SECOND-PERSON STANDPOINT

The problems canvassed in the last Part all arise from specific and pervasive features of contractual obligations. It will therefore help to consider more thoroughly what contractual obligations are.

Contractual obligations are a species of what Joseph Raz has called “voluntary obligations”—or obligations that people can voluntarily incur by engaging in specific, avoidable actions with

known normative implications.<sup>56</sup> Many of the rules of contract law are also instances of what H.L.A. Hart has called “power-conferring rules,” or rules that give us the power to vary our normative relations with one another.<sup>57</sup> Combining these two thoughts, one might profitably view the rules of modern contract law as devices that give us the ability to generate new and self-imposed obligations through specific, and conventionally defined, voluntary actions. What the preceding section suggests, then, is that these obligations have persistent features that cannot be fully explained or justified in purely economic terms. In particular, contractual obligations are typically owed *by* specific persons *to* specific other persons, who are the parties to the relevant contracts. Contract law thus gives rise to so-called “agent-centered” restrictions on action, or restrictions that “purport[] to give each agent a different aim or goal, namely that *he* or *she* fulfill a given requirement, even if by failing to do so he or she could cause two or more others to fulfill the requirement in equally weighty circumstances.”<sup>58</sup>

Elsewhere, I have diagnosed the inability of consequentialist standards to account for the agent-centered and relational features of obligation as arising from the fact that these standards are wholly first- and third-personal in form.<sup>59</sup> I have defined the “first-person standpoint” as the standpoint that we take up when we “ask questions, or come to conclusions, the validity of which depend on their capacity to govern us, rationally, as deliberating agents.”<sup>60</sup> (A prime example of this is when we take up the perspective of deliberation and ask, in effect, “How should I act?”) I have defined the “third-person standpoint” as the standpoint we take up when we “ask questions, or come to conclusions, the validity of which are independent both of their relations to us and our relations to one another.”<sup>61</sup> (Prime examples of such questions are questions about

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56. Joseph Raz, *Promises in Mortality and Law*, 95 HARV. L. REV. 916, 929 (1982) (reviewing P.S. ATIYAH, *PROMISES, MORALS, AND LAW* (1981)). Voluntary obligations are ones where “first, the agent is aware of their normative implications, and second, he can avoid them. Finally, the agent’s belief that he will incur an obligation by his action is a positive reason for holding him bound by his action.” *Id.*

57. H.L.A. HART, *THE CONCEPT OF LAW* 26–42 (2d ed. 1994).

58. Robin Bradley Kar, *Hart’s Response to Exclusive Legal Positivism*, 95 GEO L.J. 393, 429 (forthcoming 2008) (citing PARFIT, *supra* note 36, at 27; Darwall, *supra* note 36, at 291).

59. *Id.* at 430–35.

60. *Id.* at 426.

61. *Id.*

the world or value.) Darwall's work suggests, however, that there is a distinctive standpoint—namely, the “second-person standpoint”—which is irreducible to these other two and that has been underappreciated in much of the contemporary moral, political, and economic literature.<sup>62</sup> The “second-person standpoint” is “the perspective you and I take up when we make and acknowledge claims on one another's conduct and will,”<sup>63</sup> and it has a number of special features. The purpose of this Part is to explore how this work might be used to develop a particularly robust account of contract law remedies.

I should begin by clarifying what precisely I will be relying on in Darwall's work. First, there is a point about the nature of obligation. As Darwall has argued, we cannot understand the specific authority that obligations purport to have without seeing them as giving some person or group the second-personal standing to demand compliance.<sup>64</sup> We are, moreover, fated to interact with one another from the second-person standpoint, and when we make second-personal demands, we implicitly presume specific interpersonal authority relations that can both explain and justify the agent-centered (and relational) features of contractual obligations in a straightforward manner.<sup>65</sup> This does not mean that the relations we presume necessarily give rise to private, as opposed to public, standing to demand compliance with contractual rules. But it does mean that we cannot understand modern contract law as giving rise to genuine obligations without giving some person or group the second-person standing to demand compliance with these rules.

Second, there is a point about the intrinsic relationship between the claims we make from the second-person standpoint and a contractualist account of the right. As Darwall has observed, when we make demands on one another's conduct, we are interacting with

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62. *Id.* at 425 (citing DARWALL, *supra* note 19; Stephen Darwall, *Autonomy in Modern Natural Law*, in *NEW ESSAYS ON THE HISTORY OF AUTONOMY* 110, 115–16 (Natalie Brender & Larry Krasnoff eds., 2004); Stephen Darwall, *Because I Want It*, 18 *SOC. PHIL. & POL'Y* 129, 129–30 (2001) [hereinafter Darwall, *Because I Want It*]; Stephen Darwall, *Moore, Normativity, and Intrinsic Value*, 113 *ETHICS* 468 (2003)).

63. DARWALL, *supra* note 19, at 3.

64. *Id.* at 3–10.

65. *Id.*; see also Kar, *supra* note 58, at 425 (“[Claims from the second-personal standpoint] presuppose that the addresser and addressee stand in specific authority relations to one another, ones which are sufficient to give the addresser the relevant standing to raise the claim to that addressee.”).

one another from the second-person standpoint, and the legitimacy of our claims will therefore depend in part on whether they are justifiable *to* the addressees of our demands.<sup>66</sup> Facts like these suggest that we are implicitly committed to a contractualist account of what we owe to one another in these interactions.<sup>67</sup> Elsewhere, I have discussed Darwall's arguments for these two points in more detail, and have argued for their extension from moral to legal obligations.<sup>68</sup> Rather than repeat those arguments here, I will focus on the implications of these propositions for contract law.

Contractualism comes in a number of different forms, and some of them might even be thought to validate consequentialist principles of the right.<sup>69</sup> Our aim here is, however, to account for pervasive features of contract law that evade economic analysis, and to do so in a way that might harmonize this area of the law with other areas of law, including areas of public law. In what follows, I will therefore limit my attention to Rawls' version of contractualism, in part because of its operationality,<sup>70</sup> and in part because it has been specifically fashioned to identify principles that will plausibly survive the process of achieving wide reflective equilibrium with a broad range of public law doctrine.<sup>71</sup> Importantly, Rawls' version of

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66. See DARWALL, *supra* note 19, at 11–14; see also T.M. Scanlon, *Contractualism and Utilitarianism*, in CONTRACTARIANISM/CONTRACTUALISM 219, 227 (Stephen Darwall ed., 2002) (“Those who are concerned with morality look for principles for application to their imperfect world which they could not reasonably reject, and which other in this world, who are not now moved by the desire for agreement, could not reasonably reject should they come to be so moved.”); *id.* at 229 (“[M]orality applies to a being if the notion of justification to a being of that kind makes sense.”).

67. DARWALL, *supra* note 19, at 300; Stephen Darwall, *Because I Want It*, *supra* note 62, at 129–30.

68. Kar, *supra* note 58, at 424–30.

69. See, e.g., Kenneth J. Arrow, *Some Ordinalist-Utilitarian Notes on Rawls's Theory of Justice*, 70 J. PHIL. 245, 245–50 (1973) (reviewing RAWLS, A THEORY OF JUSTICE, *supra* note 10); John Harsanyi, *Bayesian Decision Theory and Utilitarian Ethics*, 68 AM. ECON. REV. 223 (1978); Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 488–502 (1980); Hal. R. Varian, *Distributive Justice, Welfare Economics, and the Theory of Fairness*, 4 PHIL. & PUB. AFF. 223, 228–29, 240 (1974); see also Derek Parfit, *Climbing the Mountain* 207–68 (Dec. 28, 2006) (unpublished manuscript), available at [http://individual.utoronto.ca/stafforini/parfit/parfit\\_-\\_climbing\\_the\\_mountain.pdf](http://individual.utoronto.ca/stafforini/parfit/parfit_-_climbing_the_mountain.pdf).

70. See *supra* text accompanying notes 48–54 (discussing operationality).

71. See WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY* 67–68 (2002) (“Rawls admits to modifying the original position in order to make sure that it yields principles which match our intuitions . . . . This may sound like cheating. But it only appears so if we take Rawls to be claiming that [the social contract and our intuitions] provide entirely independent support for one another. . . . [H]e admits that the two arguments are interdependent, both drawing on the same set of considered intuitions.”). I have no reason to believe that the results of this inquiry

contractualism will not validate consequentialist principles of the right.<sup>72</sup>

Adopting a Rawlsian framework, the critical question to ask is thus: what remedies for the breach of contract, if any, would rational parties adopt in the original position and from behind a veil of ignorance? This question can be broken down into a number of more finely grained ones. By working through these questions in sequence, I will, in what follows, develop a contractualist account of the standard contract law remedies that is more robust and more penetrating than the standard economic accounts. Some attention will also be paid to the assumptions needed to make the account work, and to the ultimate plausibility of these assumptions.

The first question to ask is why rational persons would adopt rules that give anyone else at all the standing to demand that they comply with their contractual commitments. Typically, it will require some self-sacrifice to fulfill a contractual obligation, and rational persons should therefore only be willing to consent to such enforcement if enforcement is necessary to achieve some further self-interested aims. The primary circumstance in which this occurs is when a person hopes to use a contractual promise to induce one or more others to act in ways that would be even more beneficial to the promisor than what the promisor expects to lose by fulfilling the obligation.

Promises of this kind are, however, made *to* specific persons, and are intended to induce specific persons to act in these ways. They take place within specific interpersonal relations. In order to determine whether rational persons behind a veil of ignorance would consent to a rule allowing others the standing to demand compliance, we must therefore ask a further question, concerning when, if ever, these second-personal inducements might be *non-coercive*—i.e., in the specific sense that rational persons behind a veil of ignorance would allow themselves to be induced by others in these manners. The answer would appear to be: when the promisee can expect to obtain more from the person who is doing the inducing (i.e., as a result of having the standing to demand compliance) than she expects to lose by being so induced. In these and only these circumstances

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would be significantly different under Scanlon's version of contractualism. See, e.g., Scanlon, *supra* note 66.

72. RAWLS, A THEORY OF JUSTICE, *supra* note 10, at 130–53.

will the promisee willingly trade the inducement by the promisor for the standing to demand compliance with the promise.

The above considerations help to guarantee that contracting parties interact with one another only with the aid of rules that are justifiable to both from an impartial perspective. There are, however, no analogous reasons for rational persons to consent to a broader rule granting standing either to third parties or to the government to demand compliance with a contract. For reasons already explained, rational persons would presumably opt for the narrowest rules of standing possible because compliance with a contract will typically require some self-sacrifice. A broader rule of standing would thus overburden promising parties without providing any additional justification to the promisee for the promisor's ability to induce the promisee by means of the promise. Contractualism should therefore recommend a strong default rule allowing the parties to contracts, and only those parties, to demand compliance with a contract.

The second relevant question to ask is why this standing to demand compliance would extend to purely executory contracts, which have not yet been relied upon by the non-breaching party. Absent some reliance on a contract, a promisee will typically be unable to identify any genuine harm resulting from the non-compliance.<sup>73</sup> Parties reasoning from behind a veil of ignorance might thus be thought to favor a rule that excuses non-performance before there has been any reliance.

This line of reasoning nevertheless ignores a number of important facts about modern exchanges. There are—I will assume—numerous exchanges at any given time that would be mutually beneficial to two parties. In small groups, where people have sufficient trust, care, and intimate knowledge of one another's concerns and interests, these exchanges often take place without the need for any legal intervention—either through processes of so-called gift exchange, or other forms of informal cooperation.<sup>74</sup> In circumstances where people are relative strangers, however, self-interested bargaining is often needed to identify exchanges that will

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73. See Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 810 (1941).

74. See generally MARCEL MAUSS, *THE GIFT: THE FORM AND REASON FOR EXCHANGE IN ARCHAIC SOCIETIES* (W.D. Halls trans., 1990) (examining the exchange of gifts and the obligation of reciprocation in different cultures).

be mutually beneficial, and often does in fact identify these exchanges.<sup>75</sup> Rational persons deliberating behind a veil of ignorance can know facts like these.<sup>76</sup> Given this knowledge, they would presumably agree to a rule that allows contracting parties to demand compliance with a contract prior to reliance, because they can foresee that they will typically gain from such a rule whether they end up being the victim of a breach or the breaching party. This follows from the fact that the agreement was entered into voluntarily, thereby suggesting that its enforcement will likely conduce to the mutual benefit of both parties. Rational persons will—in other words—adopt this rule to obtain its expected benefits.

A third question to ask is why recovery would typically be limited to expectation damages and nothing more. Although I have questioned the validity of the Strict Indifference Assumption in the preceding part, I have also suggested that there are circumstances in which parties should favor a rule requiring expectation damages and nothing more.<sup>77</sup> These are circumstances in which the parties contract primarily for economic gain, and in which their evaluations of the benefits of the agreement will tend to vary in roughly equal and opposite amounts from the time of execution through performance.<sup>78</sup> When these assumptions hold, people reasoning from behind a veil of ignorance would presumably agree to a rule that requires contracting parties to *excuse* one another's non-performance so long as the breaching party is willing to pay expectation damages to the victim of the breach. This is because the victims would not lose anything of value by accepting expectation damages in these circumstances, and because both parties would obtain the ability to capitalize on new sources of increased welfare production that arise from changed circumstances. Put differently, rational persons

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75. See Hayek, *supra* note 50, at 526.

76. See, e.g., RAWLS, A THEORY OF JUSTICE, *supra* note 10, at 119 (discussing how deliberators behind the veil of ignorance should have general knowledge of the basic principles of economics, politics, sociology and psychology); JOHN RAWLS, JUSTICE AS FAIRNESS 90 (2001) (noting that those behind the veil of ignorance should be assumed to know "the plain truths now common and available to citizens generally"); see also Thomas Nagel, *Rawls on Justice*, in READING RAWLS 1, 7 (Normal Daniels ed., 1989) (observing that the deliberators deliberating behind Rawls' veil of ignorance still "possess general knowledge about economics, politics, and sociology and they know that the circumstances of justice, conflicting interests and moderate scarcity, obtain").

77. See *supra* Part I.

78. See *id.*

deliberating from behind a veil of ignorance would agree to a rule requiring such an excuse because it would allow them to obtain greater advantages in some circumstances (i.e., those that are typically thought of prime cases for “efficient breach”), while losing very little or nothing in situations where the other party has decided to pay rather than perform.

Notice, moreover, that this contractualist account of the expectation damages remedy views the doctrine not as a concession to warranted breaches, but rather as a rule that requires parties to excuse one another’s non-performance and pay expectation damages in circumstances where that larger set of actions will serve a deeper cooperative purpose. The account thus squares the remedy with basic cooperative features of contractualist accounts of the right, rather than suggesting that efficiency considerations can trump private right.

So when, precisely, are the assumptions needed to generate the above contractualist account of the expectation damages remedy true? Ultimately, this is an empirical question, which will require learning more about how specific contracting parties typically value the things that they hope to exchange. One of the assumptions—namely, what I have called the “Statistical and Interpersonal Temporal Indifference Thesis”—is, in my view, a pretty good, if somewhat rough, guide to the truth. The other assumption—namely, the “Fungibility Assumption”—is not, however, very plausible at all, in my view, in the kinds of intimate circumstances that define close personal relationships. Reciprocal promises are not, however, typically enforced in those circumstances anyway.<sup>79</sup> Reciprocal promises are, on the other hand, typically enforced when they involve exchanges between relative strangers, and it is much more

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79. See, e.g., Andrew Kull, *Reconsidering Gratuitous Promises*, 21 J. LEGAL STUD. 39, 40 (1992) (observing that courts are typically reluctant to enforce family promises); Melanie B. Leslie, *Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract*, 77 N.C. L. REV. 551, 551 (1999) (arguing that while enforcement of reciprocity norms is seen “not in breach of promise suits, which occur rarely between family members,” enforcement of these norms can instead be seen “in will contests”); Mary Keyes & Kylie Burns, *Contract and the Family: Whither Intention?*, 26 MELB. U. L. REV. 577, 593 (2002) (noting “the common law’s continued reluctance to enforce family agreements,” though arguing that this reluctance may be formalistic and pointless); Todd J. Zywicki, *Institutions, Incentives, and Consumer Bankruptcy Reform*, 62 WASH. & LEE L. REV. 1071, 1130 (2005) (noting the “traditional reluctance of the common law to intervene in contracts made among family members” and suggesting that this tradition “reflects the implicit judgment that formal legal enforcement of these promises adds little to their efficient level of enforcement beyond that provided by informal extralegal enforcement of family ties”).

plausible that the Fungibility Assumption is true—or at least typically true—in these circumstances. This is because parties in market transactions are often—though not always—driven primarily either by the prospects of economic gain or by interests in goods or services that they take to be relatively fungible and obtainable from multiple places on an open market.<sup>80</sup> What a contractualist framework would seem to recommend, then, is a default rule allowing for expectation damages as the standard remedy in these common circumstances of market exchange—which, as it turns out, are the typical circumstances in which contracts are enforced.

These last remarks lead to a final question, which is when, if ever, rational persons behind a veil of ignorance would allow for exceptions to the expectation damages remedy. The short answer is: when the assumptions needed to justify the expectation damages remedy no longer hold. Presumably, there will be some circumstances in which people engage in exchanges for items that they do not deem fungible for others, or that they value in ways that cannot easily be reduced to monetary terms.<sup>81</sup> In circumstances such as these, rational persons would presumably favor a rule requiring specific performance instead<sup>82</sup>—at least on the assumption that the special way that the person values the exchange has been made clear to the other party. This is because specific performance would allow people who specially value items to enforce these exchanges by

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80. Both critics and supporters of modern market economies have tended to agree that these economies generate exchanges that are ruled primarily by profit motives. See, e.g., Thomas L. Haskell, *Capitalism and the Origins of Humanitarian Sensibility, Part 2*, 90 AM. HIST. REV. 547, 549 (1985) (“After nearly two centuries of criticism of market society, it is easy to forget how brutal life could be before the profit motive ruled supreme and how moderate, in the long perspective of human history, the capitalist’s license for aggression really is.”); RICHARD M. TITMUSS, *THE GIFT OF RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* 225 (1971) (“[T]he ways in which society organizes and structures its social institutions can encourage or discourage the altruistic in man.”). Although it would be wrong to assume that the profit motive is the only motivation for all modern market exchanges, it is also clear that profit motives play a very large role in generating a large amount of modern market activity and market exchange.

81. See, e.g., Radin, *supra* note 49, at 1906 (“To understand [particulars of personhood] as monetizable or completely detachable from the person—to think, for example, that the value of one person’s moral commitments is commensurate or fungible with those of another, or that the ‘same’ person remains when her moral commitments are subtracted—is to do violence to our deepest understanding of what it is to be human.”).

82. The remedy of specific performance typically consists of an injunction requiring the breaching party to perform as promised in the original contract. See RESTATEMENT (SECOND) OF CONTRACTS § 357 cmt. a (1981) (“An order of specific performance is intended to produce as nearly as is practicable the same effect that the performance due under a contract would have produced. It usually, therefore, orders a party to render the performance that he promised.”).

obtaining the items themselves, and because these persons will presumably always value these items more than their market value. The only cost of the rule would be the inability to capitalize on the possibility of increased welfare gains that might otherwise give rise to a so-called “efficient breach.” The chances of such gains are, however, speculative, and, in this special context, must be balanced against the known losses that will arise absent a right to specific performance.

Other circumstances in which rational persons might plausibly forgo the opportunity to pay expectation damages in lieu of performance would be instances in which expectation damages are unlikely to make the victim of a breach whole for some other reason, or are particularly difficult to calculate. Hence, rational persons deliberating behind a veil of ignorance would presumably allow for specific performance in these limited classes of circumstances as well.

Interestingly, the modern law of contract remedies does reflect just these sorts of exceptions. Although expectation damages are the typical remedy for breach of contract,<sup>83</sup> parties may seek specific performance in cases where the items in question are “unique or in other proper circumstances.”<sup>84</sup> In practice, this test tends to cover situations in which one party has formed a special attachment to an item, as in cases of family heirlooms;<sup>85</sup> where expectation damages are unlikely to make the victim of the breach whole;<sup>86</sup> or when damages are difficult to calculate.<sup>87</sup> The fact that a contractualist account of contract law remedies would recommend exceptions to

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83. *Id.* § 347 & cmt. a; *see supra* Part I.

84. U.C.C. § 2-716 (2003); RESTATEMENT (SECOND) OF CONTRACTS § 359(1) (“Specific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party.”); *see also* sources cited *supra* note 47 (listing cases explaining how rare specific performance is as a remedy).

85. U.C.C. § 2-716 cmt. 2; RESTATEMENT (SECOND) OF CONTRACTS § 360(b) & cmt. b; *see Burr v. Bloomsburg*, 138 A. 876 (N.J. Ch. 1927) (ordering a widow to return a ring to the sister of the deceased because the sister’s legal remedies were inadequate due to the ring’s sentimental value).

86. RESTATEMENT (SECOND) OF CONTRACTS § 360; *see* U.C.C. § 2-716 cmt. 2; *Weathersby v. Gore*, 556 F.2d 1247, 1257–59 (5th Cir. 1977) (holding that damages are more appropriate than specific performance for a contract for the sale of cotton because cotton is not unique and the buyer could obtain it on the open market).

87. U.C.C. § 2-716; *see* RESTATEMENT (SECOND) OF CONTRACTS § 360(a); *Hogan v. Norfleet*, 113 So. 2d 437, 439–40 (Fla. Dist. Ct. App. 1959) (holding that specific performance was proper to enforce a contract for the sale of a business where damages would be difficult to calculate).

the expectation damages remedy in just these sorts of circumstances provides further support for the robustness of the present account.

A contractualist approach to contract law remedies, rooted in Darwall's recent work on the second-person standpoint, can thus provide a plausible and unified account of (1) the agent-centered features of contractual obligation, (2) the fact that we allow parties to enforce contracts even before there has been any reliance, (3) the fact that the standard remedy for a contractual breach is expectation damages, and (4) the fact that we see deviations from the expectation damages remedy in the precise circumstances that we do. By contrast, the standard economic account of the expectation damages remedy helps with only (2) and (3). By suggesting that efficiency considerations can trump private right, the standard economic account is also inconsistent with the basic obligatory nature of private law.

In my view, none of this should be particularly surprising after due reflection. Adjudications of contract law disputes are *not*, in fact, viewed merely as opportunities for courts to make increases in net social welfare;<sup>88</sup> they are instead viewed as opportunities to decide whether *a specific plaintiff, who is a contracting party*, is owed a remedy *from a specific defendant for his or her breach*. This entire set of facts can be accounted for in a unified manner from a contractualist standpoint, whereas the agent-centered and relational features of contractual obligations can neither be explained nor justified in terms of efficiency maximization. For reasons just discussed, contractualism can also provide a more penetrating account of a number of other features of remedial doctrine. These facts should thus cast significant doubt on the overarching claims that the law and economics movement has sometimes made to articulate the deep principles that animate this area of the private law.

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88. Cf. Gregory C. Keating, *Distributive and Corrective Justice in the Tort Law of Accidents*, 74 S. CAL. L. REV. 193, 197 (2000) (discussing justice theory of tort law as compared to economic conceptions (citing JULES L. COLEMAN, RISKS AND WRONGS 303–28 (1992); ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY, AND THE LAW 24 (1999); ERNEST J. WEINRIE, THE IDEA OF PRIVATE LAW 56–83 (1995); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 547 (1972))).

### III. CONCLUSION

I began this article by observing that, as things presently stand, there is a common perception that the law and economics movement has been far more successful at explaining areas of private as opposed to public law doctrine. Facts like these have sometimes lent credibility to a particular conception of how our private relations with one another differ from our relations with the government. According to this view, the deep principles that govern our private legal relations are decidedly consequentialist in nature, and principles like those of fairness and justice only have legitimate application to our relationships with the state.

My purpose in this article has been to cast doubt on this basic conception. To that end, I have focused attention on a specific legal doctrine—namely, the expectation damages remedy—which is both central to the private law and often thought to best illustrate the importance and need of economic reasoning. I have argued that, on closer scrutiny, the doctrine nevertheless has features that can neither be explained nor justified in terms of efficiency maximization. I have also developed a distinctive, contractualist account of this area of doctrine, which draws on Darwall's recent work on the second-person standpoint, and which better accounts for the full set of facts about contractual remedies.

Because the main arguments in this article focus on one specific doctrine, it is important neither to overstate nor understate the generality of the conclusions to be drawn. It would significantly overstate things to conclude that a contractualist can necessarily provide a better account of the full range of private law doctrine than the economist. Any support for such a view would have to depend on the details of the competing accounts, and the relevant contractualist alternatives have not yet been fully developed. The above arguments nevertheless suggest that contractualism provides a better framework for understanding key areas of private law doctrine, which have typically been thought to require economic analysis. The arguments also suggest that contractual obligations have robust and pervasive features that evade economic analysis. It should therefore be worth our time and effort to try to extend contractualist accounts to a broader range of private law doctrine.

It would, on the other hand, vastly understate the importance of the arguments presented here to think that they relate only to the

expectation damages remedy. The arguments in this article draw on key insights about the nature of obligation, which Darwall has recently brought to our attention, and illustrate those insights in the context of contract law remedies. The insights themselves are, however, not limited to contract law. To the contrary, they suggest that we cannot understand the particular authority that obligations of *any kind* purport to have without seeing them as giving some person or group the second-person standing to demand compliance. When we make such claims, we engage in specific forms of interpersonal interaction, however, and these interpersonal relations cannot be understood from within a purely economic framework. We also show ourselves to be implicitly committed to a contractualist account of the right, which is not only inconsistent with principles of efficiency maximization and but is also in deeper harmony with principles that more plausibly govern our individual relations with the government. The agent-centered and relational features of contract law remedies are, in any event, also common to all areas of the private law, and the law and economics paradigm cannot plausibly account for these features, whereas a contractualist account of the private law, rooted in Darwall's recent work on the second-person standpoint, can.

Properly construed, the arguments in this article thus illustrate a broad challenge to the law and economics movement. They suggest, in effect, that the law and economics movement cannot account for the very features of private law obligations that make them private *obligations*. But this means that the arguments presented here provide a direct challenge to the view that the law and economics movement can better account for private as opposed to public law doctrine, along with the view that our private legal relations are governed by a decidedly consequentialist standard of the right. That conception should therefore be discarded in favor of a view that takes more seriously the second-personal aspects of our private legal interactions with one another.

