Against Fuller and Perdue

Richard Craswell†

The 1936 article by Lon Fuller and William Perdue, "The Reliance Interest in Contract Damages," deserves its place as a classic in the history of contract theory. As a piece of substantive contract scholarship, though, that article is several decades out of date, and is not even very useful as an organizing principle in teaching contract remedies. The first part of this Article surveys various normative theories that have been advanced by modern scholars, to show how little any of them employ or depend on Fuller and Perdue's three-way classification between expectation, restitution, and reliance "interests." The second part surveys the remedies case law, showing that Fuller and Perdue's classification is not even very helpful as a descriptive organizing principle: it obscures important similarities between remedies that nominally protect different "interests," and important differences among remedies that nominally protect the same "interest." This Article concludes that Fuller and Perdue's three-way classification—important as it undoubtedly was in the historical development of contract theory—is no longer a useful analytic tool, and offers some suggestions as to what might replace their classification.

INTRODUCTION

In 1936, Lon Fuller and William Perdue published an article they called, "The Reliance Interest in Contract Damages."[1] In the history of contract law, and of American legal thought in general, this article stands as a towering classic. It changed forever the way we think about monetary remedies for breach of contract. It also exemplified Fuller's particular brand of jurisprudence, showing the power of his critique of formalism.

As a piece of substantive contracts scholarship, though, the Fuller and Perdue article is several decades out of date. This fact should not be surprising, since the article was written several decades ago. What is surprising, though, is that this article still dominates so much of the modern analysis of remedies for breach. In particular, most analyses of monetary remedies still begin with Fuller and Perdue's distinction between the expectation, reliance, and restitution interests.[2]

---

† Professor of Law, Stanford University. I am grateful for comments and suggestions from Ellen P. April, Ian Ayres, John H. Barton, Barbara H. Fried, Henry T. Greely, Richard L. Hasen, Laura C. Lin, Eric A. Posner, Teemu Ruskola, James E. Salzman, Alan Schwartz, W. David Slawson, Lawrence B. Solum, Eric L. Talley, and participants in workshops at the Loyola and Stanford law schools.

[1] L.L. Fuller and William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 1*, 46 Yale L J 52 (1936); *The Reliance Interest in Contract Damages: 2*, 46 Yale L J 373 (1937). Perdue, a third-year law student at the time, was Fuller's research assistant. William R. Perdue, Jr., *Commentary*, in Fred R. Shapiro, *The Most-Cited Articles from the Yale Law Journal*, 100 Yale L J 1449, 1487, 1487 n 118 (1991).

[2] Fuller and Perdue, 46 Yale L J at 53–54 (cited in note 1). I describe these interests in more

My thesis is that Fuller and Perdue's classification is not very helpful in understanding contract remedies. While their article still merits study for historical purposes—it is, as I have said, a legal classic—their three "interests" should not be the starting point for modern analyses. In fact, closer examination shows that most modern scholarship already makes little use of Fuller and Perdue's three-way classification (notwithstanding the lip service it receives), and the few examples that do are not very persuasive. In the remainder of this Article, I attempt to explain why.

Part I below summarizes Fuller and Perdue's own argument, which attacked the then-prevailing orthodoxy on two fronts. The orthodox view held that contract remedies protected the expectation interest, meaning that they gave the nonbreacher enough to leave him just as well off as if the contract had been performed.[3] Fuller and Perdue challenged the normative case for protecting the expectation interest by identifying two other "interests"—the reliance and restitution interests—which in their view presented stronger claims to protection. They also attacked the descriptive accuracy of the standard account, by showing that remedies for breach often failed to protect the nonbreacher's expectation interest. Instead, they argued, courts often awarded lower sums that had the effect of protecting only the reliance or restitution interests. Thus, Fuller and Perdue made both descriptive and normative arguments to persuade readers that contract law did and should recognize three remedial interests rather than one.

In Parts II and III, I use a similar technique to argue that Fuller and Perdue's three "interests" are an unhelpful lens through which to view contract remedies. Part II surveys the normative literature on contract remedies, and argues that nothing in the modern literature identifies Fuller and Perdue's three interests as the ones most worthy of protection. More fundamentally, I argue that it is not even very useful to think about remedies in terms of the "interests" they protect, as opposed to (say) the functions they serve or the actual effects they produce. Indeed, Part II of this Article is intended in part as a demonstration of just how dramatically contract theory has changed since 1936. While Fuller and Perdue's article was a major advance for its time, most modern analysts have directed their attention elsewhere.

Part III then surveys the cases to show that a large number of decisions cannot be characterized as protecting Fuller and Perdue's three remedial "interests," or anything resembling them. Moreover, even those cases that do award reliance or restitution damages often

detail in Part I.

[3] For convenience in the use of pronouns, all of my examples will assume a female breacher and a male nonbreacher.

do so for a variety of different reasons, and with different effects on the parties' final positions. For example, often reliance damages will reduce or limit a plaintiff's recovery relative to expectation damages, but sometimes they can actually *increase* that recovery. The same is true, at least occasionally, of various measures of restitution or expectation damages. Yet Fuller and Perdue's categorization invites us to see all reliance cases (or all expectation cases, or all restitution cases) as protecting a single distinct "interest," thereby obscuring these important differences. In effect, we are still limited by their classification in a way that is not so different from the way that Fuller and Perdue's predecessors were limited by their single-minded focus on the expectation interest. We now focus on three interests, rather than one—but in doing so, we push to the background other goals courts might pursue, as well as the normative arguments that might justify those goals.

In sum, I argue that Fuller and Perdue's classification has little relevance to modern normative debates, and is not even a useful way of classifying the remedies case law. While some contracts scholars have recognized this, other discussions of contract law—and especially the organization of contracts textbooks and of first-year classes in contract law—continue to assign a central place to Fuller and Perdue's classification. We would be better served if that classification were moved out of its central role today, and returned to the historical place that it richly deserves.

I. A BRIEF SUMMARY OF FULLER AND PERDUE

Fuller and Perdue's article made a number of significant contributions, and it therefore resists easy summary. Moreover, others have described those contributions with more skill than I could, so I will not repeat their descriptions here.[4] As most lawyers know, though, the centerpiece of Fuller and Perdue's article was its identification of three purposes (or "interests") that might be served by the award of contract damages, which they labeled *restitution*, *reliance*, and *expectation*.[5]

Briefly, the restitution interest aims to restore the breaching party to the position she occupied before the contract, by forcing her to disgorge any gains she obtained from the nonbreacher. By contrast, the reliance interest seeks to restore the nonbreacher to the position he

---

[4] See especially Todd D. Rakoff, *Fuller and Perdue's* The Reliance Interest *as a Work of Legal Scholarship*, 1991 Wis L Rev 203; Stewart Macaulay, The Reliance Interest *and the World Outside the Law Schools' Doors*, 1991 Wis L Rev 247; and Robert Birmingham, *Notes on the Reliance Interest*, 60 Wash L Rev 217 (1985). For a more complete discussion of Fuller's life and work, see Robert S. Summers, *Lon L. Fuller* (Stanford 1984).

[5] Fuller and Perdue, 46 Yale L J at 53–54 (cited in note 1). As Todd Rakoff has pointed out, Fuller and Perdue never explained why they labeled these goals "interests" of the promisee. Rakoff, 1991 Wis L Rev at 216–17 (cited in note 4).

would have occupied absent the contract, by compensating him for any losses he may have suffered. The expectation interest also looks to the nonbreacher's position, but aims to restore him to the position he would have occupied if the contract had been fully performed.

Fuller and Perdue also explained how each of these purposes corresponded to a different measure of damages, and how the different measures related to each other arithmetically.[6] They recognized, of course, that measurement problems and other practical difficulties would often require the use of imperfect proxies that might not correspond with the ideal awards.[7] In theory, though, the restitution interest called for damages equal to whatever value the breacher had obtained from the nonbreacher, and the reliance interest called for damages equal to whatever the nonbreacher gave up (whether or not the breacher had received a corresponding benefit). This meant that the restitution measure could sometimes equal, but should never exceed, the reliance measure. On the other hand, the expectation measure restores to the nonbreacher not only everything he gave up in reliance on the contract, but also any net profits he would have made if the contract had been performed. Thus, the expectation measure should usually exceed the reliance measure (and also the restitution measure), at least in the typical case in which the nonbreacher's profits would have been positive.[8] This allowed Fuller and Perdue to rank the three damage measures in ascending order, with restitution typically yielding the smallest amount and expectation the largest.

A. Their Normative Analysis

In addition to identifying these three interests, Fuller and Perdue argued that the reliance interest was more worthy of protection than was commonly recognized. More precisely, they believed that the normative claims for protection followed the order just listed, with the restitution interest presenting the strongest claim and the expectation interest presenting the weakest.

The restitution interest presented the strongest claim for protection (in their view) because protection of that interest corrected both the unjust enrichment of the breacher and the unjust impoverishment

[6] Their understanding of the accounting relationship between the different awards was presumably what led Avery Katz to describe their analysis as "highly congenial to an economic perspective." Avery Katz, *Reflections on Fuller and Perdue's* The Reliance Interest in Contract Damages: *A Positive Economic Framework*, 21 U Mich J L Reform 541, 541 (1988).

[7] Fuller and Perdue, 46 Yale L J at 61, 66–67 (cited in note 1).

[8] The restitution and reliance measures could exceed the expectation measure if the contract would have been a losing one for the nonbreacher, but Fuller and Perdue did not expect this to be the typical case. Fuller and Perdue, 46 Yale L J at 75–77 (cited in note 1). See also note 134 and accompanying text.

of the nonbreacher. Protection of the reliance "interest" also corrected an unjust loss by the nonbreacher, but (to the extent that it exceeded the restitution interest) it did not undo any corresponding gain by the breacher. As Fuller and Perdue put it:

> If, following Aristotle, we regard the purpose of justice as the maintenance of an equilibrium of goods among members of society, the restitution interest presents twice as strong a claim to judicial intervention as the reliance interest, since if A not only causes B to lose one unit but appropriates that unit to himself, the resulting discrepancy between A and B is not one unit but two.[9]

By contrast, the expectation interest presented a weaker case for protection (in Fuller and Perdue's view) than either the reliance or restitution interests:

> In passing from compensation for change of position to compensation for loss of expectancy we pass, to use Aristotle's terms again, from the realm of corrective justice to that of distributive justice. The law no longer seeks merely to heal a disturbed status quo, but to bring into being a new situation. It ceases to act defensively or restoratively, and assumes a more active role. With the transition, the justification for legal relief loses its self-evident quality. It is as a matter of fact no easy thing to explain why the normal rule of contract recovery should be that which measures damages by the value of the promised performance.[10]

Fuller and Perdue then proceeded to discuss a number of possible rationales for legal protection of the expectation interest, but found none of them compelling.[11] In their view, the strongest argument for awarding expectation damages justifies that remedy as an indirect way of protecting the reliance interest, when the nonbreacher's reliance losses would be difficult to prove directly.[12]

B. Their Descriptive Analysis

Fuller and Perdue did not rest simply on normative arguments for the reliance and restitution measures. They also pointed to a number of cases in which courts had not in fact protected the nonbreacher's expectation interest, but instead had protected only his reliance or restitution interests. While the orthodox view had ignored

---

[9] Fuller and Perdue, 46 Yale L J at 56 (cited in note 1), citing Aristotle, *Nicomachean Ethics* 1132a–1132b.

[10] Fuller and Perdue, 46 Yale L J at 56–57 (cited in note 1) (footnote omitted).

[11] Id at 57–66.

[12] Id at 60–62. I discuss these arguments at more length in Part II.

such cases, or dismissed them as aberrations, Fuller and Perdue argued that these "aberrations" actually showed a pattern of judicial sympathy for one of the other two interests.

For example, Fuller and Perdue pointed to many cases in which the requirement that damages be proved with reasonable certainty had prevented nonbreachers from recovering their full expectation interest. While that requirement might be seen as a mere concession to administrative costs, with no particular normative significance, Fuller and Perdue pointed out that the rule had often been applied so as to deny recovery for the *profits* that full performance would have brought, while still allowing recovery of out-of-pocket losses incurred in *reliance* on the contract. In this way, they said, the proof-with-certainty rule often had the effect of protecting nonbreachers' reliance interests.[13]

Fuller and Perdue made similar points about judicial application of the "foreseeability" requirement of *Hadley v Baxendale*,[14] and about the implied excuse doctrines of impracticability, frustration and mistake.[15] They also pointed to a large number of cases in which the formation of the contract had been defective in some way, where courts denied full enforcement of the contract and thereby blocked the award of expectation damages, but granted partial recovery under a variety of other legal doctrines. The result was often equivalent (or nearly equivalent) to an award of reliance or restitution damages.[16] They also found similar tendencies in the enforcement of some gratuitous or "non-commercial" promises,[17] and in cases involving contract-like dealings where liability rested not on contract law but on misrepresentation or fraud.[18]

Of course, Fuller and Perdue's descriptive analysis was reinforced by their normative argument (and vice versa). That is, decisions protecting the reliance or restitution interests look more significant, and less like aberrations, once we are persuaded that there are also normative reasons why courts might *justifiably* protect the reliance or restitution interests rather than the expectation interest. Similarly, once we have been made to see that courts often *do* protect the reliance or restitution interests, the normative claim that they *ought* to protect those

[13] Fuller and Perdue, 46 Yale L J at 373–74 (cited in note 1).

[14] 9 Exch 341 (1854), discussed in Fuller and Perdue, 46 Yale L J at 84–88 (cited in note 1); 46 Yale L J at 375–76 (cited in note 1).

[15] Fuller and Perdue, 46 Yale L J at 379–86 (cited in note 1).

[16] Id at 386–96, 410–17.

[17] Id at 396–406.

[18] Id at 406–10.

interests gains plausibility. Indeed, this mutually reinforcing use of case law and normative argument is part of the article's genius.[19]

C. Their Modern Legacy

While Fuller and Perdue's article centered around three distinct "interests," Fuller's own thinking may have been rather broader. In a letter to Karl Llewellyn, written six years after the article was published, Fuller downplayed the specific "interests" themselves, and spoke in terms more suggestive of a continuous range of remedies. He referred instead to a "hierarchy" of contract interests, which he said could be "sloganized" as extending from restitution to reliance to expectation, but which also included "a number of little midstations ... along the way."[20] He then concluded:

> I consider the contribution made in my article on the reliance interest to lie, not in calling attention to the reliance interest itself, but in an analysis which breaks down the Contract-No-Contract dichotomy and substitutes *an ascending scale* of enforceability.[21]

This language suggests something closer to a continuous scale of remedies, rather than three discrete "interests."

Whatever Fuller may have intended, though, those three remedial "interests" receive most of the attention today. For example, the *Restatement (Second) of Contracts* begins its sections on remedies by announcing that all remedies "serve to protect one or more of the following interests of a promisee," followed by definitions of Fuller and Perdue's three interests.[22] Almost every casebook begins its materials on remedies in the same way—either directly, by excerpting or paraphrasing Fuller and Perdue[23] or the second *Restatement*;[24] or indirectly

[19] For a more subtle discussion of this aspect of the article, see Rakoff, 1991 Wis L Rev 203, esp at 223, 225–45 (cited in note 4).

[20] Letter from Lon L. Fuller to Karl Llewellyn (Dec 8, 1939), quoted in Robert S. Summers and Robert A. Hillman, *Contract and Related Obligation: Theory, Doctrine, and Practice* 41 (West 3d ed 1997).

[21] Id (emphasis added).

[22] Restatement (Second) of Contracts § 344 (1979).

[23] See, for example, Randy E. Barnett, *Contracts: Cases and Doctrine* ch 2 at 72 (Little, Brown 1995); John P. Dawson, William Burnett Harvey, and Stanley D. Henderson, *Contracts: Cases and Comment* ch 1 at 1 (Foundation 7th ed 1998); Charles L. Knapp and Nathan M. Crystal, *Problems in Contract Law: Cases and Materials* 892–93 (Little, Brown 3d ed 1993); Stewart Macaulay, et al, *Contracts: Law in Action* ch 2 at 27 (Michie 1995); John Edward Murray, Jr., *Contracts: Cases and Materials* ch 8 at 657 (Michie 4th ed 1991); Robert S. Summers and Robert A. Hillman, *Contract and Related Obligation: Theory, Doctrine, and Practice* ch 3 § 2 at 211 (West 3d ed 1997). The Dawson, Harvey, and Henderson casebook is particularly noteworthy in this respect, as it introduces Fuller and Perdue in the book's first sentence.

[24] See, for example, Steven J. Burton, *Principles of Contract Law* ch 1 § 1 at 9 (West 1995); Lon L. Fuller and Melvin Aron Eisenberg, *Basic Contract Law* 208 (West 6th ed 1996).

by way of the opinion in *Sullivan v O'Connor*,[25] which itself uses Fuller and Perdue's classification. In academic scholarship, many law-and-economics analyses begin with these same three remedies,[26] as do any number of non-economic writings.[27]

It is this use of Fuller and Perdue's three "interests" that I wish to criticize here. Part II argues that Fuller and Perdue's three-way classification is not a useful normative construct, while Part III argues that it is not a useful way of understanding what courts are actually doing.

II. MODERN NORMATIVE ANALYSES

It is possible, of course, to disagree on the merits with Fuller and Perdue's claim that the reliance interest presents a stronger claim for protection than does the expectation interest. I will do some of that here, but my deeper concern is with the *kind* of normative argument that Fuller and Perdue believed was relevant to their claim. I argue below that Fuller and Perdue's appeal to Aristotle (and to corrective and distributive justice) is not a useful way of thinking about remedies for breach of contract.[28]

Even more fundamentally, I also argue that the very classification employed by Fuller and Perdue—their famous distinction between the restitution, reliance, and expectation interests—is not a useful starting point for normative analysis. To most modern scholars (as to Fuller and Perdue), remedies can be defended only by reference to some purpose or policy they might serve.[29] We might adopt broader or narrower remedies in order to create efficient incentives, for example, or to achieve certain distributional goals, or to affirm an important symbolic message. Under any of these approaches, the analysis starts with the particular goal to be achieved—efficiency, distribution, or what have you—and proceeds on that basis to decide what remedy

---

[25] 363 Mass 579, 296 NE 2d 183, 186–89 (1973). Casebooks with this as either the first or the second opinion in their section on remedies include E. Allan Farnsworth and William F. Young, *Cases and Materials on Contracts* ch 5 at 486 (Foundation 5th ed 1995); Edward J. Murphy, Richard E. Speidel, and Ian Ayres, *Studies in Contract Law* ch 6 § 2 at 844 (Foundation 5th ed 1997); Robert E. Scott and Douglas L. Leslie, *Contract Law and Theory* ch 1 § D at 84 (Michie 2d ed 1993).

[26] See, for example, Steven Shavell, *Damage Measures for Breach of Contract*, 11 Bell J Econ 466 (1980); Lewis A. Kornhauser, *Reliance, Reputation, and Breach of Contract*, 26 J L & Econ 691 (1983); A. Mitchell Polinsky, *An Introduction to Law and Economics* 28 (Little, Brown 2d ed 1989). I discuss the economic analysis of contract remedies in more detail in Part II.A.

[27] See, for example, P.S. Atiyah, *The Rise and Fall of Freedom of Contract* 1–7 (Clarendon 1979); E. Allan Farnsworth, *Legal Remedies for Breach of Contract*, 70 Colum L Rev 1145, 1147–49 (1970); Mark Pettit, Jr., *Private Advantage and Public Power: Reexamining the Expectation and Reliance Interest in Contract Damages*, 38 Hastings L J 417 (1987).

[28] See Part II.E.

[29] Fuller and Perdue, 46 Yale L J at 52 (cited in note 1) ("[L]egal rules can be understood only with reference to the purposes they serve.").

ought to be awarded. Under these approaches, then, there is no reason to think that the remedy that best serves the chosen substantive goal will necessarily coincide with one of Fuller and Perdue's three "interests." Moreover, even when one of these approaches does happen to coincide (in its recommended remedy) with one of those three "interests," that coincidence will appear only at the *conclusion* of the analysis: the particular "interest" that is selected will not have played any role in the analysis leading up to that conclusion. There thus is no reason to *begin* our analysis with Fuller and Perdue's three "interests," or to treat those "interests" as key concepts of any sort.

The first four subsections below defend this assertion by surveying several possible substantive policies, including (1) economic efficiency, (2) contractualist philosophy, (3) retributivist and/or expressive goals, and (4) distributional goals. I argue that Fuller and Perdue's three "interests" are relevant to these policies (if at all) only by coincidence, if they happen to match whatever remedy best serves these goals. The final subsections then turn to the only approaches I have found that even attempt to assign a central role to Fuller and Perdue's three "interests": (5) the corrective justice theory that Fuller and Perdue themselves invoked, and (6) a form of ideological analysis that has been advanced by a few modern scholars. In each case, I argue that the purported link between the normative theory and Fuller and Perdue's three "interests" is actually mistaken.

A. Economics

Economic analysis is consequentialist: it asks what consequences will follow from adopting this remedy or that. Moreover, to economists, the best way to predict the likely consequences is to understand the *incentives* that a given remedy creates. The steady expansion of the economic analysis of contract remedies has thus come from the identification of more and more incentives that might be affected by the law's choice of remedy, and which thus would have to be considered in any normative evaluation. Of course, to the extent that the legal remedy is merely a default rule that the parties are allowed to alter, economic analysts have also been concerned about the effect of the default rule on contractual negotiations.[30] But even when the parties are likely to leave the default remedy in place, there are a number of incentives that are relevant from an economic perspective.

---

[30] For recent discussions of default rules see, for example, Ian Ayres and Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L J 87 (1989), or the *Symposium on Default Rules and Contractual Consent*, 3 S Cal Interdiscipl L J 1 (1994).

To take the most obvious example, the threat of a larger remedy might deter a promisor from deliberately breaking her promise, while a reduction in the remedy might reduce that incentive. This effect—the effect on the incentive to perform a contract or to break it—has since become famous as the "theory of efficient breach."[31] However, subsequent economic analysis has identified any number of other incentives that might also be affected by the legal remedy.

For example, the size of the remedy may also affect a promisor's incentive to take precautions against accidents that might leave her unable to perform her contract, as when stiffer penalties for breach of warranty give manufacturers an incentive to build more reliable products.[32] The remedy may also affect the *promisee's* incentives to avoid relying too much (or too little) on the promised performance, or to take other precautions to protect himself against the effects of breach.[33] The damage rules may also affect the promisee's incentive to take steps to mitigate his losses *after* a breach by the promisor.[34] More broadly, the damage rules may affect both parties' incentives to think carefully about a contract before signing it,[35] or to think differently about which parties to contract with (and at what price),[36] or to spend more time searching for other parties who might be willing to contract.[37] The damage rule can also affect the degree of risk to which

---

[31] The earliest analyses appear to have been Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 Rutgers L Rev 273 (1970), and John H. Barton, *The Economic Basis of Damages for Breach of Contract*, 1 J Legal Stud 277 (1972). The first formal proof belongs to Shavell, 11 Bell J Econ at 466 (cited in note 26). For a review of the subsequent literature, see Richard Craswell, *Contract Remedies, Renegotiation, and the Theory of Efficient Breach*, 61 S Cal L Rev 629 (1988).

[32] For an early formal model, see Kornhauser, 26 J L & Econ at 691 (cited in note 26). Less technical discussions can be found in Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 Cal L Rev 1 (1985), or Craswell, 61 S Cal L Rev at 650–53 (cited in note 31).

[33] For discussions of this effect, see Cooter, 73 Cal L Rev at 3–29 (cited in note 32); Kornhauser, 26 J L & Econ at 691 (cited in note 26); Shavell, 11 Bell J Econ at 466 (cited in note 26). More technical analyses include Tai-Yeong Chung, *Incomplete Contracts, Specific Investments, and Risk Sharing*, 58 Rev Econ Stud 1031 (1991), and Aaron S. Edlin and Stefan Reichelstein, *Holdups, Standard Breach Remedies, and Optimal Investment*, 86 Am Econ Rev 478 (1996).

[34] For a discussion of this effect, see Charles J. Goetz and Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 Va L Rev 967 (1983).

[35] For formal models of this effect, see Richard Craswell, *Precontractual Investigation as an Optimal Precaution Problem*, 17 J Legal Stud 401 (1988); Claudio Mezzetti and Theofanis Tsoulouhas, *Gathering Information Before Signing a Contract with a Privately Informed Principal*, Intl J Indus Org (forthcoming 1998).

[36] This is an important aspect of many recent game-theoretic models involving pooling and separating equilibria. See, for example, Ayres and Gertner, 99 Yale L J at 108–12 (cited in note 30); Philippe Aghion and Benjamin Hermalin, *Legal Restrictions on Private Contracts Can Enhance Efficiency*, 6 J L, Econ, & Org 381 (1990); Lucian Ayre Bebchuk and Steven Shavell, *Information and the Scope of Liability for Breach of Contract: The Rule of* Hadley v. Baxendale, 7 J L, Econ, & Org 284 (1991).

[37] For formal models of this effect, see Peter A. Diamond and Eric Maskin, *An Equilibrium*

each party is exposed, an important consideration whenever the parties are not risk-neutral.[38]

Interestingly, a few of these effects may support the expectation remedy, thus coinciding with one of Fuller and Perdue's "interests." For example, expectation damages may give promisors just the right incentive to choose between performing and breaking a contract (the "efficient breach" effect), at least when subsequent renegotiation between the parties is unlikely.[39] Expectation damages may also provide the right incentive to take precautions against any contingencies that would leave the promisor unable to perform.[40] And if the promisee is risk-averse while the promisor is risk-neutral or risk-preferring, expectation damages can also provide the best allocation of risk between the two parties.[41]

There is, however, no reason to suppose that the totality of economic effects will *always* favor an award of expectation damages. For example, if both parties are risk-averse, the optimal allocation of risk will usually be achieved by a remedy that is somewhat less than the full expectation measure (although it will not necessarily equal the reliance measure).[42] Similarly, the incentives to research the relevant contingencies prior to signing a contract may also be optimized by a remedy that is below the expectation measure—though for this effect, too, the optimal remedy could be either above or below the reliance measure.[43] In other cases, if there is a significant probability that a

---

Analysis of Search and Breach of Contract, I: Steady States, 10 Bell J Econ 282 (1979); Peter A. Diamond and Eric Maskin, *An Equilibrium Analysis of Search and Breach of Contract, II: A Non-Steady State Example*, 25 J Econ Theory 165 (1981); Dale T. Mortensen, *Property Rights and Efficiency in Mating, Racing and Related Games*, 72 Am Econ Rev 968 (1982).

[38] See A. Mitchell Polinsky, *Risk Sharing Through Breach of Contract Remedies*, 12 J Legal Stud 427 (1983).

[39] See the articles cited in note 31.

[40] See the articles cited in note 32.

[41] Polinsky, 12 J Legal Stud at 434 (cited in note 38). This conclusion holds only when the loss from nonperformance is fully replaceable by money, or (more technically) when the loss increases the marginal utility of money to the same extent as would the loss of an equivalent amount of money. For formal models of this qualification, see Philip J. Cook and Daniel A. Graham, *The Demand for Insurance and Protection: The Case of Irreplaceable Commodities*, 91 Q J Econ 143 (1977); Samuel A. Rea, Jr., *Nonpecuniary Loss and Breach of Contract*, 11 J Legal Stud 35 (1982). A less technical exposition can be found in Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 Yale L J 353, 362–67 (1988).

[42] Polinsky, 12 J Legal Stud at 442–44 (cited in note 38). Strictly speaking, this is true only for breaches that result from some event that makes performance more costly to the promisor. For breaches that result when some event allows the promisor to earn greater profits by performing some other contract instead, then the optimal remedy (from the standpoint of risk allocation) will usually equal or exceed the promisee's expectation measure. Id at 435–36.

[43] Craswell, 17 J Legal Stud 401 (cited in note 35). More precisely, whenever the expectation and reliance measures diverge, the optimal remedy (insofar as this particular incentive is concerned) will be below the expectation measure, and could be above or below the reliance measure. If the expectation and reliance measures happen to coincide—as they should in a perfectly competitive market, for example—then either measure will optimize the incentives for precon-

breach of contract will not be detected or will not be brought to trial, the optimal remedy could exceed the expectation measure.[44] On the other hand, some systems of imperfect enforcement might require lower damage measures, to correct what might otherwise be a tendency toward overdeterrence.[45] And in markets with informed customers, lower damages might suffice because promisors may already have optimal incentives, even if the law's remedy is below the expectation level.[46]

More fundamentally, whenever different amounts of damages would be optimal for each of the different incentives to be optimized, the measure that is optimal when *all* of the relevant incentives are considered will often be some hybrid or intermediate number. For example, if the potential breacher's incentives to perform or to take appropriate precautions would be optimized by full expectation damages, but if the nonbreacher's attitude toward risk leads him to prefer less than full insurance, the measure that best accommodates both of those goals will normally be more than would be chosen if insurance were the only relevant goal, but less than what would be chosen if precautions alone were relevant.[47] Once this has been recognized, it is not too far-fetched to say that the measure of damages that is truly optimal—optimal, that is, when *all* of the relevant factors have been considered—could lie anywhere on the real number line.

To lawyers who think of remedies as protecting discrete, identifiable "interests," the prospect of a continuum of remedies to choose from may seem odd. To economists who view remedies in instrumental terms, though, there is nothing at all odd about this. After all, most instruments—be they legal rules, electrical devices, or even physical tools like hammers or crowbars—can produce slightly larger or smaller effects by being tweaked in one direction. Indeed, if the exact consequences one wants to produce vary from one use of these tools to another, this sort of tweaking will often be needed. From an instrumental perspective, the focus is entirely on the *effect* one wants to produce, not on the "interest" one wants to protect.

---

tractual research.

[44] For examples of this argument for increased remedies see, for example, A. Mitchell Polinsky and Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv L Rev 869, 936–38 (1998); Daniel A. Farber, *Reassessing the Economic Efficiency of Compensatory Damages for Breach of Contract*, 66 Va L Rev 1443, 1455–64 (1980).

[45] Richard Craswell, *Deterrence and Damages: The Multiplier Principle and Its Alternatives*, 97 Mich L Rev 2185 (1999); Richard Craswell and John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 J L, Econ, & Org 279 (1986).

[46] See, for example, Kornhauser, 26 J Law & Econ 691 (cited in note 26).

[47] For examples of this sort of tradeoff, see Rea, 11 J Legal Stud 35 (cited in note 41); Alan O. Sykes, *The Doctrine of Commercial Impracticability in a Second-Best World*, 19 J Legal Stud 43, 66–67 (1990); Michelle J. White, *Contract Breach and Contract Discharge Due to Impossibility: A Unified Theory*, 17 J Legal Stud 353 (1988).

My point thus is not merely that modern economics does not necessarily support any of the three remedies that Fuller and Perdue considered (though often it will not). The more fundamental point is that economics does not even approach the question in the same way that Fuller and Perdue did, for economics does not begin by asking what "interest" the law should protect. To be sure, if the optimal award from an economic standpoint turned out to be (say) 63 percent of expectation damages, we could always *define* that amount as a recognizable "interest" of the promisee, and then announce that the law aimed to protect the promisee's "63 percent expectation interest." But that definition would be entirely arbitrary, adding nothing to any normative case for that remedy. The normative case, at least from an economic standpoint, would still consist of whatever effects had led to the initial conclusion that 63 percent of expectation damages was the appropriate "interest" for the law to recognize.

The same would be true even if the best combination of incentives happened to be produced by a remedy that did correspond to one of Fuller and Perdue's three interests. For example, suppose (as may well be true) that, at least in certain cases, a remedy of expectation damages yields the best combination of overall incentives.[48] That would give us an economic argument for expectation damages—but this economic argument would not rest on the fact that expectation damages happen to coincide with a somewhat less arbitrary "interest" of the promisee. From an economic perspective, an "interest" of 100 percent of expectation damages is no less arbitrary than an "interest" of 63 percent of expectation damages, or than any other number (at least at the beginning of the analysis). While economic analysis may *conclude* that one of those numbers is superior to the others, its justification for that conclusion owes nothing to Fuller and Perdue's framework.

B. Contractualist Philosophy

Consider now another normative theory of contract remedies, based on contractarian or contractualist moral philosophy. These terms refer to a broad family of philosophical theories, whose members differ in particulars but share the premise that just or moral rules consist of those rules to which all parties could agree under some sort of ideal circumstances. Some of these theories appeal to John Rawls's veil of ignorance, by asking what rules all parties would consent to if they did not know on which side of the rule they might find themselves.[49] Others dispense with the fiction of a veil of ignorance and ask

---

[48] See the sources cited in notes 31–32, 41.

[49] John Rawls, *A Theory of Justice* ch 3 (Belknap 1971).

what a *reasonable* moral agent could consent to, or what rules could be *justified* even to those who find themselves disadvantaged by the rule in any particular instance.[50]

The emphasis on ideal agreements, or on justifications and reasonable grounds for disagreement, distinguishes these contractualist theories from the economic analysis discussed in the preceding subsection. To be sure, the economic theories could be described as contractualist in a different sense, for economics often identifies the rules that actual agents would have an incentive to consent to. After all, if a particular remedy would be efficient in the economic sense, it would also maximize the total surplus created by the contracting parties, so there would be a strong incentive for both parties to agree to be governed by that remedy. Indeed, some authors who make economic arguments have defended their conclusions on just this sort of contractualist ground, as a supplement to the arguments based more directly on economic efficiency.[51] As others have noted, though, it is not clear that any normative force is gained by this sort of contractualism, as long as the predictions about what the parties would agree to themselves derive entirely from an efficiency analysis.[52]

However, other contractualist theories need not coincide with economic analysis, if they place restrictions on what a *reasonable* agent could agree to.[53] To date, there has been little interest in applying these theories to contract law, especially to questions about the appropriate remedy for breach.[54] But an exception can be found in a recent paper by T.M. Scanlon, who uses contractualist analysis to justify the expectation measure.[55]

---

[50] See, for example, T.M. Scanlon, *What We Owe to Each Other* esp ch 5 (Belknap 1998). For discussions of other versions of contractualism, see David Gauthier, *Morals by Agreement* (Oxford 1986), and Peter Vallentyne, ed, *Contractarianism and Rational Choice: Essays on David Gauthier's* Morals by Agreement (Cambridge 1991).

[51] See, for example, Richard A. Epstein, *Beyond Foreseeability: Consequential Damages in the Law of Contract,* 18 J Legal Stud 105, 106–08 (1989); Schwartz, 97 Yale L J at 357–60 (cited in note 41). The Epstein article includes a brief critique of Fuller and Perdue from this perspective.

[52] This point is discussed at more length in Jules L. Coleman, Douglas D. Heckathorn, and Steven M. Maser, *A Bargaining Theory Approach to Default Provisions and Disclosure Rules in Contract Law,* 12 Harv J L & Pub Pol 639, 642–44 (1989); and Richard Craswell, *Efficiency and Rational Bargaining in Contractual Settings,* 15 Harv J L & Pub Pol 805 (1992).

[53] See text accompanying note 59.

[54] A contractualist analysis of the conditions under which promises ought to be binding at all is presented in Thomas Scanlon, *Promises and Practices,* 19 Phil & Pub Affairs 199, 215–16 (1990). Contractualist analyses of issues involving secrecy and nondisclosure can be found in Coleman, Heckathorn, and Maser, 12 Harv J L & Pub Pol (cited in note 52); Kim Lane Scheppele, *Legal Secrets* (Chicago 1988); and Richard Craswell and Alan Schwartz, eds, *Foundations of Contract Law* 170–72 (Oxford 1994).

[55] T.M. Scanlon, *Promises and Contracts,* in Peter Benson, ed, *Philosophy and Contract Law* (forthcoming Cambridge 2000) (manuscript on file with U Chi L Rev).

Scanlon's paper can be read as a direct response to Fuller and Perdue, for he challenges their assertion that the expectation interest is the least worthy of protection. Scanlon emphasizes the value of what he calls "assurance," or the desire of a promisee to be certain that he will realize the benefits that have been promised. In some cases, the promisee's desire for assurance may be psychological: he may want the peace of mind that comes from knowing that the promised benefits are likely to be received. But Scanlon includes more than just psychological well-being: as he notes, the promisee may also want to make it likely that the promised benefits will in fact be delivered.[56] As long as this is a *reasonable* desire on the part of the promisee—as it surely will be in most cases—this gives promisees a reason to reject any moral principle that would allow the promisor to withdraw her promise simply upon reimbursement of the promisee's reliance losses. In other words, a moral principle that limited a breacher's responsibility to reliance damages is a principle that a reasonable agent could refuse to accept, and therefore is not a principle that is required by Scanlon's version of contractualism.

Scanlon then turns to the affirmative argument in favor of making defaulting promisors pay full expectation damages. Obviously, reasonable promisees would have no reason to object to a principle holding promisors liable for expectation damages—but what about reasonable promisors? While it might seem that a reasonable promisor could object to such a principle in favor of some other principle that left her with lower liability, Scanlon responds to this argument by qualifying the principle at issue. Specifically, Scanlon proposes a principle of liability for full expectation damages *only* in those cases where the promisor knew that the promisee wanted assurance (in Scanlon's sense of that term), and made the promise with the intention of providing just that assurance. In this way, Scanlon's proposed principle allows promisors to opt out of full liability for expectation damages by warning the promisee from the beginning that they do not intend to provide that much assurance. Since the burden of such a warning is so slight (Scanlon says), no reasonable promisor could object to this suitably qualified principle. But this means that the qualified principle is one that *no* reasonable agent—promisor or promisee—would have reason to reject. As a result, the qualified principle is justified by Scanlon's version of contractualism.[57]

[56] "What people have reason to want is not only a certain state of mind—confident belief that certain things will happen. They also want to be able to make it more likely that these things will in fact occur." Id at 38–39; see also the discussion in id at 11–16.

[57] Id at 16–18.

While this summary is too brief to do justice to Scanlon's argument,[58] my concern here is not so much with its merits but with its relationship to Fuller and Perdue. As Scanlon employs Fuller and Perdue's own distinction between expectation and reliance damages, it might appear that his analysis depends crucially on Fuller and Perdue's framework, and that he differs only in the conclusion he reaches about the moral case for expectation damages. A closer reading, however, shows that Scanlon's account owes no more to Fuller and Perdue than did the economic analyses discussed in the preceding subsection. While Scanlon himself does not develop this point, his analysis (like that of the economists) suggests that almost any number on the real number line could be justified as a remedy, without regard to whether it matches any of Fuller and Perdue's three "interests."

Consider the possibility that some promisees might reasonably prefer the slightly lesser degree of assurance that would be provided by a smaller remedy—say, a remedy equal to 50 percent of expectation damages. A smaller remedy would still provide them with some level of assurance, while also reducing the burden on promisors (who might then be more willing to deal with them, or to offer a more favorable price). Thus, there surely are *promisees* who would have no reason to object to a principle that provided them with only 50 percent of expectation damages in the event of a breach. Once this is recognized, an argument similar to Scanlon's can show that reasonable *promisors* would also have no reason to object to that principle, as long as the principle allowed some means of exit for any promisor who was willing to warn the promisee in advance. That is, this principle too should apply only to those promisors who know that their promisee wants this level of assurance, and who have not warned him that they have no intention of providing that level. When qualified in this way, promisors as well as promisees have no reason to reject this principle—which is just what we need for a contractualist defense of this remedy.

Thus, there is nothing unique about expectation damages in the structure of Scanlon's argument. What Scanlon has really provided is a demonstration that almost *any* remedy can be justified in contractualist terms, as long as it is one that some promisees have good reason to want and some promisors are willing to provide (and as long as those who want some other remedy are allowed to opt out). To be sure, the insistence that the parties have a justifiable *reason* to want a certain remedy might rule out a few extreme provisions—for example, Scanlon might not consider it relevant if some promisees wanted an

---

[58] In particular, I have said nothing about that part of Scanlon's argument which explains why it is justifiable to use the law against those who violate this moral principle. See id at 21–40. Interested readers are urged to consult the full text.

extremely harsh remedy just to gratify a whim, or just to see the promisor suffer.[59] But at least within the range of possible remedies that might be justified by acceptable reasons, Scanlon seems committed to defending any and all remedies that reasonable parties might want.[60]

In short, Scanlon's argument does not depend in any way on Fuller and Perdue's three "interests." Those interests do not limit the range of possible remedies that Scanlon must consider; nor do they play any role in his analysis of what reasonable promisors and promisees could accept. Scanlon does of course *conclude* that the expectation remedy could be justified by his analysis—but the fact that the expectation remedy is also one of Fuller and Perdue's three "interests" carries no weight in his argument. The three-way classification of Fuller and Perdue is thus as irrelevant to Scanlon's contractualist analysis as it was to the economic analysis considered earlier.

C. Retributive and Expressive Goals

The contractualist and economic analyses are sufficiently similar that it is easy to see why neither depends on Fuller and Perdue. As I have already indicated, though, a similar point can be made about most other normative theories. In particular, it can also be made about retributive and expressive theories of remedies.

Retributive goals are most often invoked in connection with the award of punitive damages. To be sure, punitive damages are sometimes defended on instrumental or economic grounds, as a way of increasing deterrence.[61] But punitive damages can also be defended from a non-instrumental retributive perspective, as meting out the level of punishment that the breacher *deserves* as punishment for her wrongful acts.[62] Officially, contract law does not provide for the award of punitive damages, so this justification is more often discussed in tort and criminal law. But punitive damages have at times been available for

---

[59] Compare Scanlon, *What We Owe to Each Other* at 229–41 (cited in note 50) (arguing that the mere convenience to others, even a large number of others, should not be aggregated in a way that would justify imposing extreme hardships on a few). Scanlon's examples in that book all involved non-contractual risks that the victim had no opportunity to opt out of, while in a contractual setting the victim can always opt out by refusing to sign the contract. It is not clear whether a victim's failure to opt out when such an opportunity was present would alter Scanlon's conclusion on this point.

[60] Scanlon, *Promises and Contracts* at 34 (cited in note 55). In this respect, Scanlon reaches the same conclusion (for different reasons) as that reached by authors such as Epstein, 18 J Legal Stud 105 (cited in note 51), whose contractualism rests entirely on efficiency.

[61] See the articles cited in note 44.

[62] For a useful discussion of this argument (including its relation to the deterrence goal), see Bruce Chapman and Michael Trebilcock, *Punitive Damages: Divergence in Search of a Rationale*, 40 Ala L Rev 741, 779–98 (1989).

breaches of contract,[63] and they can still be awarded under closely related doctrines such as fraud.[64] Punitive damages have also been advocated from time to time by contracts scholars, in part to advance these retributive goals.[65]

Another possible justification for contract remedies—which I will call the expressive goal—is related to retribution, but it can also serve instrumental purposes. Expressive analyses view damage awards and other judicial sanctions as expressions of society's disapproval of whatever conduct triggered the sanction. Legal expressions of disapproval may be valued for their own sake, without regard to the consequences; but they may also be valued instrumentally, for the moral education they provide to citizens.[66] Still, even the instrumental version of expressionism is sufficiently different from the instrumentalism of most economic theories—and sufficiently similar to retribution—that the expressive and retributive goals are most usefully discussed together.

Of course, my concern is not with the merits of these goals, but with their relationship to Fuller and Perdue. As should already be apparent, though, the expressive and retributive theories make little if any use of Fuller and Perdue's three "interests." In criminal law, for example—where the expressive and retributive goals are most important—few would argue that the appropriate criminal penalty could be determined by asking which of the victim's "interests" ought to be compensated. Indeed, to the extent that Fuller and Perdue's analysis is built around interests of the victim (or nonbreacher), it is largely irrelevant to a retributive or expressive theory that centers on the appropriate response to the wrongdoer (or breacher).

To put the same point in a slightly different way, the retributive and expressive theories (like the economic and contractualist theories discussed earlier) look to the entire real number line for the appropriate punishment. After all, the wrongfulness of the breacher's behavior and the appropriate social response to wrongfulness are both matters of degree, so any retributive theory will often require the penalty to be

---

[63] See, for example, *Seaman's Direct Buying Service, Inc v Standard Oil Co of California*, 36 Cal 3d 752, 686 P2d 1158, 206 Cal Rptr 354 (1984), overruled by *Freeman and Mills, Inc v Belcher Oil Co*, 11 Cal 4th 85, 900 P2d 669, 44 Cal Rptr 2d 420 (1995).

[64] See text accompanying note 124.

[65] See, for example, William S. Dodge, *The Case for Punitive Damages in Contracts*, 48 Duke L J 629 (1999); Steven B. Katz, *The California Tort of Bad Faith Breach, the Dissent in* Seaman's v. Standard Oil, *and the Role of Punitive Damages in Contract Doctrine*, 60 S Cal L Rev 509 (1987); Patricia H. Marschall, *Willfulness: A Crucial Factor in Choosing Remedies for Breach of Contract*, 24 Ariz L Rev 733 (1982).

[66] Recent discussions of this effect include Marc Galanter and David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 Am U L Rev 1393 (1993); Paul H. Robinson and John M. Darley, *The Utility of Desert*, 91 Nw U L Rev 453 (1997).

scaled continuously. The same is probably true of the educative effect of different punishments: larger sanctions should be more effective both in capturing the public's attention and in driving home a message of condemnation. As a result, neither of these theories has any reason to frame its analysis in terms of particular, discrete "interests." This makes the classification of Fuller and Perdue irrelevant to expressive and retributive theories as well.

To be sure, Fuller and Perdue's three interests could have expressive relevance in a bootstrapping sort of way, if enough people came to *interpret* the legal protection of a particular interest as sending a particular kind of message. For example, if most people already took the award of expectation damages as a particularly harsh condemnation of breach, or if they already took the award of reliance damages as a less severe condemnation, then either of those awards might send a message that could not so easily be sent by an award of (say) 63 percent of expectation damages, or by any other arbitrary number. But there is little reason to believe (and no scholar has ever argued) that any of Fuller and Perdue's interests already convey those meanings to any appreciable segment of society. And even if they did convey such a meaning, there is also no reason to suppose that expressive significance could not come to be attached to other awards as well. For example, if the law routinely awarded 63 percent of expectation damages, over time that award would probably acquire expressive significance of its own. In short, even if we take this expressive purpose seriously, there is still no reason to begin our analysis with Fuller and Perdue's three remedial "interests."

The same is true of another form of retributivism, which argues for *lower* remedies in certain cases. Drawing on notions of comparative fault, some scholars have argued that a breacher's liability should be reduced in cases where the nonbreacher was at least partially at fault.[67] While some sharing of the losses might also be defended on efficiency grounds, as a way of sharing the risk and/or giving both parties incentives (albeit diluted ones), the efficiency effects of splitting losses are rather complex.[68] In any event, the authors I refer to here support loss-sharing on something close to a notion of just deserts: if a party is

---

[67] See, for example, Charles Fried, *Contract As Promise: A Theory of Contractual Obligation* 70–73 (Harvard 1981); Jeffrey L. Harrison, *A Case for Loss-Sharing*, 56 S Cal L Rev 573 (1983); Robert E. Hudec, *Restating the "Reliance Interest"*, 67 Cornell L Rev 704, 716–18 (1982); Leon E. Trakman, *Winner Take Some: Loss Sharing and Commercial Impracticability*, 69 Minn L Rev 471, 484–86 (1985); W.F. Young, *Half Measures*, 81 Colum L Rev 19 (1981).

[68] Compare the discussion of the analogous issues involving comparative negligence in, for example, Robert D. Cooter and Thomas S. Ulen, *An Economic Case for Comparative Negligence*, 61 NYU L Rev 1067 (1986); David Haddock and Christopher Curran, *An Economic Theory of Comparative Negligence*, 14 J Legal Stud 49 (1985).

only 30 percent at fault, then it is *fair* to make him bear only 30 percent of the losses.

Whatever might be said about the merit of this proposition, it too makes no use of Fuller and Perdue's three-way classification. Fault, too, is a matter of degree, and only by coincidence would an award of reliance or restitution damages happen to match the percentage of liability deemed appropriate under a fault-based theory.[69] Thus, even from the standpoint of this normative theory, Fuller and Perdue's classification of remedies still adds nothing to the analysis.

D. Distributional Goals

Yet another normative perspective assesses remedies according to their distributional effects. As noted earlier, the expectation measure gives the nonbreacher the profits he would have made from the deal, rather than merely restoring him to his precontract position.[70] This fact can then be combined with the premise, held by a number of scholars on the left, that profits (and the free-market system more generally) are themselves a source of distributional inequity, as they tend to accrue mostly to those who are already powerful or wealthy.[71] If we accept this premise, it might seem to follow that expectation damages could only aggravate these inequalities, by allowing the powerful to collect their profits even in those cases where the other party fails to perform.[72]

While this argument sounds intuitively plausible, it is actually unsound. That is, even if we were to grant the premise—that profits from market exchanges are a source of inequality—it would not follow that expectation damages aggravate this problem, or that reliance damages are therefore superior. In fact, this intuitive argument is unsound on several levels.

First, the intuitive argument implicitly assumes that it is the stronger or more powerful party who is usually suing for damages. Otherwise, if it were the weaker party who was suing, the weaker

---

[69] See Hudec, 67 Cornell L Rev at 717 (cited in note 67).

[70] Fuller and Perdue themselves saw this as a distributive effect, which moved the law "from the realm of corrective justice to that of distributive justice." Fuller and Perdue, 46 Yale L J at 56 (cited in note 1).

[71] For various versions of this position see, for example, Atiyah, *Freedom of Contract* chs 12, 19 (cited in note 27) (discussed in text accompanying note 113); Morton Horwitz, *The Transformation of American Law, 1780–1860* 186–211 (Harvard 1977); Betty Mensch, *Freedom of Contract as Ideology*, 33 Stan L Rev 753, 767–68 (1981).

[72] See, for example, Mark Pettit, Jr., *Private Advantage and Public Power: Reexamining the Expectation and Reliance Interest in Contract Damages*, 38 Hastings L J 417, 427 (1987) ("[M]ore often than not, it is the stronger actors in our society who seek to employ state power to enforce this privately negotiated 'extra' advantage"—in other words, the profits protected by expectation damages.).

party would presumably want a larger remedy and not a smaller one. To be sure, there are good reasons to expect that stronger parties do sue more often, given the cost of bringing suit in our society. But this difference is itself a function of the available damage remedies: it is the cost of bringing suit *combined with the difficulty of recovering significant damages* that particularly discourages suits by the poor. For this reason, those concerned with increasing weaker parties' access to the courts often recommend *larger* damage awards, up to and including punitive damages, precisely to benefit those who otherwise might not find it possible to sue.[73] Thus, it is at least ambiguous whether a reduction in the typical award, from expectation damages down to reliance damages, will actually help the weaker parties.

Another way to make this point is to ask why damage awards should not be reduced even further, perhaps down to zero. If most suits are brought by the powerful, so that a reduction from expectation damages to reliance damages reduces the benefit to the powerful, why wouldn't each further reduction leave the powerful with even less, and thereby serve the same distributional goals? When I discuss this possibility with students, their intuitive reaction is that a remedy below reliance damages would expose poor victims to a different kind of injury by allowing the powerful to breach their contracts with impunity, leaving their victims even worse off than if no contract had been formed. But this intuition reflects a shift from thinking of the weaker party as a *defendant*, who would be helped by a low damage award, to thinking of him as a *plaintiff*, who would be hurt by a low award. Without some further basis for grounding our intuitions about how often the weak and the strong find themselves as plaintiff or defendant—and about how that ratio might change if we were to change the damage rules—it is difficult to make much of this argument.

More fundamentally, though, the intuitive distributional argument fails on another level by failing to take account of the effect of contract remedies on the price term. Even if stronger parties most often appear as plaintiffs, so that a lower remedy would appear to help the weak (under the intuitive argument given above), a lower remedy will also make these contracts less attractive to the stronger parties, precisely by reducing what they can recover in the event of breach. As a consequence, the stronger parties are likely to demand additional concessions as their price for entering the contract, in the form of

[73] This criticism of the distributional argument for reliance damages has been made by Macaulay, 1991 Wis L Rev at 256 n 34 (cited in note 4); and by Michael B. Kelly, *The Phantom Reliance Interest in Contract Damages*, 1992 Wis L Rev 1755, 1808–09. For a broader skepticism about the systematic distributional impact of contract rules generally, see Duncan Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 Md L Rev 563, 609–20 (1982).

harsh additional terms or a price that is more favorable to them. For the same reason, if the law were instead to adopt a higher remedy, stronger parties might find these contracts more attractive, in which case they might have reason to offer more generous prices in order to get more of these attractive contracts.

To some extent, then, any gains or losses that the weaker parties may realize in the event of a breach will be paid for up front, through more or less favorable prices. Needless to say, this makes the distributional effect of any remedy much harder to analyze. As a first approximation, the distributional effects may offset each other entirely, in which case no distributional claim can be made for any remedy. And as a second approximation, the distributional effects may run in exactly the same direction as the efficiency analysis discussed earlier. That is, if there is a net gain in efficiency from adjusting the remedies in one direction or another, that will create a larger pie for the parties to split, in which case the weak should not end up any worse off, and might even end up slightly better (if they can snare a few crumbs of the increase for themselves). On the other hand, if there is a net *loss* in efficiency, this will *reduce* the total size of the pie, which means that the weaker parties are unlikely to gain any extra crumbs, and may well end up worse off.[74]

Of course, other distributional effects are also possible, especially if there are differences *among* the class of weaker parties in the extent to which they would gain or lose from any particular remedy. Often the most significant effects will involve redistribution from some buyers to others (and/or from some sellers to others), rather than any net distribution from buyers to sellers as a class.[75] Indeed, some of these effects might well support a policy of reducing damage awards (though not necessarily to reliance damages), thus pointing in the same direction as the intuitive argument considered earlier. For example, if some buyers would lose huge profits in the event of a breach, while other buyers would lose less, a rule that allowed every buyer to recover all of his losses (whatever their amount) could benefit the first class of buyers at the expense of the second, at least if sellers were unable to charge the first group a higher price. This cross-subsidization effect has been noted by scholars from all points on the political spectrum, arguing for lower damage awards in a variety of contexts.[76]

---

[74] For a review of the literature on this point, see Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 Stan L Rev 361, esp 366–72 (1991).

[75] Id at 372–84.

[76] See, for example, Richard L. Abel, *A Critique of American Tort Law*, 8 Brit J L & Soc 199, 202–06 (1981); George L. Priest, *A Theory of the Consumer Product Warranty*, 90 Yale L J 1297, 1350–51 (1981); Gwyn D. Quillen, Note, *Contract Damages and Cross-Subsidization*, 61 S Cal L

Once this distributional analysis is taken seriously, though, it loses any connection it may have had with the classification of Fuller and Perdue. Instead, we are now back in an instrumental world, where we can choose from damage measures of any size to achieve the best distributional effect. Larger remedies may increase redistribution in approximately the right direction, or (depending on the circumstances) they may make the distribution worse—but in either case what matters will be the resulting distribution, and not the extent of any correspondence with Fuller and Perdue's three "interests." As with the other normative perspectives considered earlier, a distributional analysis can dispense with Fuller and Perdue entirely.

E. Corrective Justice

By now, it should be apparent that Fuller and Perdue's three "interests" are unlikely to play a central role in any instrumental theory. Instead, what we need is some theory that assigns normative significance to those interests in their own right, rather than as three among many possible means to an end. These final two subsections will consider two such theories. The first is the corrective justice argument that was sketched—though not developed at any length—by Fuller and Perdue. The second is an ideological analysis that has been put forward by several scholars.

As discussed earlier,[77] Fuller and Perdue's argument was that the expectation remedy rested at most on distributive justice, as it sought to give the plaintiff something he never had rather than merely seeking to restore some status quo. By contrast, the reliance remedy could rest on corrective justice, since it aimed to undo a wrongful departure from the precontractual status quo. And the restitution remedy seemed to present an even stronger case, since it undid a wrongful gain by the defendant as well as undoing the plaintiff's wrongful loss. If this argument could be sustained, then Fuller and Perdue's three "interests" (or two of them, at any rate) would indeed deserve the central place they currently occupy.

Notice, though, that this argument—like most appeals to corrective justice—depends for its appeal on an assumption about the relevant baseline. That is, Fuller and Perdue treat reliance losses as a kind of *injury* or *harm*, implying that the promisee has been moved below some baseline to which he ought to be restored. At the same time, they treat the loss of the expectation interest as a mere failure to receive some *benefit* or *gain*: as the failure to move above some baseline.

Rev 1125, 1129–32 (1988).

[77] See text accompanying notes 9–10.

For this argument to work, then, we need some account of why this baseline is normatively relevant.

1. Corrective justice and expectation damages.

This point is easiest to see if we start with an analogous corrective justice argument that could have been made on behalf of the expectation remedy, and that Fuller and Perdue considered but rejected. That argument begins with the premise that when a person enters into a contract, the performance that is promised to him becomes part of his property. By this, I mean not merely that it will become part of his property later, when the contract is performed, but rather that it becomes his property *now*, at the time the contract is signed. If this premise is granted, failure to deliver that promised performance then looks very much like theft: it is refusing to yield up property that is rightfully the promisee's.[78] And if we further assume that the proper remedy for theft is the return of the stolen property itself, or its equivalent in value, we can then reach a conclusion about the appropriate remedy for breach of contract. That is, if the good that is "stolen" is the performance that was promised under the contract, it would seem that the proper remedy is either to deliver the performance itself (the remedy of specific performance), or to deliver the value of that performance (expectation damages).

There are, of course, problems with each of these premises, most of which will be taken up below. Still, the argument does have at least some plausibility; and it may have seemed even more plausible in 1936. At that time, the idea of contract rights as a form of property would have been familiar from the *Lochner*-era decisions, in which the Supreme Court struck down as unconstitutional several legislative restrictions on permissible contract terms.[79] By 1936, the tide of Supreme Court decisions had already turned, but the issue was still controversial, and the debates would have been familiar to Fuller and Perdue's readers.[80]

Perhaps for this reason, Fuller and Perdue felt it necessary to consider this argument at some length. After raising the question of why the law ought to protect the expectation interest, one of the first answers they considered drew explicitly on this analogy to property rights:

---

[78] For a modern example of this assumption, see Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J Legal Stud 1, 13–18 (1989).

[79] *Lochner v New York*, 198 US 45 (1905); *Adair v United States*, 208 US 161 (1908); *Coppage v Kansas*, 236 US 1 (1915).

[80] This history, and especially its relevance to beliefs about freedom of contract, is discussed in Barbara H. Fried, *The Progressive Assault on Laissez Faire: Robert Hale and the First Law and Economics Movement* ch 2 (Harvard 1998).

> The essence of a credit economy lies in the fact that it tends to eliminate the distinction between present and future (promised) goods. Expectations of future values become, for purposes of trade, present values. In a society in which credit has become a significant and pervasive institution, it is inevitable that the expectancy created by an enforceable promise should be regarded as a kind of property, and breach of the promise as an injury to that property. In such a society the breach of a promise works an "actual" diminution of the promisee's assets—"actual" in the sense that it would be so appraised according to modes of thought which enter into the very fiber of our economic system.[81]

As Fuller and Perdue recognized, though, this analogy fails for several reasons to establish a case for the expectation remedy. First, even if we stipulate that the performance promised under a contract should be treated as a property right, nothing necessarily follows about the appropriate remedy for infringement of that right. While Fuller and Perdue did not emphasize this point in their 1936 article, we now know that a given property right can be protected by law in any number of ways. As another famous article demonstrated, property rights can be protected either by property rules or liability rules (by injunctive relief or damages),[82] and there are other possibilities as well.[83] Indeed, hardly any scholars today would assert that, by defining the right at issue, we have automatically defined the appropriate remedy.

Even if we swallow this difficulty, a second problem is that it is not at all clear that the promised performance *ought* to be treated as a property right, at least for purposes of contract law. This was the problem that Fuller and Perdue emphasized in their response to this argument. As they noted, the promised performance may seem like property *if* the law treats it as such, by giving the promisee a right to insist on that performance or its equivalent in value.[84] But to argue in

---

[81] Fuller and Perdue, 46 Yale L J at 59 (cited in note 1).

[82] Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 Harv L Rev 1089 (1972).

[83] For a sampling of the literature that has grown up since the original article by Calabresi and Melamed, see, for example, Ian Ayres and Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 Yale L J 1027 (1995); Louis Kaplow and Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 Harv L Rev 713 (1996); James E. Krier and Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 NYU L Rev 440 (1995).

[84] Fuller and Perdue, 46 Yale L J at 59–60 (cited in note 1) ("A promise has present value, why? Because the law enforces it. 'The expectancy,' regarded as a present value, is not the cause of legal intervention but the consequence of it."). A similar point regarding property rights in general had been made by Robert L. Hale, *Value and Vested Rights*, 27 Colum L Rev 523 (1927). For the historical roots of this argument, and its place in legal writing of the 1920s and 1930s, see Fried, *Progressive Assault on Laissez Faire* at 76–89 (cited in note 80).

this way is to assume the conclusion, at least when the question is whether contract law *ought* to recognize the promisee as having that right. To Fuller and Perdue, as to most modern observers, the decision to recognize a property right must itself be justified on the basis of some further normative argument.

Another way to make this point is to note that the question of contractual performance as "property" could be answered differently for purposes of constitutional law (in cases such as *Lochner*) than for purposes of substantive contract law (in cases of ordinary breach). The constitutional question is a question about the validity of statutes, and about the relative authority of courts vis-à-vis legislatures: its answer thus depends on theories about the proper scope of judicial review. By contrast, the remedial question in cases of ordinary breach is a question about the proper content of the law of contracts, whose answer need have nothing to do with the relative roles of courts and legislatures. It thus would not be inconsistent to reject *Lochner*—say, on the belief that courts should not overturn democratically enacted legislation—while still believing that contract law should award expectation damages for the breach of an enforceable contract. Nor would it be inconsistent to endorse *Lochner*—say, on the belief that legislatures cannot be trusted to decide which contracts to respect—while also believing that those same contract rights entitle the promisee to no more than reliance damages for certain kinds of breaches. In short, just as the recognition of property rights for constitutional purposes requires a constitutional justification, so the recognition of property rights for remedial purposes requires a remedial justification.

Indeed, this latter point seems to be widely conceded in modern analyses of contract remedies. While scholars today do sometimes analyze the expectation remedy in terms of property rights, they properly start the normative inquiry one stage earlier, by asking whether contract law *ought* to grant the promisee a right to the full value of the promised performance. For example, some scholars have argued that recognition of such a right—or perhaps an even stronger right, in which the promisee could demand specific performance of the contract—would produce more efficient incentives.[85] Others have argued that such a right fits better with a contractualist analysis, based on what most parties would normally intend.[86]

[85] Fred S. McChesney, *Tortious Interference with Contract Versus "Efficient" Breach: Theory and Empirical Evidence*, 28 J Legal Stud 131, 152–59 (1999). See also Anthony T. Kronman, *Specific Performance*, 45 U Chi L Rev 351, 352–53 (1978) (analyzing the choice between specific performance and expectation damages as the choice between protecting the promisee's interests with property rules or liability rules).

[86] Randy E. Barnett, *A Consent Theory of Contract*, 86 Colum L Rev 269, 297–300 (1986); Randy E. Barnett, *Contract Remedies and Inalienable Rights*, 4 Soc Phil & Pol 179, 195–96 (1986).

At this point, though, we have left corrective justice theory behind, and with it we have eliminated any central role for the expectation interest as such. That is, if we must look to some other normative theory to define the relevant baseline, we are effectively looking to that other theory to define the appropriate remedy, rather than deriving the appropriate remedy from a theory of corrective justice. To be sure, the corrective justice argument may still be formally correct in the sense that *once we have defined the relevant baseline*, we may then say that any breach that moves the promisee below that baseline violates corrective justice (and any breach that does not move the promisee below that baseline does not). Clearly, though, it is the other theory—the one that defines the relevant baseline—that is doing the normative work.

2. Corrective justice and reliance damages.

Less obviously, perhaps, the same is true of Fuller and Perdue's own argument in favor of awarding reliance damages. They did not spend as much time defending the reliance measure as they did questioning the expectation measure. In fact, their entire argument on behalf of reliance damages comes in a single passage (part of which was quoted earlier):

> [T]he promisee who has actually relied on the promise, even though he may not thereby have enriched the promisor, *certainly presents a more pressing case for relief* than the promisee who merely demands satisfaction for his disappointment in not getting what was promised him. In passing from compensation for change of position to compensation for loss of expectancy we pass, to use Aristotle's terms again, from the realm of corrective justice to that of distributive justice. . . . With the transition, the justification for legal relief loses *its self-evident quality*.[87]

In fact, though, the corrective justice case for protecting the reliance interest is nowhere near as self-evident as Fuller and Perdue asserted. Rather, this corrective justice argument is subject to all of the problems discussed in the preceding subsection, in connection with the corrective justice argument for expectation damages. First, even if we recognize that the promisee has a property right in his reliance inter-

By contrast, the principal weakness of Friedmann, 18 J Legal Stud 1 (cited in note 78), is that he simply assumes (without defending) the proposition that withholding the promised performance is equivalent to theft of the promisee's property.

[87] Fuller and Perdue, 46 Yale L J at 56–57 (cited in note 1) (emphasis added). As Todd Rakoff has observed, "It cannot be said that [Fuller] 'smuggles in' his values, except in the sense that one might say that the greatest smugglers operate brazenly in the daylight." Rakoff, 1991 Wis L Rev at 213 (cited in note 4).

est, it hardly follows that the remedy for any infringement of that interest *must* be measured by the value of whatever was infringed. Here, too, it is fallacious to suppose that defining the relevant right is itself sufficient to define the appropriate remedy.

Second, even if we pass over the question of the appropriate remedy for an admitted infringement, further argument is needed to show that reliance on a broken promise should count as an infringement at all. True, if the promisee has relied on a promise, that will often leave him with fewer goods or assets than he had before. It might even seem obvious (or "self-evident") that depletions of the promisee's goods or assets should count as a taking of his rightful property, for which corrective justice would demand compensation.[88] But the depletion that comes from relying on a promise results in part from the promisee's own actions, since the promisee always has the option of refusing to give up any assets until performance is completed. Thus, we need at least some further argument to explain why any depletion that results from *voluntary* reliance on a promise should be treated as an infringement of the promisee's rights.[89]

The same question arises, in an even more obvious form, once we recognize that reliance losses do not always involve any depletion of the promisee's current stock of assets. Instead, some reliance losses are opportunity costs: they are the value of the other benefits the promisee would have pursued had he not instead relied on this particular promise.[90] We could, of course, simply *define* the promisee's property to include both his existing assets and all the assets that he would have acquired if the now-broken promise had never been made. Given this definition, we could then say that the breach had indeed deprived the promisee of his "property," and that corrective justice therefore demanded that all of this property be restored. But defining the promisee's property in this way begs the question just as

---

[88] There is some psychological evidence that people intuitively distinguish between (a) the loss of some good that they already had, and (b) the failure to obtain some gain or benefit that was never theirs in the first place. For a review, see Elizabeth Hoffman and Matthew L. Spitzer, *Willingness to Pay vs. Willingness to Accept: Legal and Economic Implications*, 71 Wash U L Q 59 (1993). However, nobody has yet argued that this psychological distinction has any normative significance of a sort that would require compensation for all losses that fell below the first of these baselines, and for no losses that fell below only the second. And even if such an argument could be constructed, it still would not match the distinction between reliance and expectation damages, for the reasons to be discussed in the following paragraph.

[89] A similar objection stipulates that the law should protect (at most) only *reasonable* reliance by the promisee, and notes that some further theory is therefore needed to explain when a promisee's reliance should be deemed reasonable. See, for example, Barnett, 86 Colum L Rev at 275 (cited in note 86); Jim Leitzel, *Reliance and Contract Breach*, 52 L & Contemp Probs 87, 90–91 (1989).

[90] Fuller and Perdue, 46 Yale L J at 55 (cited in note 1); 46 Yale L J at 417–18 (cited in note 1).

thoroughly as it did in the analogous argument for expectation damages, when the promisee's property was defined to include the benefits that full performance of the contract would have brought. In either case, the definition of "property" is what needs a normative justification—thus requiring us again to turn to some other normative theory.

Put slightly differently, the problem here is one that we now recognize as defining the relevant baseline. The corrective justice argument for expectation damages assumed that the relevant baseline was the position the promisee would have occupied once the promise had been performed, from which it followed that any departure from that baseline was an injury that required compensation. Similarly, Fuller and Perdue's corrective justice argument (implicitly) assumed that the relevant baseline was the position the promisee would have occupied if the promise had never been made, from which it followed that only departures from *that* baseline could count as injuries and require compensation. And while there are of course arguments that can be advanced in favor of each of these baselines, those arguments all rest on some other normative theory, not on corrective justice itself. While corrective justice theory can give us a way of talking about what to do when the relevant baseline is infringed, it cannot tell us what baseline ought to be selected as relevant. In particular, it cannot tell us that the three baselines that Fuller and Perdue singled out—based on the expectation, reliance, and restitution "interests"—are the most important baselines to consider.

3. Corrective justice and torts.

Another possible corrective justice argument draws an analogy to tort law rather than to property. Indeed, this analogy may be the one that is more widely discussed today, for it is often said that protection of the reliance interest owes more to tort than it does to contract. As a historical matter, there are plausible claims that promissory estoppel—in which the enforceability of promises rests on reliance rather than on consideration—grew out of tort law rather than contract, or (at least) out of rules that arose during a time when tort and contract were not distinct.[91] More to the point, the remedies that are available in tort law seem similar to the reliance remedy in one respect, for both can be described as looking "backwards," to return the promisee to the position he would have occupied if he had never had his unfortu-

---

[91] See, for example, the first edition of Samuel Williston, *The Law of Contracts* §§ 139, 1338 (1920), cited in Fuller and Perdue, 46 Yale L J at 70 n 25 (cited in note 1). Others who have made a similar argument include Orvill C. Snyder, *Promissory Estoppel as Tort*, 35 Iowa L Rev 28 (1949); Warren A. Seavey, *Reliance upon Gratuitous Contracts or Other Conduct*, 64 Harv L Rev 913, 926 (1951); and Grant Gilmore, *The Death of Contract* 88–103 (Ohio State 1974).

nate interaction with the other party. By contrast, the expectation remedy seems more "forward" looking, as it seeks to move the promisee to the position he would have reached if that interaction had been successfully completed.

The tort analogy also raises questions similar to those raised by Fuller and Perdue, about why the law should ever award any more generous remedy. (This may be why the tort analogy is often seen as particularly congenial to the reliance interest.) After all, tort law does not normally require compensation for negligent actions that happen not to injure anyone. But the breach of an unrelied-upon promise also (arguably) fails to injure anyone, for if nobody has relied on the promise then it seems that nobody has been made affirmatively worse off.[92] From this point of view, damages for an unrelied-upon promise (or any damages in excess of the reliance losses) do indeed seem to present a puzzle that calls for an answer, while damages for reliance losses seem much more "self-evident."

Obviously, though, this torts analogy rests on another implicit baseline in its judgment about what counts as an "injury" to a disappointed promisee. The torts analogy treats the promisee as having been injured, not merely deprived of a potential gain, if he has relied on a promise (perhaps only by turning down other opportunities). It also treats him as merely failing to receive a potential gain, rather than actually being injured, if he is denied the benefits that were promised to him. At bottom, then, the torts analogy rests on the same baseline as the property-rights analogy discussed earlier. This dependence means that the torts analogy is incomplete without some further account of why its baseline is the appropriate one, rather than a higher or lower baseline. As in the case of the property-rights analogy, these arguments cannot come from a theory of corrective justice itself, but must come instead from some other normative theory.

F. Ideological Analyses

As a result, we are left still looking for a normative theory in which Fuller and Perdue's three "interests" play anything like a pivotal role. Unfortunately, we are nearly out of alternatives. The only other theory that has even been suggested by modern scholars is one that attaches ideological significance to the expectation and reliance remedies. Specifically, this theory sees expectation damages as the remedy most appropriate to individualism, capitalism and the free market; while reliance and restitution damages are seen as better

[92] This analogy had been drawn four years earlier in George K. Gardner, *An Inquiry into the Principles of the Law of Contracts*, 46 Harv L Rev 1, 22 (1932), cited in Fuller and Perdue, 46 Yale L J at 419 n 224 (cited in note 1).

suited to collective ideologies such as socialism or communitarianism. On this view, the choice between the various remedies depends on a more fundamental choice between rival systems of social organization, or (at least) between rival systems of rhetoric.

I should note at the outset that nothing in modern economics supports this linkage between expectation damages and capitalism, or between reliance damages and any of capitalism's rivals. As an empirical matter, we know that there are markets in which parties who break their contracts pay only the other party's reliance losses (or less),[93] yet those markets seem as "capitalistic" as any others. (We could of course, *define* the payment of reliance damages to be "noncapitalistic," but that would be assuming the conclusion.) Indeed, as a theoretical matter, the economic analysis in Part II.A identified several reasons why expectation damages might not always be the most efficient remedy to use. It thus seems odd to assert that capitalism or free markets depend in any way on the use of a remedy that might not even be the most efficient one.

Nevertheless, the association of expectation damages with capitalism (and of reliance damages with its rivals) has a long history that draws on several sources. If this association were valid, the expectation and reliance interests would then have normative significance in their own right, precisely because of their association with these larger systems of social organization. My task, then—since I do not believe the expectation and reliance interests do have this significance—is to show that this association makes no sense from any point of view, not merely from the standpoint of economics. To do this, I consider each possible source of the association.

1. The tort and property metaphors.

As noted earlier, it is sometimes said that reliance damages owe more to tort principles than to contract.[94] Another common belief holds that tort law imposes duties without regard to a party's consent, while contract law enforces only those duties that a party has voluntarily assumed. If these two premises are combined, it follows that reliance damages (being a tort notion) sound more as if they do not depend on the parties' consent, while expectation damages (as part of contract law) sound more as if they do. And if we accept this conclusion, it might well seem appropriate to associate expectation damages

---

[93] See, for example, Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 Am Soc Rev 55 (1963) (discussing informal norms of compensating only reliance damages in the event of a breach); Epstein, 18 J Legal Stud at 113–21 (cited in note 51) (discussing standard liquidated damage clauses set at below-expectation levels).

[94] See the discussion in Part II.E.3.

with individualism and free markets, while associating reliance damages with collective regulation and restrictions on individual freedom.

Obviously, though, the syllogism behind this association is too facile. By now, it is well understood that the distinction between contract and tort is not that simple, and that it does not line up neatly with any distinction between voluntary and involuntary obligations.[95] Even in 1936, Fuller and Perdue were aware of the difficulties with this distinction. Indeed, they repeatedly criticized any attempt to rest normative arguments about the appropriate remedy on any essential or categorical differences between tort and contract.[96]

Of course, even if we dispense with any categorical difference between tort and contract, we might still want to preserve a distinction between voluntary and involuntary duties. But this distinction—significant as it may be for other purposes—is irrelevant to the choice between expectation and reliance damages, because neither of those remedies is any more (or less) voluntary than the other. After all, many rules of contract law take the form of default rules or negative inferences, which are "imposed" on a defendant only if she does not take the trouble to disclaim them explicitly.[97] This is particularly true of remedies for breach: since most contracts do not specify *any* remedy to be collected in the event of breach, the law must select a remedy if and when a breach occurs. Seen in this way, both the expectation and the reliance measures are equally "imposed" on parties, in the sense that each is usually chosen by the law and not by the parties. Alternatively, to the extent that the parties are free to specify some other remedy if they choose, the expectation and the reliance measures are equally "voluntary," in that each is "imposed" only on parties who have not specified otherwise.[98] Thus, even if we recognize a distinction between voluntary and involuntary duties (which may or may not coincide with the distinction between tort and contract), there is no basis

[95] For early recognitions of this point, see Morris R. Cohen, *The Basis of Contract*, 46 Harv L Rev 553 (1933), and Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 Colum L Rev 603 (1943). For a more recent discussion, see P.S. Atiyah, *Misrepresentation, Warranty, and Estoppel*, in P.S. Atiyah, *Essays on Contract* 275 (Clarendon 1986).

[96] Fuller and Perdue, 46 Yale L J at 400 n 170 (cited in note 1) ("[T]he real need is for a redefinition of the interests protected, without reference to the labels 'contract' and 'tort.'"); id at 419 ("We have already sufficiently intimated our opinion that the breaking down of these departmental barriers would represent a distinct service to legal thinking.").

[97] For analyses of default rules from varying perspectives, see the *Symposium on Default Rules and Contractual Consent*, 3 S Cal Interdiscipl L J at 1 (cited in note 30).

[98] See Fuller and Perdue, 46 Yale L J at 58 (cited in note 1) ("If a contract represents a kind of private law, it is a law which usually says nothing at all about what shall be done when it is violated.... There would, therefore, be no necessary contradiction between the will theory and a rule which limited damages to the reliance interest."). I develop this argument at more length in Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 Mich L Rev 489 (1989).

for associating one side of that distinction with expectation damages, and associating the other side with reliance.

Still, the association of expectation damages with free-market capitalism, and reliance damages with some alternative, may also have another (and equally fallacious) source. As discussed earlier, it is possible to argue for expectation damages in corrective justice terms, if we begin by assuming that the value of the promised performance had already become part of the promisee's property.[99] A property-rights argument was also employed in constitutional law, by those who argued that courts should invalidate legislative restrictions on the permissible terms of contracts.[100] Since both of these arguments assert that a promisee's contractual rights are a form of property, it is easy to conclude that the two arguments must be related in some deeper way. If so, then perhaps those who support the expectation remedy should also support constitutional limitations on legislative powers—while those who oppose such constitutional limitations should also oppose the expectation remedy. This, too, would give us a normative argument in which expectation and reliance damages had normative significance in their own right.

I have already explained, though, why this association is invalid.[101] If the recognition of a property right is a legal *conclusion*, then the grounds for recognizing property rights for purposes of constitutional law and judicial review need have nothing to do with the grounds for recognizing such rights for purposes of the remedy for ordinary breach. One can defend expectation damages as the normal remedy for breach, without also arguing that the legislature is constitutionally barred from interfering with that remedy; just as one can defend reliance damages as the normal remedy for breach, without thereby having to argue that the legislature is constitutionally barred from interfering with *that* remedy. The two questions—what should be the normal remedy for breach, and what should the legislature be allowed to alter?—simply have no logical connection.

2. Duncan Kennedy and Charles Fried.

With these obviously spurious associations out of the way, we can now turn to more serious arguments. One rests on a famous article by Duncan Kennedy, which distinguished between two rhetorical modes that he labeled *individualism* and *altruism*.[102] Kennedy claimed that in-

---

[99] See Part II.E.

[100] See text accompanying notes 79–80.

[101] See text accompanying note 84.

[102] Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv L Rev 1685, 1713–22 (1976).

dividualist rhetoric was associated not only with a substantive belief in free markets and capitalism, but also with a preference for certain legal forms, such as bright-line rules rather than flexible standards.[103] He also saw an association between each of these factors (individualism, the free market, and bright-line rules) and classical contract doctrine as it would have been articulated around 1890.[104] Conversely, Kennedy saw altruist rhetoric as resonating better with the opposite pole of each of these spectrums: with communitarianism and public regulation, with flexible legal standards, and with modern additions to contract law such as the implied obligation of good faith.[105]

Significantly, Kennedy did not himself claim that expectation damages necessarily fell on the "individualist" side of the divide, or that reliance damages fell on the other. Indeed, such a claim (had he made it) would have been difficult to sustain. As discussed earlier, there is no intrinsic reason why a capitalist system must have its promises enforced by expectation damages, rather than by any number of possible alternatives.[106] Also, the rules defining the expectation measure of damages are neither more nor less precise than the rules defining the reliance measure, so neither choice maps easily onto the rules/standards spectrum. And on the altruism/individualism spectrum, it could be said that the expectation measure reflects a *more* altruistic outlook than does the reliance measure. After all, the expectation measure typically holds the breacher responsible for more of the nonbreacher's losses, while the reliance measure lets the breacher go her own way without assuming as much responsibility. There thus is no obvious normative argument (and Kennedy did not make one) that altruists should prefer the reliance measure of damages, while individualists should prefer the expectation measure.

Nevertheless, it is true that expectation damages were the standard remedy of classical contract doctrine, and that this doctrine arose during a time when capitalism was widely celebrated.[107] Moreover, at least one modern scholar writing from a liberal or individualistic perspective—Charles Fried—has flatly asserted that his perspective entails the use of expectation damages as the appropriate remedy for breach.[108] As his entire argument is only a few sentences long, it can be quoted entirely:

---

[103] Id at 1740–45.

[104] Id at 1745–48.

[105] Id at 1720, 1753–60.

[106] See text accompanying note 93.

[107] For a more skeptical view, suggesting that even classical contract law was not all that respectful of freedom of contract (as that term is usually defined), see Mark Pettit, Jr., *Freedom, Freedom of Contract, and the "Rise and Fall"*, 79 BU L Rev 263, 304–52 (1999).

[108] Fried, *Contract As Promise* at 17 (cited in note 67).

> If I make a promise to you, I should do as I promise; and if I fail to keep my promise, it is fair that I should be made to hand over the equivalent of the promised performance. In contract doctrine this position appears as the expectation measure of damages for breach. . . . As the critics recognize and as I have just stated, to the extent that contract is grounded in promise, it seems natural to measure relief by the expectation, that is, by the promise itself. If that link can be threatened, then contract itself may be grounded elsewhere than in promise, elsewhere than in the will of the parties.[109]

While this argument, too, may seem plausible on first glance, it rests on a fallacy that I have already discussed.[110] True, if the courts were to override the parties' explicit agreement to adopt the expectation remedy, an award of reliance damages instead would necessarily be grounded elsewhere than in the will of the parties. (The same would be true if the courts were to override an express agreement adopting the reliance remedy, thus forcing those parties to accept expectation damages instead.) In most cases, however, the parties have not specified any remedy in their contract, so the courts themselves must pick a default remedy. In these cases, any remedy the court picks will be equally consistent (or equally inconsistent) with "the will of the parties."

To be sure, Fried could defend his claim by invoking some other theory about why a default remedy of expectation damages was more consistent with the will of the parties than a default remedy of reliance damages would be. For example, he might argue on efficiency grounds that the expectation measure is the one that best advances the parties' interests; or he might make a contractualist argument to the effect that the expectation remedy is the one that most reasonable parties would choose. But once we shift the argument to these other substantive theories, we have lost any link with the expectation and reliance interests as such, and hence any link with Fuller and Perdue's classification. That is, while it may well be possible to argue that the expectation remedy best serves certain substantive policies, that debate can be carried on directly in terms of those substantive policies, with the expectation or reliance "interests" figuring only as possible conclusions.

---

[109] Id at 17–18. See also Randy E. Barnett, *Contract Scholarship and the Reemergence of Legal Philosophy*, 97 Harv L Rev 1223, 1240–41 (1984) (also assuming that reliance-based liability is antithetical to individual freedom).

[110] See text accompanying note 98. I criticize Fried's argument at more length in Craswell, 88 Mich L Rev at 517–20 (cited in note 98).

3. Patrick Atiyah.

A similar difficulty plagues those on the other side of the argument, who have started from less individualistic premises and argued for reliance damages as the appropriate remedy. The leading example on this side is Patrick Atiyah.[111]

Atiyah's work is more directly concerned with the question of which promises ought to be enforced, as distinct from the question of what remedies are available when an enforceable promise is breached. The two questions merge, however, in a case that is central to Atiyah: the case of a fully executory promise that has not yet been relied on by either side.[112] If reliance damages are the only remedy for breach, a promise that has not yet been relied upon could be breached with no remedy at all, thus making it effectively unenforceable. But if expectation damages are the appropriate remedy, the promisor could not breach without paying the value that her performance would have yielded, thus making the promise effectively enforceable. In short, when Atiyah asks whether unrelied-upon promises should be enforced at all, he is also asking about the appropriate measure of damages.

The answer Atiyah reaches is similar to Fuller and Perdue's, as he too regards reliance losses as presenting the stronger claims to compensation. For Atiyah, though, the strength of those claims rests not on any theory of corrective justice, but rather on his views about individualism and markets. As he puts it, "promise-based liability" (his term for liability that stems from the promise alone, before it has been relied on)

> rests upon a belief in the traditional liberal values of free choice. Many still admire these values but they bring with them, inescapably, many other consequences which are today less admired, especially in England. They bring, in particular, the recognition that some individuals are better equipped to exercise free choice than others, through natural aptitude, education, or the possession of wealth. And the greater is the scope for the exercise of free choice, the stronger is the tendency for these original inequalities to perpetuate themselves by maintaining or even increasing economic inequalities.[113]

To be sure, this passage rests the case against expectation damages partly on the distributional argument that was considered (and

---

[111] For an argument somewhat similar to Atiyah's, see Michael B. Metzger and Michael J. Phillips, *The Emergence of Promissory Estoppel as an Independent Theory of Recovery*, 35 Rutgers L Rev 472, 500–08 (1983).

[112] P.S. Atiyah, *Promises, Morals, and Law* 202–12 (Clarendon 1981).

[113] Atiyah, *Freedom of Contract* at 6 (cited in note 27).

rejected) in an earlier subsection.[114] But this passage also suggests that expectation damages are part of an entire package that includes capitalism, markets, and free choice in general—and that the case for expectation damages must therefore stand or fall on the case for the entire package.

This "package" approach becomes even clearer when Atiyah considers what for him are the only alternatives: the restitution and reliance measures. Restitution (he says) has less to do with freedom of choice, because "where liabilities are benefit-based, the law . . . strive[s] for a reasonable or just balance in the reciprocity of benefit."[115] And reliance, in Atiyah's view, is

> still more hostile to the values of free choice. As soon as liabilities come to be placed upon a person in whom another has reposed trust or reliance, *even though there is no explicit promise or agreement to bear that liability*, the door is opened to a species of liability which does not depend upon a belief in individual responsibility and free choice. Not only is the party relied upon held liable without his promise, but the party relying is relieved from the consequences of his own actions. The values involved in this type of liability are therefore closely associated with a paternalist social philosophy, and a redistributive economic system.[116]

If Atiyah were right about the implications of reliance and expectation damages, we would then (finally!) have an argument in which those interests had normative significance of their own. In making this argument, however, Atiyah conflates the measure of damages with the lack of an explicit promise (or other commitment) by the party who is being held liable. In the passage just quoted, Atiyah describes reliance-based liability as falling on a defendant "even though there is no explicit promise or agreement to bear that liability."[117] If liability is indeed imposed in this way, without such a promise or agreement, then Atiyah may be right that it does not depend upon individual responsibility and free choice.[118] But exactly the same could be said of liability

---

[114] See Part II.D.

[115] Atiyah, *Freedom of Contract* at 6 (cited in note 27).

[116] Id at 6–7 (emphasis added).

[117] Id at 6.

[118] I say that Atiyah "may" be right because it is not clear how much stress he intended to place on the absence of an *explicit* promise or agreement. Obviously, there are circumstances where an obligation can be voluntarily assumed even without any *explicit* commitment (for example, by filling one's tank at a self-service gas station). In fact, many of the examples discussed by Atiyah as instances of reliance-based liability involve cases where the defendant could probably have avoided liability by explicitly disclaiming any binding commitment. See id at 777, citing *Hoffman v Red Owl Stores, Inc*, 26 Wis 2d 683, 133 NW2d 267 (1965). In these cases, the defendant's decision *not* to make such a disclaimer might arguably be deemed a voluntary assumption of obligation. I discuss this issue at more length in Richard Craswell, *Two Economic Theories of*

for expectation damages, if that were to be imposed "even though there is no explicit promise or agreement to bear that liability." In other words, it is not the measure of damages as such, but rather the imposition of liability *without any promise or agreement*, that makes the resulting liability seem inconsistent with free choice.

Once this point is seen, the relevance of Fuller and Perdue's classification again becomes doubtful. As discussed earlier, a legal regime that rested liability on express promises could award either reliance damages or expectation damages for their breach, and both would be equally consistent with the operation of capitalist markets and the promisor's freedom of choice. Alternatively, a legal regime could base liability on duties that were imposed by law, but it could still award either reliance damages or expectation damages for a breach of those duties, and in that case neither remedy would be consistent with freedom of choice. At least as a logical matter, there is no necessary connection between the source of the duty that gives rise to liability and the size of the fine or damage award that must be paid on its breach.

Of course, the lack of any logical connection between the two concepts does not rule out the possibility of a historical connection. It is possible, for example, that when the only available remedy was expectation damages, courts might have been reluctant to impose liability in the absence of an express commitment, and that this reluctance did not disappear until lesser remedies such as reliance damages became available. Notice, though, that even this conjecture abandons the project of attaching any normative significance to Fuller and Perdue's three interests. If the growth of new forms of liability requires a reduced measure of damages, then all that matters (for these purposes) is that the new measure of damages be *smaller*, not that it necessarily match the reliance or restitution "interests."

In other words, this argument too returns us to the instrumental realm, in which damages can be varied continuously to produce larger or smaller effects. Perhaps this merely illustrates the pervasiveness of instrumental thought in modern scholarship—but it is, by now, remarkably hard to find a normative theory in which Fuller and Perdue's three "interests" play any kind of plausible role!

III. MODERN DESCRIPTIVE ANALYSES

A different defense of Fuller and Perdue's classification would rest on their description of what courts actually do. That is, if the restitution, reliance, and expectation interests are what courts do in fact protect, it might be useful to classify remedies in that way even if there

---

Enforcing Promises, in Peter Benson, ed, *Philosophy and Contract Law* (forthcoming Cambridge 2000).

is no normative significance to that classification. My task in this part of the Article, then, is to show that Fuller and Perdue's three-way classification is also unhelpful as a purely descriptive matter.

This claim requires qualification, though. I do not mean that Fuller and Perdue were incorrect to identify restitution and reliance damages as being *among* the remedies that courts regularly award. Even less do I plan to defend the view that Fuller and Perdue's classification replaced: the view that expectation damages were the only possible remedy. By increasing the menu of possibilities from one to three, Fuller and Perdue certainly advanced the analysis that preceded them, and I have no quarrel with this part of their description.

Instead, my quarrel is with the interpretation that Fuller and Perdue's analysis has received in the years since 1936. Today, Fuller and Perdue's three "interests" have attained such prominence that they are often assumed to be the *only* items on the menu, or the only "interests" that courts might plausibly protect.[119] These three "interests" have also become accepted as the most useful way to classify various remedies, especially in the teaching of contract law.[120] The implicit assumption seems to be that all cases awarding reliance damages—or expectation damages, or restitution—must have important features in common with each other, and much less in common with cases protecting some other "interest."

This use of Fuller and Perdue as a descriptive classification is what I wish to challenge here. I argue below that a large number of cases do not protect any of Fuller and Perdue's three "interests," and thus do not fit their classification. Moreover, any two cases that do award reliance damages, and so protect the reliance "interest," will often have very little in common with one another, so the fact that they could both be described as protecting the same "interest" is often of no significance. At the same time, many of these cases have much more in common with cases that nominally award some other remedy: cases which appear (in Fuller and Perdue's classification) to protect a completely different "interest." In this way, Fuller and Perdue's classification both overstates the common features within any given "interest," and obscures important similarities that cut across their interest-

---

[119] See, for example, the language of the Restatement (Second) of Contracts § 344 (1979), which asserts without qualification that contract remedies serve one or more of the three interests identified by Fuller and Perdue. The absence of any qualifications on this claim implies that *all* contract remedies serve one or more of these three interests. And the failure to mention any other interests suggests that these are the *only* interests that contract remedies serve. For a similarly narrow focus, see Farnsworth, 70 Colum L Rev at 1147–49 (cited in note 27) (listing Fuller and Perdue's three interests as the only choices for compensatory damages).

[120] See, for example, the contracts casebooks cited in notes 23–25.

based lines. For all of these reasons, their famous three-way classification is not a useful descriptive tool.

A. Remedies That Exceed Expectation

In Fuller and Perdue's framework, the expectation measure was usually the largest of the three, while the reliance and restitution measures were thought to be smaller.[121] In practice, though, courts often award remedies that exceed the expectation measure as defined by Fuller and Perdue. These awards fit poorly, if at all, into Fuller and Perdue's three categories.

1. Punitive damages.

Punitive damages obviously do not fit Fuller and Perdue's categories, since they do not match any of their three "interests." To be sure, punitive damages are not normally available for breach of contract, especially now that many courts have cut back on the tort of "bad faith breach of contract."[122] But punitive damages are still available, at least in some states, for certain kinds of breaches.[123] They are also still available for some kinds of fraud, or for other torts that are often committed in connection with broken contracts.[124] Since Fuller and Perdue emphasized that remedies could only be understood by looking at *all* the doctrines a promise-breaker might be subject to, without being limited by preexisting doctrinal categories,[125] it will hardly do to exclude punitive damages from the analysis on the grounds that they are not really *contracts* remedies.

2. Cost of completion.

Even if we limit our focus to traditional contract doctrines, courts sometimes increase the measure of liability in ways that appear to re-

---

[121] See text accompanying notes 7–8. Fuller and Perdue did recognize that the reliance and restitution measures could occasionally exceed the expectation measure; I discuss those cases in Part III.A.4.

[122] See *Freeman & Mills, Inc v Belcher Oil Co*, 11 Cal 4th 84, 900 P2d 669, 44 Cal Rptr 2d 420 (1995), overruling *Seaman's Direct Buying Service, Inc v Standard Oil Co*, 36 Cal 3d 752, 686 P2d 1158, 206 Cal Rptr 354 (1984).

[123] For example, many states permit punitive damages against insurance companies who refuse in bad faith to settle claims under an insurance contract. For a discussion of these cases, see Roger C. Henderson, *The Tort of Bad Faith in First-Party Insurance Transactions After Two Decades*, 37 Ariz L Rev 1153 (1995).

[124] See, for example, *BMW of North America, Inc v Gore*, 517 US 559 (1996). For a discussion of other rules that permit the award of punitive damages in disputes connected with contracts, see Timothy J. Sullivan, *Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change*, 61 Minn L Rev 207 (1977); Randy L. Sassaman, Note, *Punitive Damages in Contract Actions—Are the Exceptions Swallowing the Rule?*, 20 Washburn L J 86 (1980).

[125] Fuller and Perdue, 46 Yale L J at 419 (cited in note 1).

flect punitive concerns. Consider, for example, the choice between two methods of measuring expectation damages for work that has been left unfinished or performed incorrectly. One method awards the diminution in market value that results from the incomplete or incorrect work. The other method awards the full cost of fixing or completing the work, in order to bring it up to the level required by the original contract.[126]

Obviously, an award equal to the diminution in market value could leave the promisee less well off than if the contract had been performed, if he attached any subjective value to exact performance that was not reflected in the market's valuation.[127] If so, an award measured by the cost of fixing or completing the work will better protect the promisee's subjective valuation, by letting him get the work fixed or completed. If, however, the cost of fixing or completing the work is unusually high, it is possible for that cost to exceed any subjective value the promisee may place on full performance. In that case, an award equal to that cost will leave the promisee better off (in his own, subjective estimation) than if the contract had been performed, by allowing him to leave the work unfixed and simply pocket the money.[128] (The remedy of specific performance could have a similar effect, if the promisee is able to settle his suit for specific performance by demanding compensation equal to almost the entire amount that it would have cost the promisor to perform.[129])

To be sure, awards that exceed the promisee's subjective value might be dismissed as mere measurement errors, traceable to our inability to measure subjective value directly. After all, there are also deviations in the opposite direction, when promisees end up with less than their full subjective value (for example, if the court awards a smaller measure tied to the measurable loss of market value). If these deviations were randomly distributed, there would be no reason to draw any particular distinction between those awards that ended up too high and those that ended up too low. It would be a mistake, however, to decribe all of these deviations as random measurement error. In at least some cases, the courts seem sensitive to the deliberateness

[126] For a discussion of the case law, see E. Allan Farnsworth, *Contracts* § 12.13 (Little, Brown 2d ed 1990).

[127] The usual illustration of this result is *Peevyhouse v Garland Coal and Mining Co*, 382 P2d 109 (Okla 1962). For a more general discussion of the issue see Timothy J. Muris, *Cost of Completion or Diminution in Market Value: The Relevance of Subjective Value*, 12 J Legal Stud 379 (1983).

[128] The example usually used to illustrate this possibility is *Groves v John Wunder Co*, 205 Minn 163, 286 NW 235 (1939). See also *Jacob and Youngs, Inc v Kent*, 230 NY 239, 129 NE 889 (1921).

[129] Timothy J. Muris, *The Costs of Freely Granting Specific Performance*, 1982 Duke L J 1053, 1063.

or "willfulness" of the breaching party's behavior, preferring the higher cost-of-completion award if the breach was deemed "willful."[130] To the extent that courts pay attention to such things, the measurement errors are not at all random, and (in some sense) are not really "errors" at all. Instead, they reflect a judicial desire to punish particularly bad breaches, even if the resulting award does happen to exceed the true expectation interest.

Granted, even these awards can still be *described* as an award of expectation damages, or as protecting the expectation "interest," since the cost of completion is one recognized way of measuring that interest. In this way, these punitive cost-of-completion awards (as they might be called) can always be forced to fit Fuller and Perdue's classification. But what is gained by classifying these awards in the "expectation" category, where they reside with many other cases in which the court was *not* trying to punish a deliberate breach, but was merely trying to estimate the expectation interest as best as it could? If we lump together all awards that could nominally be described as "expectation" damages, we obscure what is most significant about the "willful breach" cases.

3. Other measurement doctrines.

A similar point might be made about the more general rules that govern the measurement of expectation damages, such as the rule requiring the amount of damages to be proved with "reasonable certainty."[131] Obviously, some promisees will not be able to prove all of their losses with the required degree of certainty. If these shortfalls were randomly distributed, there would be no particular significance to that fact either. But here, too, many authors have suggested that courts adjust the degree of certainty they deem "reasonable" based in part on the wrongfulness of the breaching party's behavior. As Corbin put it,

> It seems probable also that a lesser degree of certainty will be required as against one whose breach is described as "willful" or is motivated by malice or avarice than against one whose breach was due to misfortune and whose efforts to perform were honest and in good faith.[132]

[130] See, for example, *Kangas v Trust*, 110 Ill App 3d 876, 441 NE2d 1271, 1275–76 (1982) (awarding damages based on the cost of completing defective work, rather than a minimal amount equal to the lost market value, based in part on the fact that the defendant's breach was "willful"). For further discussions of the relevance of the willfulness of the breach, see, for example, Marschall, 24 Ariz L Rev at 733–61 (cited in note 65).

[131] Restatment (Second) of Contracts § 352 (1979).

[132] Arthur Linton Corbin, 5 *Corbin on Contracts* § 1020 at 126–27 (West 1964).

Corbin was skeptical about the wisdom of this judicial tendency, but he had no doubt that the tendency did exist.[133]

If Corbin is correct, something again is lost by lumping together all cases that purport to be awarding expectation damages, no matter how much they differ in the degree of proof they require. Yet this is the only option that Fuller and Perdue's classification gives us, since these cases fit no better in the "reliance" or "restitution" categories. In its ability to deal with these cases, then, Fuller and Perdue's classification is clearly incomplete.

4. Restitution as a punitive remedy.

Finally, a similar point could be made about some cases that purport to award restitution damages. Since these cases protect an interest other than the the expectation interest, they would normally (under Fuller and Perdue's framework) be classified separately from the cases just discussed. If we look at the way that restitution is actually measured, however, we see that the effect is often very similar to the cases just described—yet very different from many other cases that also purport to award restitution damages.

This similarity with the other punitive cases is often found when (at the time of the breach) the nonbreacher has already performed part of his end of the bargain. If the other party's breach is "material" or "total," the nonbreacher can elect between (1) suing for expectation damages, or (2) suing in restitution to recover the amount by which his performance "unjustly enriched" the breacher. Obviously, most nonbreachers will elect to sue in restitution only if that gives them a larger recovery than they could get in expectation damages. But a larger recovery is entirely possible if the value of the nonbreacher's services are measured in terms that are more favorable than the terms of the original contract. (The nonbreacher is similarly benefited if the *breaching* party is the one who provided goods or services, and if the value of those services is measured in a way that is *less* favorable than the terms of the original contract.) Indeed, this was the only context in which Fuller and Perdue considered punitive policies—and that only briefly, in discussing the special case where restitution would exceed expectation damages because the contract was a losing one for the nonbreacher.[134]

---

[133] Corbin's criticisms can be found in Corbin, 5A *Corbin on Contracts* § 1123 at 7 (cited in note 132). For an earlier (and less critical) discussion of the same tendency, see Ralph S. Bauer, *The Degree of Moral Fault As Affecting Defendant's Liability*, 81 U Pa L Rev 586 (1933), cited in Fuller and Perdue, 46 Yale L J at 375 (cited in note 1).

[134] Fuller and Perdue, 46 Yale L J at 76–77 (cited in note 1) ("[S]hould default by the defendant have the consequence of entitling the plaintiff to shift to him the loss which he would have suffered if the defendant had performed the contract? Is this a proper penalty to impose for con-

Another way of putting this point is to recognize that there are actually many different remedial measures—some more generous to the promisee, some less so—that could plausibly pass under the name of restitution. If, for example, a builder finishes building half of a house before the homeowner unjustifiably repudiates the contract, and the builder then sues for the reasonable value of the half-completed house, that value could be measured in several different ways. To name just four, the builder might collect (a) any increase in the market value of the home-owner's land resulting from having a half-completed house on it; (b) whatever price the home-owner would have to pay another builder, at current construction rates, to build that half-completed house; (c) half of the price the home-owner originally agreed to pay this builder, for the fully completed house; or even (d) whatever this builder spent to build the first half of the house, taking the builder's actual costs as a rough measure of the house's value.[135] Depending on how favorable the original contract was, and also on what has happened to property values and construction costs since the original contract was signed, any one of these measures could (in a particular case) be larger or smaller than the others. They could also be either larger or smaller than any of the ways in which expectation damages might be measured, and so could exceed or fall short of the builder's expectation interest. As a result, it is highly misleading to speak of "restitution" as though it were a single unified remedy.[136]

Of course, if these excesses and shortfalls were randomly distributed, there would be little reason to comment on them. But here, too, there is some evidence that courts are influenced in their choice of measurement by how well or badly the breaching party behaved. For

---

tract breach? Probably in most cases it would not be so regarded.... We only suggest that it would perhaps be unwise to lay down a categorical rule about the matter, and that it is quite possible in a case of *a particularly inexcusable breach* that the court might feel it was not imposing too heavy a penalty on the defendant....") (emphasis added).

Other, more recent analyses of this issue include Eric G. Andersen, *The Restoration Interest and Damages for Breach of Contract*, 53 Md L Rev 1, 15–32 (1994); Robert Childres and Jack Garamella, *The Law of Restitution and the Reliance Interest in Contract*, 64 Nw U L Rev 433 (1969); Amy B. Cohen, *Reviving* Jacob and Youngs, Inc. v. Kent*: Material Breach Doctrine Reconsidered*, 42 Vill L Rev 65 (1997); Andrew Kull, *Restitution As a Remedy for Breach of Contract*, 67 S Cal L Rev 1465 (1994); Henry Mather, *Restitution As a Remedy for Breach of Contract: The Case of the Partially Performing Seller*, 92 Yale L J 14 (1982); Bernard E. Gegan, *In Defense of Restitution: A Comment on Mather,* Restitution As a Remedy for Breach of Contract: The Case of the Partially Performing Seller, 57 S Cal L Rev 723 (1984).

[135] For a discussion of these various measures, see Dan B. Dobbs, *Law of Remedies: Damages—Equity—Restitution* 797–98 (West 2d ed 1993); George E. Palmer, 1 *The Law of Restitution* ch 4 at 370–76, 396 (Little, Brown 1978).

[136] As any number of authors have pointed out. See, for example, John P. Dawson, *Restitution Without Enrichment*, 61 BU L Rev 563 (1981); Andrew Kull, *Rationalizing Restitution*, 83 Cal L Rev 1191, 1204–10 (1995); Douglas Laycock, *The Scope and Significance of Restitution*, 67 Tex L Rev 1277 (1989).

example, if the breach was particularly egregious, the courts may be more inclined to measure the nonbreacher's services in a way that gives him a particularly generous measure of recovery (or to measure the breacher's services in a way that minimizes their value).[137] The egregiousness of the breacher's behavior may also be one factor in deciding whether the breach was "total" or "material," which is the doctrinal prerequisite for the nonbreacher to have the option of figuring his damages in restitution.[138]

To be sure, there are many other cases that award restitution damages without making any effort to penalize the breacher's conduct.[139] But this is precisely my point: there are many cases that award restitution damages for very different reasons. As a result, the bare fact that a case protects the restitution "interest" tells us little about whether the award is being made punitively, in a way that leaves the nonbreacher with more than his expectation interest; or whether it is being used in some other way, to leave the nonbreacher with less. Any classificatory scheme that lumps together all cases of restitution damages, as instances of the same "interest," will therefore obscure more than it clarifies.

B. Remedies that Approximate Expectation

1. Measuring the expectation interest.

All of the doctrines discussed in the preceding subsection can also be used in a non-punitive way, to try to arrive at a more accurate measure of the nonbreacher's expectation interest. As discussed earlier, in many cases the cost of completing unfinished work will provide a *more* accurate measure of the value of performance to the nonbreacher, especially if that party had subjective attachments that would not have been reflected in any difference in market value.[140] Specific performance is another way to approximately protect the nonbreacher's expectation interest, and is especially likely to be granted when the monetary value of that interest is hard to measure.[141]

---

[137] Corbin, 5 *Corbin on Contracts* § 1104 (cited in note 132).

[138] See the Restatement (Second) of Contracts § 241(e) (1979) (listing, as one of the relevant factors, "the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing"). This test is discussed at more length by Cohen, 42 Vill L Rev at 69–82 (cited in note 134).

[139] I discuss these cases in Part III.C.1.

[140] See text accompanying note 127.

[141] Farnsworth, *Contracts* at § 12.6 (cited in note 126). I describe specific performance as only an "approximate" measure of the expectation interest because (1) even specific performance will not compensate the nonbreacher for the inevitable delays he suffers in not receiving the performance until after litigation, and (2) specific performance might in some cases be more generous to the nonbreacher, if he can use the threat of specific performance to bargain for an even more favorable settlement from the breacher.

Liquidated damage clauses provide yet another way of approximating the nonbreacher's expectation interest, and these too are especially likely to be used by parties (and to be upheld by courts) when the actual damages are hard to measure.[142] To the extent that these doctrines are applied in a straightforward way, without being influenced by the egregiousness of the breacher's conduct, they all fit comfortably in Fuller and Perdue's "expectation" category.

2. Reliance damages as a measure of expectation.

Significantly, though, many cases awarding reliance damages also fit comfortably in the "expectation" category. As noted earlier, the principal difference between the expectation and reliance measures is that the expectation measure should include any profit the promisee would have earned from performance, while the reliance measure normally will not.[143] But the profits that would have been earned are often particularly difficult to prove, especially if the promisee's venture was at all speculative. As a number of authors have noted, in such cases it might make sense to assume (absent any better evidence to the contrary) that the venture would have broken exactly even, earning neither a profit nor a loss.[144] On that assumption, the reliance and expectation measures will be the same, so awarding reliance damages will also protect a rough estimate of the expectation interest.[145]

Indeed, this use of reliance damages may well be the most frequent in cases decided today. The typical case involves a plaintiff who was promised employment for an unspecified duration,[146] or who was offered a chance to start a business in a new location.[147] When the promise is later withdrawn, it is usually hard for the promisee to prove just how profitable the business would have been, or to prove how long he would have continued to be employed in the job that was promised him. As a result, if courts refused to award even reliance damages in these cases, the promisees would often be left with no provable damages at all. To award no damages at all, though, is surely to err on the low side of the true expectation measure, since most promisees would not accept such offers unless they at least expected

---

[142] Id at § 12.18.

[143] See text accompanying notes 7–8.

[144] For discussions of this point see, for example, Birmingham, 60 Wash L Rev at 229–33 (cited in note 4); Farnsworth, *Contracts* at § 12.16 (cited in note 126); Kelly, 1992 Wis L Rev at 1811–25 (cited in note 73).

[145] To the extent that restitution damages allow the promisee to recover his costs, they too can serve as an approximation of an expectation interest that would be difficult to prove directly. For a discussion of this use of restitution, see Kull, 83 Cal L Rev at 1206–07 (cited in note 136).

[146] See, for example, *Grouse v Group Health Plan, Inc*, 306 NW2d 114 (Minn 1981).

[147] See, for example, *Pop's Cones, Inc v Resorts International Hotel, Inc*, 307 NJ Super 461, 704 A2d 1321 (1998).

to break even. Awarding reliance damages is thus one way to come closer to the true expectation damages, when those damages cannot be measured exactly.

Of course, since the award in these cases is usually denominated an award of reliance damages, a simple-minded application of Fuller and Perdue's classification would group these cases together with all other cases that award reliance damages, thus separating them from those cases whose award was labeled expectation. Such a grouping, however, will usually be unhelpful for two reasons. It obscures the differences between these cases and other cases that award reliance damages for different purposes, while obscuring the similarities between these cases and others that appear to award expectation damages.

To begin with the first point, there are other cases that use reliance damages to deliberately reduce the promisee's recovery, by awarding reliance damages *even when there is a perfectly adequate measure of expectation damages* (and when the expectation measure would exceed the reliance measure).[148] Indeed, this use of reliance damages was the principal focus of Fuller and Perdue, who assumed that the reliance measure would usually be less than the expectation measure.[149] By contrast, though, in the cases now under discussion, reliance damages are being used to *increase* the promisee's recovery, because otherwise the promisee would not be able to prove his expectation interest and thus would recover nothing at all. Surely there is an important difference between using reliance damages to increase the measure of recovery, and using reliance damages to reduce it. A classificatory scheme that lumps together both of these uses of reliance damages has an obvious disdavantage.

At the same time, the classification of all reliance awards into one category also obscures the similarities between (some) reliance cases and some cases that award expectation damages. That is, if the *reason* for awarding reliance damages (in the cases discussed above) is to come closer to the expectation interest than we would come if we awarded nothing at all, then this use of reliance damages should be regarded as substitutable for other methods of approximating the true expectation interest. For example, rather than awarding reliance damages, we might consider relaxing the standards of proof, or allowing the plaintiff to prove his expected profits through other indirect means. It therefore is not surprising that in cases governed by the Uni-

[148] I discuss these cases at more length in Part III.C.1.

[149] See the text accompanying notes 5–8.

form Commercial Code, where the standards for proving damages are the most lenient, reliance damages are hardly ever awarded.[150]

Similarly, when the reason for awarding reliance damages is to come closer to the true expectation interest, we might also consider other ways of approximating the expectation interest, such as awarding specific performance or enforcing a liquidated damage clause. This, too, is what the law does: a plaintiff whose contract has a liquidated damage clause, or for whom specific performance is a viable option, will not normally be forced to settle for reliance damages, at least in the cases under discussion here (that is, in cases where the only bar to collecting expectation damages is that the expectation damages are hard to measure). If the expectation damages are hard to measure, that fact will normally make a liquidated damage clause fully enforceable (as long as the clause is not so excessive as to be a penalty), and it will also argue in favor of granting specific performance (as long as there is no other barrier to that remedy). By contrast, in the very different set of cases in which the reliance measure is used to *reduce* the promisee's recovery, the promisee normally will not be allowed to seek specific performance as an alternative, or to collect on a liquidated damage clause.[151]

In short, the various cases that award reliance damages do not have enough in common to be usefully classed together. To the contrary, at least some of the cases awarding reliance damages have much more in common with cases that are normally classified as "expectation" cases, insofar as they all seek ways to avoid leaving the promisee too far short of his true expectation interest. As a way of describing what courts are doing in these cases, Fuller and Perdue's classification simply is not helpful.

C. Remedies that Award Less Than Expectation

We must now consider the cases alluded to above, in which the promisee's recovery is reduced to a level *below* his measurable expectation interest. As noted earlier, Fuller and Perdue saw this as the principal use of reliance damages, since they assumed that the reliance measure would often fall below the expectation measure.[152] Since this use of reliance damages was so central to Fuller and Perdue's analysis, one might expect that this is where their classificatory framework would prove most useful.

---

[150] Michael T. Gibson, *Reliance Damages in the Law of Sales Under Article 2 of the Uniform Commercial Code*, 29 Ariz St L J 909 (1997).

[151] As I discuss in Part III.C.1, these are typically cases in which the underlying contract is unenforceable for some reason, which would normally bar the use of specific performance or liquidated damage clauses.

[152] See text accompanying notes 7–8.

In fact, though, Fuller and Perdue's classification may not be all that helpful even when it comes to remedies below the expectation interest. When the courts use reliance damages to reduce a promisee's recovery, they do so for various reasons (and they reduce it to various levels), so it is not obvious that even these cases are usefully classed together. Moreover, there are other doctrines that courts also use to reduce a promisee's recovery, in the form of adjustments to what would usually be called the expectation measure—so it is not obvious that these doctrines should be classed *separately* from those that use reliance damages to reduce a promisee's recovery. In short, here too the Fuller and Perdue framework may lump together some cases that are better kept separate, while keeping separate cases that would better be classified together.

1. Reliance and restitution as a limit on recovery.

As a preliminary matter, it is worth noting that the use of reliance damages to reduce a promisee's recovery is not all that common. Reliance damages are often used in the way described in the preceding subsection, when expectation damages are not directly measurable, in order to save the promisee from what might otherwise be no recovery at all. But cases where the promisee is *limited* to recovering his reliance damages, and thus is not allowed to collect an available measure of expectation damages, are less frequent than Fuller and Perdue may have anticipated.

For example, Fuller and Perdue suggested that when a promise's enforceability itself rested on the promisee's reliance, or on what is sometimes called "promissory estoppel," it would be appropriate to limit the measure of recovery to reliance damages.[153] As a number of authors have noted, though, courts today often award expectation damages even in promissory estoppel cases, at least when the expectation damages are measurable.[154] To be sure, there are some cases which seem to hold that only reliance damages are recoverable in cases resting on promissory estoppel—but most of these cases are ones in

---

[153] Fuller and Perdue, 46 Yale L J at 401–06 (cited in note 1).

[154] See, for example, *Cosgrove v Bartolotta*, 150 F3d 729, 734 (7th Cir 1998). Discussions in the law reviews include Randy E. Barnett, *The Death of Reliance*, 46 J Legal Educ 518 (1996); Mary E. Becker, *Promissory Estoppel Damages*, 16 Hofstra L Rev 131 (1987); Sidney W. DeLong, *The New Requirement of Enforcement Reliance in Commercial Promissory Estoppel: Section 90 as Catch-22*, 1997 Wis L Rev 943, 966–70; Daniel A. Farber and John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake"*, 52 U Chi L Rev 903, 909 & n 24 (1985); Jay M. Feinman, *Promissory Estoppel and Judicial Method*, 97 Harv L Rev 678, 687–88 (1984); Robert A. Hillman, *Questioning the "New Consensus" on Promissory Estoppel: An Empirical and Theoretical Study*, 98 Colum L Rev 580, 601–02, 609–10 (1998); W. David Slawson, *The Role of Reliance in Contract Damages*, 76 Cornell L Rev 197, 202–06 (1990); Edward Yorio and Steve Thel, *The Promissory Basis of Section 90*, 101 Yale L J 111, 129–51 (1991).

which expectation damages could not be measured anyway, so reliance damages would have been the remedy even if the case had not been grounded in promissory estoppel.[155] Some cases have even announced that only reliance damages were recoverable, but then proceeded to award some version of expectation damages, including some measure of the promisee's lost profits.[156] As a result, it is somewhat difficult to find promissory estoppel cases in which the promisee would have been able to prove some measure of expectation damages, but where the court nevertheless limited him to reliance damages.[157]

A similar trend has occurred in cases involving fraud or misrepresentation, where—even though the cause of action sounds in tort—the expectation remedy is routinely available. That is, while fraud plaintiffs were once awarded enough to put them in the position they would have occupied had the fraudulent statement never been made (the analog of reliance damages), they are now routinely placed in the position they would have occupied had the fraudulent statement been true (the analog of expectation damages).[158] For example, if a seller lies about the quality of her house, the buyer will not only recover his purchase price, but will also recover the value the house would have had if it had been as good as the seller claimed. In these cases too, the courts seem genuinely reluctant to limit plaintiffs to a smaller reliance measure of damages.

Nevertheless, there are still some cases (in addition to the occasional promissory estoppel decision) in which plaintiffs are *limited* to reliance damages, when a larger measure of expectation damages would otherwise be available. Many of these involve contracts whose enforceability would otherwise be barred by some legal "technicality"

---

[155] See, for example, *Walser v Toyota Motor Sales*, 43 F3d 396 (8th Cir 1994). The leading case of *Hoffman v Red Owl Stores, Inc*, 26 Wis 2d 683, 133 NW2d 267 (1965), may also fit this description.

Robert Hillman reports that, of fourteen cases awarding damages in promissory estoppel cases between 1994 and 1996, seven awarded expectation damages and seven awarded reliance damages. Hillman, 98 Colum L Rev at 601–02 (cited in note 154). Unfortunately, Hillman follows Fuller and Perdue's framework and thus makes no attempt to distinguish between (a) cases awarding reliance damages when expectation damages could not be measured otherwise, so the alternative to reliance damages was no recovery at all; as opposed to (b) cases awarding reliance damages when expectation damages could be measured, so the alternative to reliance damages was a more generous award of expectation damages.

[156] See, for example, *Dugas v Guillory*, 719 S2d 719, 724–26 (La App 1998); *Sammons Communications of Indiana, Inc v Larco Cable Construction*, 691 NE2d 496, 498–99 (Ind App 1998).

[157] Difficult, but not impossible. For an exception, see *Collins v Old Republic Title Co*, 1997 WL 457709 (D Kan 1997). See also *Marbucco Corp v Suffolk Construction Co*, 165 F3d 103, 104–06 (1st Cir 1999) (expectation damages disallowed in a promissory estoppel action, *unless* the promisee could show that the promisor had acted in bad faith).

[158] See, for example, *Midwest Home Distributor, Inc v Domco Industries, Ltd*, 585 NW2d 735, 738–42 (Iowa 1998). As noted earlier in Part III.A.1 (and as the *Domco* case illustrates), fraud may also expose the defendant to liability for punitive damages.

such as the statute of frauds or the parol evidence rule.[159] In these cases, awarding expectation damages might seem like too obvious an abandonment of the technical rule in question, so many courts have limited plaintiffs to recovering their reliance damages.[160] There are also a handful of cases that bar the plaintiff from collecting expectation damages when the contract is rendered unenforceable by some unforeseen circumstance—but which nevertheless allow the plaintiff to collect his reliance damages, in an effort to divide some of the costs of the unforeseen circumstance between the plaintiff and the defendant.[161] And in either of these last two categories, where the original contract is not fully enforceable, courts routinely award restitution damages if the plaintiff has conferred any benefit on the defendant, thus (in effect) limiting plaintiffs to restitution damages.[162]

The question, then, is whether even these cases are usefully accommodated by Fuller and Perdue's classification. While this is a somewhat closer call, I believe that they are not. Even here, Fuller and Perdue's three categories obscure important differences within any given category, and important similarities that cut across their categorical lines.

2. Diversity within the reliance cases.

To begin with, not all of the cases awarding "reliance damages" are necessarily pursuing the same goal, or are even awarding the same measure of damages. Fuller and Perdue defined reliance damages as the amount needed to put the promisee in the position he would have occupied if the promise had never been made.[163] This would normally include the value of any opportunities the promisor could have taken had he not instead relied on the promise now at issue.[164] For example, if

---

[159] Farnsworth, *Contracts* at § 6.12 (cited in note 126) (discussing statute of frauds); id at § 7.3 (discussing parol evidence rule).

[160] Barnett and Becker suggest that these cases reflect not so much a judicial preference for the smaller remedy (à la Fuller and Perdue), as a judicial desire to (1) get around the harshness of the "technical" rule that bars full enforcement, without (2) seeming too obviously to vitiate the technical rule by allowing the full panoply of contract remedies. Randy E. Barnett and Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations*, 15 Hofstra L Rev 443, 470–80 (1987).

[161] See, for example, *Albre Marble and Tile Co v John Bowen Co*, 338 Mass 394, 155 NE2d 437 (1959). See also the articles cited in note 67.

[162] Farnsworth, *Contracts* at § 12.20 (cited in note 126). Of course, if courts apply a lenient notion of "benefit," and measure that benefit by the amount of the plaintiff's expenditures, this use of restitution damages will equal the reliance measure. See, for example, *Earhart v William Low Co*, 25 Cal 3d 503, 600 P2d 1344, 158 Cal Rptr 887 (1959). For discussions of this use of "restitution" damages, see Dawson, 61 BU L Rev (cited in note 136), or Fuller and Perdue, 46 Yale L J at 380–81, 389–90 (cited in note 1).

[163] Fuller and Perdue, 46 Yale L J 52, 54 (cited in note 1).

[164] Actually, as several authors have noted, Fuller and Perdue equivocated on this point during the course of their article. See Fuller and Perdue, 46 Yale L J at 417–18 (cited in note 1). For

the promisee turns down one high-paying job because he has been promised a higher-paying job somewhere else, and if the latter promise is then broken, the promisee's reliance interest should include the value of the job that he would have accepted had it not been for the promise that was later broken.

However, as Michael Kelly has shown, courts often exclude those opportunities from their measure of reliance damages, meaning that they award *less* than Fuller and Perdue's definition of the reliance interest.[165] To be sure, some of these cases are ones in which the lost opportunities would have been difficult to value, so these decisions might be charged to random measurement error. But Kelly argues that at least some of these decisions (and some of the commentators' arguments in support of these decisions) reflect a substantive hostility to awarding plaintiffs the profit they might have made elsewhere.[166] If he is right, then reliance damages are sometimes used to pursue Fuller and Perdue's corrective justice goal (that is, placing the promisee where he would have been if no promise had been made), but sometimes to pursue the rather different goal of compensating out-of-pocket losses but not lost profits. As Kelly concludes, it is thus unhelpful to speak of *the* reliance interest as though it had a single meaning.[167]

A similar point can be made about the cases that award reliance damages in an effort to apportion losses, if the contract has become unenforceable through some contingency that was not the fault of either party. An award of reliance damages (when that measure is less than expectation damages) is one way to split the losses, by giving the plaintiff less than he would have received had the contract been performed, but more than he would get if he were denied recovery entirely. But there are other ratios into which the losses could be divided—for example, both parties' lost profits could be added together and divided by two, so that each party bore exactly half of the combined losses from the misfortune. Alternatively, the combined losses could be divided in proportion to the parties' relative fault, or according to any other percentage that would only by coincidence match an award of reliance damages (as defined by Fuller and Perdue). Indeed, several commentators have urged that courts enjoy just this sort

---

discussions, see Kelly, 1992 Wis L Rev at 1764–67 (cited in note 73); Rakoff, 1991 Wis L Rev at 213 (cited in note 4). But Fuller and Perdue's original definition of the reliance interest, as well as their argument that the expectation measure might serve as a proxy for unmeasurable reliance losses that included lost opportunities, both presuppose that the reliance interest does include the value of any opportunities foregone. Fuller and Perdue, 46 Yale L J at 55, 60–63 (cited in note 1).

[165] Kelly, 1992 Wis L Rev at 1769–71, 1774–76 (cited in note 73).

[166] Id at 1808–11. See also the arguments, considered in Part II.D, that courts should refuse to award lost profits in order to further distributive goals.

[167] Kelly, 1992 Wis L Rev at 1767–76 (cited in note 73).

of flexibility in deciding how to apportion the losses following an unforeseen contingency.[168] As Robert Hudec concluded, in these loss-sharing cases "there is not necessarily a single measure of reliance liability."[169]

In short, even when courts do use the reliance remedy to reduce the promisee's recovery, it is not clear that they are always reducing it to the same level. Fuller and Perdue's classification, which speaks of only a single reliance "interest," tends to obscure these differences among the various reliance cases. While the total number of such cases may not be large enough to count this as a severe drawback, it does add to the disadvantages of that classificatory scheme.

3. Expectation doctrines as limits on recovery.

More important, any categorization that treats the reliance "interest" as fundamentally different from the expectation "interest" also obscures important similarities between some of the cases awarding reliance damages and some cases awarding expectation damages. There are, of course, many doctrines that courts can invoke to reduce a promisee's recovery even while awarding expectation damages. For example, elements of expectation damages can be disallowed if they were not reasonably foreseeable by the promisor,[170] or if they could have been avoided by reasonable mitigation,[171] or if their amount cannot be proven with reasonable certainty.[172] There are also categorical rules that exclude certain elements—for example, the exclusion of attorneys' fees and other costs of litigation,[173] or the exclusion of compensation for emotional distress (except when physical injury results, or when the contract could be expected to have particular emotional significance).[174]

To be sure, these doctrines can sometimes be used to approximate reliance damages (as Fuller and Perdue were aware). As noted earlier, the chief difference between expectation and reliance damages

---

[168] See the authors cited in note 67. The Second Restatement encourages this approach, stating that when nonperformance is excused by an unforeseen contingency, the court may grant relief "on such terms as justice requires, including (but apparently not limited to) protection of the parties' reliance interests." Restatement (Second) of Contracts § 272(2) (1979). See also id at § 158(2) (using similar language to describe the remedies when a contract is voidable on grounds of mutual mistake).

[169] Hudec, 67 Cornell L Rev at 717 (cited in note 67). Compare the similar position of Michael Kelly, described in the text accompanying note 167, or the analogous observations about restitution in the text accompanying notes 135–136.

[170] For a summary of the case law, see Farnsworth, *Contracts* at § 12.14 (cited in note 126).

[171] Id at §§ 12.12–12.13.

[172] Id at § 12.15.

[173] Id at 871 n 3.

[174] Id at 934–35.

is that expectation damages include the profit the promisee would have made from the contract, while reliance damages do not. Thus, if one of these doctrines is used to disallow the expected profits—for example, if a court rules that those profits were not proved with reasonable certainty, or were not reasonably foreseeable to the promisor—the result is the same as one measure of reliance damages. Indeed, one of Fuller and Perdue's contributions was to point out the many cases in which courts did exactly that, thus protecting the reliance interest without even realizing they were doing so.[175]

However, there are just as many (and probably more) cases where these doctrines are used to reduce the promisee's recovery to some level that does not correspond to reliance damages, or to any of Fuller and Perdue's other "interests." For example, sometimes part but not all of the profits will be proved with reasonable certainty, thus leaving the promisee with less than expectation damages but more than reliance damages. In other cases, the promisee may end up with even less than reliance damages, if the unprovable or unforeseeable elements include some or all of his reliance expenditures. Many of the categorical exclusions can also leave the promisee with less than reliance damages, by excluding such items as attorneys' fees or compensation for emotional distress. Typically, these losses would not have been incurred if no contract had been made, so the failure to compensate these losses leaves the resulting remedy below even the reliance measure.

Of course, if we were wedded to Fuller and Perdue's framework, in which the reliance and restitution measures are the only conceivable alternatives to expectation, we might see these doctrines as a kind of judicial groping toward reliance or restitution. After all, most precedents still speak of expectation damages as the "normal" measure of recovery, so it would be understandable if courts, rather than flatly overturning those precedents, instead sought (perhaps only subconsciously) to chip away at the expectation measure wherever they could. This could lead to a series of doctrines whose general tendency was to reduce promisees' recovery below the expectation measure, without necessarily hitting the reliance or restitution measures exactly. Since this is the pattern we in fact observe, that could suggest courts are actually striving toward the reliance and restitution measures, even if they are doing so imperfectly.

Notice, though, that the plausibility of this account depends entirely on the assumption that reliance and restitution are the only plausible alternatives to expectation damages. After all, one could tell a similar story by starting with the premise that courts were really

---

[175] Fuller and Perdue, 46 Yale L J at 373–77 (cited in note 1).

drawn to an ideal of (say) 63 percent of the expectation measure, and that the various doctrines discussed above all represent a rough judicial groping toward *that* goal. If this story seems less plausible, it is probably because it is hard to think of any reason why courts would want to aim for such an arbitrary target as 63 percent of the expectation measure. But the claim that courts are really aiming for 100 percent of the reliance measure is no less arbitrary, unless we have some better reason to think they should be aiming for that goal instead.

Instead, if we abandon our focus on Fuller and Perdue's classification, and concede that there is a broad range of sub-expectation targets that courts might aim for, we can then understand these doctrines in rather different terms. Some of these doctrines might be used to divide the losses roughly between plaintiffs and defendants—just as was suggested earlier of some of the cases awarding reliance damages.[176] In other cases, the reduction in the plaintiff's recovery might serve more instrumental goals. For example, the foreseeability limit could be analyzed in terms of the incentive it creates for a better-informed party to share his information with a lesser-informed party,[177] or for the incentives it gives promisees to take precautions to reduce the possible consequences of breach.[178] It could also be analyzed for its distributional effect, if full liability would cause a price increase that would have to be paid even by promisees who had little at stake in the transaction, and who thus might prefer not to pay higher prices to cover the large damages recoverable by other customers.[179] The exclusion of damages for emotional distress from expectation damages, and the exclusion of certain kinds of lost opportunities from reliance damages, might be justified on similar grounds, if promisees differed widely in their susceptibility to such damages. The emotional distress exclusion might also be justified on insurance grounds, by asking whether most parties would gain by paying a higher price up front in exchange for the right to collect extra *money* for such non-monetizeable injuries.[180]

In short, once we stop focusing on Fuller and Perdue's three "interests," we can see a wide range of sub-expectation levels to which a promisee's recovery might be reduced, and a wide range of legal doc-

---

[176] See note 168 and accompanying text.

[177] For analyses of this effect see, for example, Richard A. Posner, *Economic Analysis of Law* 141 (Aspen 5th ed 1998); Bebchuk and Shavell, 7 J L, Econ, & Org at 289–91 (cited in note 36).

[178] Cooter, 73 Cal L Rev at 15–16 (cited in note 32); *Evra Corp v Swiss Bank Corp*, 673 F2d 951, 957–60 (7th Cir 1982) (Posner).

[179] As Judge Cardozo put it, in declining to hold a telegraph company liable for the full consequential damages caused by a lost telegram, "[t]o pay for this unknown risk, [the company] will be driven to increase the rates payable by all, though the increase is likely to result in the protection of a few." *Kerr S.S. Co v Radio Corp of America, Inc*, 245 NY 284, 157 NE 140, 142 (1927). For further analyses of this effect, see the articles cited in note 76.

[180] See the articles cited in note 41.

trines that might effect such a reduction. Given this range of possibilities, the question of whether any particular reduction should be classified as protecting the reliance "interest" or the expectation "interest" seems to me one of the *least* interesting questions to ask about the award. In this way, too, Fuller and Perdue's categories obscure much more than they clarify.

Indeed, Fuller and Perdue themselves did not treat their categories in such a rigid way. For example, when they discussed the exclusion of unforeseeable damages, they saw the chief significance of that rule in its recognition that "it is not always wise to make the defaulting promisor pay for *all* the damage which follows as a consequence of his breach."[181] The article then discussed several possible doctrinal standards for determining just how much such a promisor ought to pay, including the traditional test that looked to the "foreseeability" of each element of damages, as well as Fuller and Perdue's own reliance measure of damages.[182] But Fuller and Perdue's main interest was in the idea that damages could be adjusted *somewhat* downwards, not necessarily that they be adjusted precisely to the level of reliance damages. As they saw it, reliance damages and the foreseeability test both illustrated a more important underlying phenomenon, which was the judicial tendency to "compromise between no enforcement and complete but too onerous enforcement."[183]

Unfortunately, the modern use of Fuller and Perdue's categories has obscured many of these nuances. Especially in the teaching of contract law—a subject often taught by professors whose research interests lie elsewhere—the three categories are usually presented as the most fundamental organizing principle of contract remedies.[184] My argument here is that this is a mistake, for Fuller and Perdue's classification is not nearly as helpful as most people think. As a normative matter, it is not very helpful in understanding the relevant policies; and as a descriptive matter, it actually obscures much of what courts do.

IV. BEYOND FULLER AND PERDUE?

The question, then, is what should replace that classification. I am not seeking a replacement in the form of a complete set of legal rules, defining when each remedy should be granted. Such a task would be well beyond the scope of a single article, and Fuller and Perdue did not even attempt such a treatment. As later commentators have

---

[181] Fuller and Perdue, 46 Yale L J at 84 (cited in note 1) (emphasis added).

[182] Id at 84–87.

[183] Id at 87. See also Fuller's subsequent letter to Karl Lewellyn, quoted in text accompanying note 21.

[184] See the contracts casebooks cited in notes 23–25.

noted, Fuller and Perdue were rather casual about stating the exact rules that they thought should govern each of their three remedies.[185]

In particular, I am not proposing that we abandon all predefined damage measures and ask courts instead to choose whatever damages seem most appropriate in each case, based on the policy considerations discussed in Part II. While such an approach might bring advantages in terms of flexibility and sound case-by-case policy, it would have obvious drawbacks in terms of unpredictability and unfettered judicial discretion. Indeed, an assessment of this balance between predictability and flexibility, or between rules and standards, would be critical in any attempt to propose new rules to govern the remedies for breach.[186] But Fuller and Perdue were not primarily concerned with developing new rules, and thus devoted very little attention to this balance. For a similar reason, I shall do the same.

Instead, Fuller and Perdue's lasting impact has come from their framework for organizing our thinking and our teaching about remedies for breach. This is the aspect of Fuller and Perdue that I have criticized, so it is this aspect—the framework for organizing our thinking and teaching—that requires replacement. That is, if we take the existing legal rules (and the remedies they define) as given, is it useful to organize or to classify those rules according to whether they serve the expectation, reliance, or restitution "interests"? Or would some other classification be a more useful way of organizing our thinking and teaching?

Of course, it might be questioned whether we need any organizing framework at all. The alternative is to simply *list* all the remedies that courts currently award, without attempting to organize them into any larger framework. Such a list would include the restitution, reliance, and expectation measures, but it would also include many others—specific performance, liquidated damages, punitive damages, and so on—without privileging Fuller and Perdue's three remedies as being in any way more fundamental. This laundry-list approach thus attempts to avoid any organizing framework at all, beyond a bare list of the legally permissible remedies.

Indeed, this approach could be carried to an even more particularized level, by listing every possible adjustment to damages as a separate remedy on the list. For example, we could have separate entries for foreseeable expectation damages, and for expectation damages as measured by the cost of completion, and expectation damages

---

[185] See, for example, Macaulay, 1991 Wis L Rev at 274–76 (cited in note 4); Rakoff, 1991 Wis L Rev at 239–42 (cited in note 4).

[186] For analyses of this issue with respect to legal rules in general, see Kennedy, 89 Harv L Rev at 1687–1701 (cited in note 102); and Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 Duke L J 557 (1992).

as measured by the diminution in market value. There is, after all, nothing that compels us to treat damages measured by the cost of completion and damages measured by the diminution in market value as being instances of the same underlying remedy (called "expectation damages"). Instead, any decision to group those two measures together is a decision about how to *classify* or *organize* the various measures the law awards—and if we are to avoid classifications entirely, we might wish to avoid these classifications as well.

As this example illustrates, though, it is probably unwise to eschew organizing frameworks entirely (if a complete absence of organization were even possible). True, each possible remedy differs in some respects from every other, but most remedies also share various similarities. A useful organizing framework should group together the different remedies in a way that highlights the most important differences and similarities, even while recognizing that there will always be some similarities between various remedies that are not grouped together (and always some differences among those that are). Part of the attraction of Fuller and Perdue's framework is precisely that it did provide, for two generations of legal scholars, a thematic way of grouping together various remedies that would otherwise have to be seen as an unorganized laundry list. Framed in this way, the question is whether there is any alternative grouping that can do this better than Fuller and Perdue's.

As should by now be obvious, I believe that there is. Indeed, I used just such a grouping to organize the preceding section of this Article. As I suggested there, some remedies seem usefully understood as attempting to approximate the plaintiff's expectation interest as nearly as the available evidence allows—including some remedies that may be designated "reliance" damages, but which actually serve to estimate the expectation interest.[187] Other remedies seem to aim for compensation *above* the expectation interest: not just in the case of punitive damages, but also in the case of some ways of measuring expectation or restitution damages.[188] Still other remedies attempt to limit the plaintiff to something *below* his expectation interest—including some cases awarding reliance or restitution damages, and most of the cases employing the doctrines that limit expectation damages.[189]

Admittedly, the choice of expectation damages as the dividing line that separates the other two categories is to some extent arbitrary.[190] Still, any classification requires a dividing line of some sort, and

---

[187] See Part III.B.

[188] See Part III.A.

[189] See Part III.C.

[190] Another possibility is to define the dividing line in terms of the ideal expectation award that would be due to a promisee *who had properly mitigated*. As many formulas for measuring

since contract law still treats expectation damages as the standard remedy, there is pedagogical value in using that remedy as the starting point. In addition, the expectation remedy has a number of effects (perhaps more than any other single remedy) that are relevant from a normative standpoint, which makes that remedy a convenient baseline for policy analysis as well. For example, in many situations the expectation remedy—if calculated correctly—creates the right incentives for the promisor to take precautions against accidents that would prevent performance.[191] It may also create the right incentive for promisees who are choosing between performance or breach;[192] and in some situations, it may provide promisees with their preferred level of insurance.[193] Significantly, though, expectation damages have these effects only if they are measured so as to leave the nonbreacher truly indifferent between receiving damages and receiving the promised performance. For this reason, I take this "true" measure of expectation damages, and not expectation damages as they might be measured by a court, as the dividing line between my two outer categories. As noted earlier, expectation damages as they are actually measured by courts often fall short of this "true" measure, and occasionally exceed it.[194] If courts' actual awards fall short of that ideal, they will also fall short of the normative effects described above, so it will be useful to classify these shortfalls in the "below expectation" category, along with all the other remedies that fall short of that ideal (including reliance and restitution awards, at least in some cases). In this way, we preserve Fuller and Perdue's insight that the application of mere measurement rules can have just as great an effect on remedies—and, hence, can be driven just as much by substantive policies—as can other doctrines whose substantive goals are more apparent on their face.

In short, the classification that I propose has three parts: (1) remedies above expectation, (2) remedies that approximate expectation, and (3) remedies below expectation. The middle category, remedies that approximate the expectation interest, is essentially the same as Fuller and Perdue's (and the traditional category that preceded them), so I cannot claim any improvement in that regard. But the first category—encompassing remedies *above* the expectation interest—is clearly an advance over Fuller and Perdue, since they saw the expecta-

---

expectation damages already have the mitigation limit built into it (for example, the cover-price-minus-contract-price formula for breach of a contract for the sale of goods), I have found this dividing line useful in teaching contracts remedies.

[191] See note 33.

[192] See note 31.

[193] See text accompanying note 42.

[194] See Parts III.A and III.C.

tion interest as the largest possible remedy (except in the unusual case of a losing contract, where expectation might be exceeded by reliance and restitution). As a result, Fuller and Perdue's three categories do not help us talk about the many other remedies that exceed, and often intentionally exceed, the expectation interest. At the same time, my third category (remedies that aim *below* the expectation interest) should also be viewed as an advance over Fuller and Perdue. While Fuller and Perdue provided two categories for remedies that fall below the expectation interest—restitution and reliance—my third category is even broader, to reflect the many other sub-expectation remedies besides those two.

Of course, such a classification might seem both obvious ("above, below, and equal to expectation—what's so novel about that?") and useless ("why do we need such a classification anyway?"). In response to the obviousness charge, note that this classification does group the remedies in ways that do not always follow existing doctrinal lines. For example, this classification puts some of the cases awarding reliance damages in the "below expectation" category, and others in the category of remedies that approximate the expectation interest. It also puts some restitution cases in the "above expectation" category, and others in the category for remedies "below expectation." Even the cases that purport to award expectation damages will sometimes fall in the "above" category and sometimes in the "below" category, depending on how the damages are measured and on what limiting doctrines are applied. Obvious as such a division may seem, then, this is not how existing remedies are conceived doctrinally.

In some respects, though, my classification of remedies may *better* reflect doctrinal realities than do the existing categories. For example, if all awards of reliance damages really rested on the same doctrinal foundation, my separation of those cases into different categories might seem obtuse. It is not at all clear, however, that all awards of reliance damages really do rest on the same legal doctrine. After all, when the plaintiff is using reliance damages as an estimate of his expectation interest (because expectation damages are too hard to measure in any other way), the plaintiff need not satisfy any further legal test in order to receive the reliance measure. By contrast, when a defendant seeks to *limit* the plaintiff to the reliance measure of damages (when a measure of expectation damages would otherwise award some larger amount), the defendant usually must satisfy some further legal test in order to limit the plaintiff's recovery. For example, the defendant may have to show that the underlying contract is unenforceable because it violates the statute of frauds, or because of some un-

foreseen contingency[195]—otherwise, there will be no legal barrier to the plaintiff's demand that he be compensated with the larger measure of expectation damages. Since these different uses of reliance damages are thus triggered by different legal tests, they could just as easily be viewed as distinct legal remedies (which merely happen to share a confusingly similar name). Viewed in this way, my separation of the different reliance cases might actually be more faithful to the relevant doctrinal standards, as well as to the remedies' actual results.

In any event, a more serious objection to my classification is that it may be too broad and unfocused, especially in the outer two categories. After all, the category of "remedies below the expectation interest" lumps together several different sub-expectation remedies, which might more usefully be separated; and the same is true at the other end for "remedies above the expectation interest." Even if these two categories are still superior to Fuller and Perdue's—since theirs offered almost no place for remedies above the expectation interest, and only two kinds of remedy below it—it might be better to have an even more fine-grained classification, that did not group so many remedies together.

If a finer grain is desired, though, there are many ways to subdivide my outer categories to provide more structure. Those who prefer doctrinal subdivisions could return to the laundry-list approach, and simply list all of the legal doctrines that could produce the effect described by each category. Using this approach, the "below expectation" category could list each of the doctrines that limit expectation damages (the foreseeability requirement, the mitigation requirement, the requirement of proof with certainty, and the various categorical exclusions of attorneys' fees and other losses), along with *some* uses of the reliance and restitution measure, in cases when those fell below the measurable expectation damages. Similarly, the "above expectation" category could list punitive damages; *some* uses of restitution and reliance (when those exceeded the best measure of the expectation interest); some liquidated damage clauses; and some cases employing particular measures of expectation damages (such as the cost-of-completion measure, in cases when that measure exceeded the plaintiff's subjective valuation of complete performance).

Alternatively, rather than following these doctrinal lines, for some purposes it might be better to subdivide each category according to the *reason* for aiming above or below the expectation measure. For example, the economic analysis discussed earlier has identified four or five reasons that might (in appropriate circumstances) justify an award below the expectation ideal. A lower award might strengthen

---

[195] See Part III.C.1.

the promisee's incentives to take his own precautions to reduce the consequences of breach, especially if the promisee was the better cost-avoider.[196] A lower award might also better match the promisee's taste for insurance, if he was not very risk-averse;[197] or it might prevent what would otherwise be the cross-subsidization of some promisees by others.[198] In some cases, lower awards might prevent what would otherwise be a problem of overdeterrence.[199] And in markets where reputations were believed to work well, lower awards (up to and including complete nonenforcement) might reduce the costs of operating the legal system, without giving up anything desirable in terms of incentives.[200] To this list, those who wish could add non-economic justifications as well—for instance, lower awards might express a social judgment that the promisor was not really at fault, or that the fault was divided between promisor and promisee.[201] Conceivably, lower awards might in some cases produce a desired distributional effect.[202]

On the other end, there is a similarly small list of reasons that might justify remedies that exceed the expectation measure. Most of the economic justifications focus either on the need to make up for imperfect enforcement,[203] or on the desire to alter the parties' bargaining positions (should an occasion for breach arrive) in a way that improves their ex ante incentives,[204] or—a related concern—on the desirability of protecting certain rights with property rules rather than liability rules.[205] The list of non-economic reasons for large awards is similarly small, being limited to the desire to punish the breacher, to make an expressive statement of condemnation,[206] or—again, *perhaps*—the desire to produce a particular distributional effect.[207]

Of course, there are many other ways to subdivide these categories, and others may have different ways of doing it. In some sense, what ultimately matters is the amounts that courts actually award, and how we classify those amounts is a matter of our own convenience. My main claim, however, is that Fuller and Perdue's classification is *not* a convenient way of classifying them, for almost any purpose that might be relevant. It does not fit well with any plausible normative theory

---

[196] See notes 33–34 and accompanying text.

[197] See note 38 and accompanying text.

[198] See note 76 and accompanying text.

[199] See note 45 and accompanying text.

[200] See note 46 and accompanying text.

[201] See note 67 and accompanying text.

[202] See Part II.D.

[203] See note 44 and accompanying text.

[204] See Edlin and Reichelstein, 86 Am Econ Rev at 478–501 (cited in note 33).

[205] See note 85 and accompanying text.

[206] See the discussion in Part II.C.

[207] The "perhaps" is for the reasons discussed in Part II.D.

about the appropriate remedies for breach; it also does not usefully describe the amounts that courts award. Admirable as the article was for its time—and I count myself as one of its greatest admirers—it should be left in its historical context, rather than being used as the foundation of modern analysis.