

## CONTRACTUALISM ABOUT CONTRACT LAW

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Over the last several years, I have begun exploring the possibility of a direct *contractualist* account of modern contract law. The term “contractualism” refers to a specific strain of social contract theory, which aims to account for standards of the right and/or related standards of justice or political legitimacy, in terms of a suitable object of agreement among moral equals.<sup>1</sup> Representative examples of such theories include John Rawls’s account of justice in terms of principles that persons would rationally agree to from a suitably-defined position of moral equality (as represented by his well-known “veil of ignorance”)<sup>2</sup> and T.M. Scanlon’s account of moral rightness in terms of rules that no one could reasonably reject

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<sup>1</sup> Cite to Darwall.

<sup>2</sup> See JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999) [hereinafter RAWLS, A THEORY OF JUSTICE]; JOHN RAWLS, POLITICAL LIBERALISM (1993) [hereinafter RAWLS, POLITICAL LIBERALISM].

as a basis for informed, unforced general agreement.<sup>3</sup> By a contractualist *account*, I mean the articulation of an appropriately-fashioned contractualist standard that will explain, and in this case justify, broad swatches of our modern law of contracts. Because the account I have in mind is in part explanatory, it should, if it is successful, help us understand modern contract law—and, hence, an important aspect of how modern markets operate—as part and parcel of a larger system of norms that conduce fairly to mutual advantage. The account would thus help locate modern markets within a larger liberal political framework, and may even reconcile liberalism with several of modern contract law’s otherwise puzzling features. Because the account is in part justificatory, it should also—if valid—provide us with a valuable criterion for evaluating these rules and suggesting needed reforms where appropriate.

In developing this account, I aim to address two basic gaps in the theoretical literature on contract law. The first concerns the range of views that are currently represented. Within moral and political philosophy proper, the most fundamental divide is between consequentialist and deontological accounts of moral and political right. Consequentialists—on this familiar division—begin by identifying certain purportedly valuable states of affairs (the “good”), and then define moral and political right purely in terms of the production of these consequences; whereas deontologists insist that moral and political right must be defined in some ways independently of such consequences (or “prior to the good”). Contractualists are deontologists in this latter sense because, although they allow for robust consideration of various consequences of rules when attempting to identify the moral and political right, they do so from a particular standpoint (namely, that of acceptability to moral equals), which prevents their particular form of justification from reducing to a wholly consequentialist one.<sup>4</sup> Contractualism is, in fact, commonly thought of as the most promising and robust theoretical alternative to consequentialist accounts of moral and political right.

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3. See T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* (1998) [hereinafter SCANLON, *WHAT WE OWE TO EACH OTHER*].

<sup>4</sup> FN: Note that contractualism is deontological as a theory of the fundamental source of value; but that it can still recommend certain moral or legal obligations that are consequentialist in form.

Despite its prominence in other areas of normative inquiry, contractualism has played almost no role in theoretical discussions of the rules of modern contract law.<sup>5</sup> Here, familiar debates between deontologists and consequentialists have tended to take a rather different form. Deontologists have typically tried to account for the rules of modern contract law by reference to the morality of ordinary promise-keeping, often adding that these moral rules reflect a proper respect for liberty or autonomy.<sup>6</sup> (These views qualify as deontological because the morality of promise-keeping contains duties that trump certain forms of consequentialist reasoning, and because these authors typically view liberty and autonomy as placing trumps on this kind of reasoning as well.) Consequentialist theorists have, by contrast, tended to adopt the language of law and economics, and to defend accounts of the rules of modern contract law in terms of efficiency maximization.<sup>7</sup> In this particular area of the law, the standard debates between deontologists and consequentialists have thus been framed in ways that exclude an important class of theories. The first aim of this Article will be to fill this gap by placing contractualism about contract law squarely into the relevant debates.

The second problem that I aim to address concerns the use and value of theorizing about this area of the law. As described more fully below, there are now a number of contractual doctrines that have become increasingly stable and widespread in modern developed nations. It has also become increasingly clear that modern

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5. The one notable exception is T.M. Scanlon's work in *Promises and Contracts*, in *THE THEORY OF CONTRACT LAW* 86, 86–93 (Peter Benson ed., 2001) [hereinafter Scanlon, *Promises and Contracts*]. The contractualist dimensions of this piece have, however, not been taken up much in contemporary discussion of contract law. This may be due in part to the fact that while the contractualist dimensions of Scanlon's piece are expectably strong and clear, the piece does not wrestle with some of the nuances of modern contract law doctrine in as particularized a fashion as is common in the legal literature. See, e.g., Kevin A. Kordana & David H. Tabachnick, *Rawls and Contract Law*, 73 *GEO. WASH. L. REV.* 598 (2005).

6. For the classic description of this view, see CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981).

7. See, e.g., RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* (1981); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 79–125 (3d ed. 1986); Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 *RUTGERS L. REV.* 273 (1970).

markets of some kind are needed for a flourishing modern political economy. But—for reasons to be discussed—none of the predominant theories of contract can provide a satisfying account of central and apparently ineliminable features of modern contract law. Alan Schwartz and Robert E. Scott have put the point quite bluntly: “Contract law has neither a complete descriptive theory, explaining what the law is, nor a complete normative theory, explaining what the law should be.”<sup>8</sup> Many contract law scholars have thus felt forced to conclude that this area of the law reflects a plurality of distinct and partially inconsistent values—including some mixture of efficiency, liberty, fairness, reliance, and commitment to the ordinary morality of promise-keeping. Absent a theoretical standpoint from which to harmonize these distinctive commitments, theory has, however, proven an ineffective tool to determine how to weigh these values so as to fashion a body of contract law that best expresses its constitutive normative commitments.

A second aim of this Article will be to fill this gap, and establish a greater role for theory, by developing a contractualist account of contract law that harmonizes the most fundamental and seemingly ineliminable tensions in the present case law. If successful, contractualism about contract law should be viewed not just as one contender among many in the theoretical debates, but rather as a *major* contender with the unique capacity to harmonize these important tensions.

These, then, are my two most basic theoretical aims in developing a contractualist account of contract law. My deeper concerns are, however, more than theoretical. One of the unfortunate consequences of the particular way that standard debates between deontologists and consequentialists have found expression in this particular area of the law is that *both sides* have tended to picture fairness considerations as alien intrusions into the basic subject matter of modern contract law. Unlike promise-based theorists (who are limited, in some ways, by their unwavering focus on ordinary morality), consequentialists have also been able to acknowledge important economic insights and identify distinctive ways that the private law has made modern market activity possible. Efficiency

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<sup>8</sup> Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 133 YALE L.J. 541, 543 (2003); [ADD MORE RECENT CITES: Benson, Oman, Kraus, Kar]

theorists have thus succeeded in developing a much richer and more robust account of many contract law doctrines than deontologists have.

Together, these facts have, in turn, helped sustain a very common—but, to my mind, ultimately distorted—conception of modern market activity, and of the areas of private law that have allowed modern markets to flourish. On this familiar view, modern markets operate in accordance with their own principles, which aim solely at the production of either an efficient allocation of resources or greater gross national product. It is a short step to the familiar conclusion that any regulation of markets for fairness represents an interference with the basic ways that modern markets function. Considerations of justice and fairness may appropriately govern important areas of public law, on this view, but they have no legitimate place in the special areas of private law that support modern market activity.

A contractualist approaching these same issues can, however, not only absorb key economic insights but can do so *without leaving them subject to thoroughgoing economic interpretation*. Contractualism about contract law can thus inherit many of the explanatory advantages of efficiency-based theories while simultaneously accounting for important features of doctrine that evade economic analysis. Contractualism about contract law can, in fact, thereby provide an even more robust account of central areas of doctrine than efficiency-based accounts can. If the deep principles that have allowed modern markets to flourish are ultimately contractualist rather than efficiency-based in nature, however, then a number of important conclusions should follow.

First, as explained more fully below, contractualism can be used to illuminate the precise ways in which fairness considerations should enter into the modern law of contracts. Doctrines that do this in the right way can thus be exposed as reflecting important aspects of (rather than deviations from) the deep principles support modern market activity. Second, we might begin to resist the common picture that markets operate in accordance with their own principles, which fundamentally distinguish markets from other important forms of modern social interaction. Although modern market activity is, of course, distinctive in a number of important respects, we can instead understand the legal rules that make this activity possible as part and parcel of a larger system of norms that conduce fairly to mutual

advantage.

And finally, third, we might begin to reconcile modern contract law with a form of justification that is acceptable to ordinary moral agents. As Seana Shiffrin has recently argued, this will be very hard to do so long as a number of well-known divergences between contract and promise are justified solely on efficiency-based grounds. This is because consequentialist forms of justification do damage to the fundamentally deontological way that ordinary moral agents typically understand their moral and legal duties.<sup>9</sup> A contractualist account of contract law may, on the other hand, allow for the right kind of reconciliation—contingent only upon our law maintaining consistency with a fundamentally contractualist account of the right.

The arguments of this Article will be split into three main sections. Section I begins with some preliminary remarks about the relevant object of this inquiry and the methodology I will employ to test alternative theories of contract law. The object in question consists of three doctrinal facts that are central to the law of modern contracts and require explanation: (1) modern contract law typically enforces purely executory contracts, before there has been any reliance or harm to the victims of breaches, and typically does so by allowing for expectation damages (and, to a lesser extent, specific performance) rather than a range of other possible remedies; (2) modern contract law focuses, in central ways, on the enforcement of promises that are supported by consideration, and either does not enforce or provides limited enforcement to many other classes of promises; and (3) modern contract law exhibits a pervasive tension between doctrines that require courts to defer to the parties' voluntary assent and doctrines that either invite or require courts to police bargains for fairness. Not only do each of these facts raise special problems for our understanding of modern contract law, but there is—as of yet—no unified theory that can account for all three facts at once.

Section II then accounts for these three doctrinal facts in a unified manner by developing a particular form of contractualism

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9. Shiffrin urges that “[t]he content and normative justifications of a legal practice—at least one that is pervasive and involves simultaneous participation in a moral relationship or practice—should be capable of being known and accepted by a self-consciously moral agent.” at 712.

about contract law. Drawing on and extending Rawls's well-known contractualist account of justice, the section begins by articulating a specific contractualist standard that will be employed. Whereas Rawls's test is best tailored to evaluate rules that govern important relationships between individual citizens and the state, the test developed here will be adapted in a number of ways to better evaluate those rules that govern individual relations between citizens. The remainder of Section II will then use this test, along with a number of important economic insights, to account for the three central areas of doctrine that form the object of the present inquiry. Along the way, Section II will argue that these contractualist explanations are superior to both efficiency-based and promise-based accounts of each of these areas of doctrine.

A full defense of contractualism about contract law would, of course, require an examination of a much broader range of doctrine. As indicated above, however, my theoretical aims here are more preliminary. They are to establish that contractualism about contract law offers a promising and underrepresented alternative to the predominant theories in the literature; and that the view has the unique capacity to resolve what is arguably the most central theoretical dilemma in this literature. These conclusions should be sufficient to warrant further time and effort developing the view and attempting to extend it to a broader range of doctrine. I will, however, take up this larger project only in subsequent publications.

Section III, finally, turns to a number of objections that one might raise to this entire project. Given the important role that contractualism has played in so many other areas of normative inquiry, it should be surprising that so little work has been done developing a contractualist account of contract law. As it turns out, there are, however, a number of important obstacles that any such theory will face, and these obstacles likely explain the dearth of work work in this area. Section III describes these obstacles. It then argues that, rather than undermining the entire prospects of a satisfying contractualist account of contract law from the start, these obstacles are better understood as placing special constraints on the form that any satisfying contractualism about contract law must take. The remainder of the section argues that the specific contractualist standard employed in this Article meets these special constraints, thereby revealing that the views developed here avoid these major objections.

### I. SOME PRELIMINARIES ON METHOD AND OBJECT OF INQUIRY

In the course of this Article, I will be comparing a number of different theories of contract law. It will therefore help to articulate a criterion for adjudicating between them, and to develop a better sense of what the ultimate object of this inquiry is.

Beginning with method, I propose that we attempt to place the various candidate theories of contract law into what is commonly referred to as wide reflective equilibrium with the modern law of contracts.<sup>10</sup> In this context, achieving reflective equilibrium will consist in a back and forth process through which we aim to render consistent a number of our beliefs: *viz.*, our considered judgments about the right outcomes of various contract law disputes, our considered judgments about the rules or principles that we take to appropriately govern those decisions, and various candidate theories of contract law, which purport to give an account of its basic subject matter. In principle, any of these elements should be revisable as we aim to achieve an acceptable coherence among them.<sup>11</sup> An acceptable coherence will, however, require more than mere consistency, and should include some beliefs that provide support for, or the best explanations of, the others.<sup>12</sup>

For example, if modern contract law were to reflect a deep commitment to a principle of efficiency-maximization, then we should be able to explain a number of contract law rules and principles as reflecting just this commitment, and we should be able to explain the outcomes of many cases in terms of just these rules and principles. By the same token, however, we should feel some pressure to abandon this efficiency-maximization rationale to the extent that we find well-settled cores of contractual doctrine that evade economic analysis.

Thus far, I have described the process of reaching ‘narrow’ reflective equilibrium. To achieve ‘wide’ reflective equilibrium, we must also seek to bring this entire set of beliefs into coherence with a number of philosophical considerations that have less to do with

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10. NORMAN DANIELS, *JUSTICE AND JUSTIFICATION: REFLECTIVE EQUILIBRIUM IN THEORY AND PRACTICE* (1996); RAWLS, *A THEORY OF JUSTICE*, *supra* note 1, at 18–19.

11. DANIELS, *supra* note 10, at 70–71; RAWLS, *A THEORY OF JUSTICE*, *supra* note 1, at 18–19.

12. DANIELS, *supra* note 10, at 21.

contract law specifically.<sup>13</sup> The issues that most concern me relate to the *subject matter* of our judgments about right and wrong—and, in particular, to what this subject matter could coherently be, given a number of well-known semantic, epistemic, and motivational constraints on how these judgments operate.<sup>14</sup>

I cannot do justice to these large topics here, but I can clarify the assumptions I will be making. I will assume that consequentialist and contractualist accounts of the right are the most promising lines of thought that have been developed in response to these particular philosophical problems,<sup>15</sup> and that any alternatives—including intuitionist deontological accounts of the right—are therefore less apt to survive the process of achieving wide reflective equilibrium as deep theories. This does not mean that alternative accounts that will be familiar from the literature—such as Daniel Markovits' account of contract as collaboration<sup>16</sup> or Peter Benson's account of contract in terms of the logic of transfer<sup>17</sup>—cannot serve other goals or help illuminate contract law in important ways as middle-level theories. It does, however, mean that alternatives like these cannot play the particular role that I will be taking a deep philosophical account of contract law to play.<sup>18</sup>

With these methodological remarks on the table, we can now turn to a rough characterization of the object of this inquiry. I have

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13. *Id.* at 153.

14. For a good discussion of these issues, see T.M. Scanlon, *Contractualism and Utilitarianism*, in *UTILITARIANISM AND BEYOND* 103 (Amartya Sen & Bernard Williams eds., 1982), *reprinted in* *CONTRACTARIANISM/CONTRACTUALISM* 219, 222–26 (Stephen Darwall ed., 2003) [hereinafter Scanlon, *Contractualism and Utilitarianism*].

15. For a discussion of the considerations suggesting that these theories promise to meet these criteria, see Scanlon, *Contractualism and Utilitarianism*, *supra* note 14, at 219, 224–26 (discussing consequentialism, specifically utilitarianism), and *id.* at 219, 226–35 (discussing contractualism).

16. Daniel Markovits, *Contract and Collaboration*, 113 *YALE L.J.* 1417, 1420 (2004).

17. Peter Benson, *The Unity of Contract Law*, in *THE THEORY OF CONTRACT LAW: NEW ESSAYS* 118, 125–26 n.14 (Peter Benson ed., 2001).

<sup>18</sup> I do not believe that either Markovitz or Benson would disagree with this last proposition, as nothing in their work suggests that they share the specific aims of this Article. If, however, either were to think otherwise, then they would, at the very least, bear the burden of showing how their theories might answer to the deep questions about the subject matter of what we owe to one another.

spoken of the “rules of modern contract law,” but it should be clear that there are many different variants of modern contract law, which sometimes differ from state to state, from country to country, or from type of contract to type of contract. Peter Benson has nevertheless recently observed that:

[I]n both the common law and civil law the definitions of and mutual connections between the various principles of contract law are for the most part well-settled and no longer subject to controversy. Indeed, despite differences in formulation, the main elements of the law of contract are strikingly similar in both legal systems, and these systems, whether directly or by derivation, prevail throughout most of the contemporary world.<sup>19</sup>

Benson has, moreover, articulated three central questions that a theory of contract law should presumably answer, given this well-settled doctrinal core:

The first question asks why expectation damages and specific performance, the so-called “normal” contract remedies, should be given for breach of a wholly executory and unrelieved-upon agreement. The second focuses on the necessity and the centrality of the doctrine of consideration: what might be the rationale for this long-established condition of contract formation? And the third question asks whether contractual liberty, as embodied in the traditional principles of contract formation, is compatible with contractual fairness, as reflected in, say, the more recently developed doctrine of unconscionability.<sup>20</sup>

In what follows, I will take these three questions, along with their most common legal answers in domestic law, to define the central doctrinal core and object of the present inquiry. I have chosen this focus for four main reasons.

First, although I do not claim that these doctrines arise in precisely the same way in the contract law of all developed nations, Benson’s work suggests that recognizable and highly similar versions of these doctrines are widely recognized and highly stable in most systems of modern contract law. These features are, in fact,

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19. *See id.* at 118.

20. *Id.* at 119.

both stable and pervasive enough that it would be plausible to dub them intrinsic features of flourishing *capitalist* economies. All other things being equal, these doctrines thus plausibly represent considered judgments about the modern law of contracts. For reasons discussed, one must ultimately settle on a suitable class of such considered judgments, if one hopes to achieve achieve reflective equilibrium over this area of the law, and these facts thus provide an initial justification for the present focus.

Second, by focusing on these particular doctrinal issues, one can expose a major lacuna in modern contract law theory: neither efficiency-based nor promise-based theories can be used to provide a satisfying account of all three of these dimensions of doctrine. After describing how well-settled this core of modern contract law is, Benson thus says:

The same cannot be said . . . of efforts to understand the law at a reflective level. In common law jurisdictions at least, there is at present no generally accepted theory or even family of theories of contract. To the contrary, there exist only a multiplicity of competing theoretical approaches, each of which, by its very terms, purports to provide a comprehensive yet distinctive understanding of contract but which, precisely for this reason, is incompatible with the others.<sup>21</sup>

The point here is not just that there are theoretical disagreements in the literature but rather that different and incompatible theories appear necessary to account for different but seemingly ineliminable features of modern contract law. Facts like these have, in fact, led a number of contemporary contract law theorists to settle on a form of value-pluralism about contract law, under which its rules are viewed as reflecting an *ad hoc* mixture of distinct and partially inconsistent values—including values such as efficiency, social welfare, liberty, reliance, fairness, and a commitment to the ordinary morality of promise-keeping.<sup>22</sup> Importantly, the most fundamental tensions that

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21. *Id.* at 118.

22. *E.g.*, Jody S. Kraus, *Legal Theory and Contract Law: Groundwork for the Reconciliation of Autonomy and Efficiency in Contract Theory*, 1 *J. SOC. POL. & LEGAL PHIL.* 385 (2002) [hereinafter Kraus, *Legal Theory*]; Jody Kraus, *Reconciling Autonomy and Efficiency in Contract Law: The Vertical Integration Strategy*, 11 *PHIL. ISSUES* 420 (2001) [hereinafter Kraus, *Reconciling*].

arise in this area of the law are directly, and almost exhaustively, reflected in the combination of doctrines that form the object of the present inquiry. Not only do we lack a unified theoretical treatment of these particular doctrines, but a theory that could achieve this end this would thus harmonize the most central tensions in this area of the law. These facts provide a second important justification for the present focus.

There is, of course, no guarantee that we will be able to articulate such a theory. One might therefore wonder whether modern contract law is ultimately nothing more than an arena where proponents of distinct and incompatible value systems have left their indelible marks. For reasons discussed, to stop at such an understanding would, however, leave open the question of how these different values are to be appropriately weighed against one another. Without further guidance, this question can become highly politicized, with many on the economic right arguing that fairness considerations represent an alien intrusion into the basic subject matter of modern contract law, and many on the economic left suggesting that fairness considerations should play a more robust role. A more penetrating theoretical account of the rules of contract law would help to depoliticize these issues by identifying the precise degree to which doctrines that allow courts to police for fairness are expressions of the deep principles that underlie modern contract law and allow modern capitalist political economies to flourish. These facts provide yet a third justification for our present focus.

Finally, fourth, one of the curious features of modern contract law is that it contains a particular blend of so-called “default” and “mandatory” rules. Default rules are ones that parties can voluntarily contract around, whereas mandatory rules resist such voluntary alteration. Not only do the three doctrinal areas that form the object of the present inquiry raise central puzzles and tensions within the law of modern contracts, but they do so in the form of rules that have a distinctively mandatory status. Parties cannot, for example, voluntarily alter the basic remedies that will attach to a subsequent breach, either by contracting for increased remedies in the first instance or by agreeing in advance to waive their ordinary remedies pre-reliance. Nor can parties voluntarily decide to forego the consideration requirement, and thereby render their gratuitous promises binding. Nor, finally, can they assent to be bound by an unconscionable contract, or to waive in advance a number of

analogous common law or statutory protections against unfair bargains.

The mandatory status of some contract law rules have raised special problems for both efficiency- and promise-based accounts of contract law. A contractualist account of these three doctrinal areas, which contains an account of their mandatory status, might therefore yield a particularly helpful understanding of why these alternative theories are limited in scope. These facts thus provide the fourth and final justification for our present focus.

## II. CONTRACTUALISM ABOUT CONTRACT LAW: AN INITIAL SKETCH

### *A. Developing a Suitably-Fashioned Contractualist Test for the Private Law*

Insert section here that will do a number of things:

1. describe Rawls's test, and its application to the basic structure of society
2. set forth the Black's Law Dictionary distinction between "public" v. "private" law (the first of which governs relations between citizens and the state—including con law, ad law, crim law, tax law, social welfare entitlements, etc.—and the second of which governs relations between citizens—including contract law, property law, tort law, etc.);
3. argue that Rawls's contractualist standard is specifically-fashioned to test central areas of the public law (e.g., con law, tax law, social welfare entitlements—all of which give individual citizens claims against the state or vice versa);
4. develop a related standard for the private law;
5. because the private law involves relations between citizens, impose a constraint that parties behind the relevant veil of ignorance cannot know which party to a particular transaction they will be (this is morally arbitrary knowledge);
6. clarify that the parties can nevertheless absorb a number of important economic insights from behind the veil of ignorance, along with a number of important facts about the importance of specific legal rules (and legal enforcement

- mechanisms) to allow for modern markets to flourish;
7. give example that, if individuals hope to use use promises as tools to induce reciprocal promises or performances from others (especially from relative strangers), legal enforcement of the promises may be necessary to generate the relevant trust needed for the induction;
  8. point out that other economic insights will be incorporated into the arguments in the following sections, as needed;
  9. indicate that I will be applying this modified version of Rawls's test without necessarily committing myself to his larger views concerning justice being political not metaphysical (there are, after all, many reasons to think contractualist standards of the right are the right ones—see Scanlon or Darwall--and, if one believes this, then the test developed in this section will merely proceduralize our intuitions concerning which private law rules meet this correct fundamental test; but it may also be the case that we should resist making realist claims, a la Rawls, and should instead consider this test as one that might plausibly garner an overlapping consensus as the most suitable standard for evaluating laws that govern the relations between persons with potentially distinctive but reasonable comprehensive conceptions of the good);
  10. note that people deliberating behind the veil of ignorance are rational utility maximizers, and set forth the standard economic definitions of this;
  11. note that there will be no reason to rely on Rawls's notion of social primary goods in this particular context, because people can know that their preferences will be revealed in their voluntary choices during the processes of ordinary bargaining

*B. Explaining the Structure of Contractual Remedies:  
Which Remedies, and Why Pre-Reliance*

As discussed above, one of the central doctrinal puzzles in modern contract law concerns the question of why courts would enforce purely executory contracts, before there has been any reliance or harm to the non-breaching party, and why they would do

so by allowing for expectation damages (and, to a lesser extent, specific performance) in the typical case. This feature of doctrine can be puzzling because, absent some harm to the victim, it is unclear why the victim should deserve a remedy.<sup>23</sup> In order to simplify the analysis, I will begin by focusing on the general rule, which allows for expectation damages—and neither more, nor less—in these common circumstances.

It should be noted that both promise-based and efficiency-based theorists can account for at least the first half of this puzzle: namely, why we would enforce purely executory contracts in the first place. Charles Fried is perhaps the best-known proponent of the view the contract is fundamentally about the morality of ordinary promise-keeping, and, for him, the moral facts are clear: “If I make a promise to you, I should do as I promise.”<sup>24</sup> Nothing in this statement requires reliance on a promise before one is obligated to keep it. Hence, for promise-based theorists, there is no special puzzle concerning why contracts should be enforced pre-reliance.

The efficiency theorists can provide an equally clear, if somewhat less straightforward, argument for the same conclusion. To understand the argument, one must begin with some standard definitions. In orthodox economic theory, a transition from one state of affairs to another is said to be “Pareto-efficient” if at least one person would prefer the new state of affairs to the old one and no one would prefer the old one to the new.<sup>25</sup> A transition is said to be “Kaldor-Hicks efficient” if, hypothetically, it could be rendered Pareto-efficient if the “winners” in the new state of affairs were to compensate the “losers” for those losses.<sup>26</sup>

Economists also commonly assert that we reveal our preferences

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

24. *Id.*

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

26. *Id.* at 1517.

in voluntary choice.<sup>27</sup> If both parties have entered into an agreement voluntarily, its enforcement should therefore tend to produce states of affairs in which both parties can satisfy more of their respective preferences.<sup>28</sup> And this, in turn, means that the legal enforcement of voluntary agreements should tend to produce gains *under both efficiency standards and whether or not there has been any reliance on the relevant promises.*

The duty to keep a contract does not, however, typically include a strict duty to perform it under the common law. Rather, as Oliver Wendell Holmes has starkly put the issue: “[t]he duty to keep a contract at common law means . . . that you must pay damages if you do not keep it,—and nothing else.”<sup>29</sup> The damages in question are, moreover, expectation damages, or the expected value (at the time of breach) of what the victim of the breach would have obtained had both parties fully performed.<sup>30</sup> We should therefore ask why expectation damages—and neither more nor less—is the standard remedy for a contractual breach. An answer to this question would resolve the second half of the puzzle in this subsection.

Promise-based theorists will have a much more difficult time with this second question. If the moral facts require simply that we keep our promises in the standard case, then promise based-theorists should presumably recommend specific performance as the standard contract law remedy,<sup>31</sup> with, perhaps, an allowance for expectation damages only in those cases where performance has become impossible.<sup>32</sup> But this is emphatically not the way the standard remedies work in modern contract law.<sup>33</sup>

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

28. See Shiffrin, *supra* note 17, at 730–31 nn.43–44.

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

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

31. See Peter Linzer, *On the Amoralism of Contract Remedies—Efficiency, Equity, and the Second Restatement*, 81 COLUM. L. REV. 111 (1981).

32. Scanlon has argued that expectation damages would be the logically entailed remedy when specific performance is impossible. See Scanlon, *Promises*

Efficiency theorists, by contrast, have developed a well-known and powerful account of the expectation damages remedy in terms of so-called “efficient breach.” When a party voluntarily breaches a contract and is forced to pay expectation damages, two consequences are often said to follow. First, by virtue of obtaining expectation damages, the victims of breaches are said to be left in the same position they would have been in if the contracts had been fully performed.<sup>34</sup> Second, by requiring *nothing more than* expectation damages, parties who find new opportunities to increase their personal welfare by breaching are given the ability to capitalize on

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*and Contracts*, *supra* note 3, at 103.

<sup>33</sup> Readers familiar with Charles Fried’s work in *Contract as Promise* may find these last conclusions somewhat surprising. They might object that his book in fact contains an extended argument suggesting that what he calls the “promise principle” entails that expectation damages are the right measure of damages for contractual breaches.<sup>33</sup> One must nevertheless examine his arguments very carefully to understand what they do, and do not, establish.

Fried’s arguments are directed at proponents of alternative measures for contractual damages, based either on reliance or restitutionary interests.<sup>33</sup> Against these alternatives, Fried makes a number of morally intuitive arguments like the following:

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 proposition appears as the expectation measure of damages for breach.<sup>33</sup>

It is, however, one thing to say that expectation damages are the appropriate measure of damages when monetary damages are to be awarded, and quite another to say that parties to contracts should have the right either to perform or to breach and pay expectation damages when performance is possible. Our ordinary moral intuitions arguably support the former view, but not the latter. Indeed, the ordinary morality of promise-keeping would appear to reject the almost wholesale commodification of performance obligations that is presupposed by the latter view and by much of modern law of contract. The intuitions that Fried draws upon would therefore appear to establish at most what has already been conceded: that expectation damages are appropriate, under the promise principle, either when specific performance is impossible or in any rare cases where ordinary morality might allow for the commodification of performance obligations.

34. See Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273, 281 (1970) (citing 5 SAMUEL WILLISTON, A TREATISE OF THE LAW OF CONTRACTS § 1338 (rev. ed. 1937)); Richard Craswell, *Contract Remedies, Renegotiation, and the Theory of Efficient Breach*, 61 S. CAL. L. REV. 629, 636 n.9 (1988).

these new opportunities, at least when these gains are larger than the costs that the victim of the breach would face absent compensation.<sup>35</sup>

It is thus sometimes said, even by critics, that

the program of expectation damages, if faithfully implemented, satisfies not only the Kald[o]r-Hicks standard of hypothetical compensation but the more restrictive Pareto standards of efficiency as well: not only is there a net social gain for the contracting parties, but no one is left worse off after breach than before.<sup>36</sup>

There is something very powerful about this line of argument. Efficiency principles would appear to provide a unifying explanation of both why we enforce voluntary exchanges and why we typically allow for only the recovery of expectation damages. Because the explanation is consequentialist in nature, it might also appear to harmonize well with certain features of modern markets, such as their tendencies to produce vast increases in social wealth and average per capita income.<sup>37</sup> Explanations like this can thus encourage the view that markets operate in ways that are distinctive from, and that serve different purposes than, the basic structure of society.<sup>38</sup>

A contractualist can, however, absorb many of these same economic insights, and yet produce an even more robust account of contract law remedies, which avoids these last conclusions. A threshold question for the contractualist will be why rational persons

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35. Craswell, *supra* note 30, at 636–37.

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

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

Coleman, *supra* note 23. Kaldor-Hicks efficiency differs more. “One state of affairs, *S*, is Kaldor-Hicks efficient to another, *A*, if and only if the winners under *S* could compensate the losers such that, after compensation, no one would prefer *A* to *S* and at least one person would prefer *S* to *A*.” *Id.* at 1517.

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

38. *See* Shiffrin, *supra* note 17, at 713.

deliberating behind the veil of ignorance would consent to the legal enforcement of any of their promises at all. Legal enforcement mechanisms will predictably force people to follow through with many promises that they no longer desire to fulfill at the time of performance, and so rational deliberators might be thought to exhibit some default resistance to any such enforcement.

As discussed above, people reasoning from behind the veil of ignorance can, however, also know a number of general facts about economics, sociology and human psychology. At any given time, there are—I will assume—numerous possible exchanges between persons that would be mutually beneficial to both. In small groups, where people have sufficient trust, care, and intimate knowledge of one another's concerns and interests, these exchanges often take place without the need for any legal intervention—either through processes of so-called gift exchange, or other forms of informal cooperation.<sup>39</sup> When people are relative strangers, on the other hand, self-interested bargaining is often needed to identify the precise exchanges that they will find mutually beneficial.<sup>40</sup> Relative strangers will, however, only be able to engage in the relevant kind of self-interested bargaining if they can use their promises as tools to induce reciprocal promises or performances on the part of others. These relative strangers must, in other words, be able to make promises that others find sufficiently trustworthy .

Knowing these facts, rational persons deliberating behind the veil of ignorance should consent to the legal enforcement of their promises for two basic reasons. First, they should understand that, in an important class of cases, legal enforcement will be needed to make possible the kind of self-interested bargaining under discussion. This is because legal enforcement will help ensure that one's promises are sufficiently trustworthy to relative strangers to induce reciprocal promises or performances from them. Second, when this type of bargaining has resulted in a voluntary agreement, both parties should expect to obtain more from the right to enforce the other party's promises than they will lose by granting the other party the reciprocal right to enforce their own. In order to obtain the

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

40. See Hayek, *The Use of Knowledge*, *supra* note 93, at 526.

right to enforce promises made to them, both parties should therefore be willing to consent to the legal enforcement of their own.

By drawing on a number of important economic insights, contractualists can thus provide an equally compelling explanation for why courts would enforce purely executory contracts, absent any reliance or harm to the non-breaching party. In order to address the second half of the puzzle that began this section, a contractualist must, however, address the further question of why courts would tend to allow for expectation damages as the standard remedy, rather than something more or less.

There is—I will assume—an important set of circumstances in which parties will typically be contracting either primarily for economic gain or for goods or services that can easily be obtained elsewhere on an open market. For this class of cases, people reasoning from behind the veil of ignorance would presumably agree to a rule that requires contracting parties to *excuse* one another's non-performance so long as expectation damages are paid. Such a rule would allow them to obtain greater personal advantages in some circumstances (*i.e.*, ones that are commonly thought of as instances of efficient breach) by claiming the excuse, while losing little or nothing in the reciprocal situations where the other party has decided to pay rather than perform. A contractualist can thus provide an equally cogent rationale for the expectation damages remedy—at least in application to the special set of circumstances under discussion.

Notice, moreover, that this form of justification absorbs a number of important economic insights while providing them with a fundamental reinterpretation. Rather than suggesting that people should be able to breach their contractual duties whenever a breach is justifiable on consequentialist grounds, the present account suggests that we have not two distinctive duties, both of which are deserving of our full respect. Our primary duty (*viz.*, to perform our contracts) along with our secondary duty (*viz.*, to excuse one another's nonperformance, and accept expectation damages, in a special set of circumstances) can, moreover, be pictured as part and parcel of a larger system of obligations, which have been specifically-tailored to govern an important class of modern social interactions. In my view, the fact that the present account can thereby “moralize” this remedy, and show it to be more than just a dereliction of our duties, provides an initial but critically important reason to favor this account over the

standard economic ones.

There is, of course, yet a further question concerning what the appropriate scope of the expectation damages remedy should be. A contractualist will answer this question by determining when it is right to assume that parties will typically be contracting either primarily for economic gain or for goods or services that can easily be obtained elsewhere on an open market. This assumption is not very plausible, in my view, in the kinds of intimate circumstances that define close personal relationships. Reciprocal promises are, however, not typically enforced in those circumstances anyway. Reciprocal promises are, on the other hand, typically enforced when they involve exchanges between relative strangers on an open market, and it is much more plausible that the relevant assumptions hold in these circumstances. What contractualism about contract law would seem to recommend, then, is a default rule establishing that, in the most common class of cases where contracts are legally enforced, expectation damages are the appropriate remedy.

Contractualism about contract law could, moreover, claim a second important advantage over economic theories if it could explain why the law allows for exceptions to this default rule in the precise circumstances that it does. The contractualist will expect exceptions to arise when, but only when, the assumptions mentioned above, which were needed to justify the standard remedy, no longer hold. This will occur when one or another party is engaging in a transaction for goods or services that she either does not deem fungible for others similar goods or services or values in ways that materially outstrip the contract's expected market value.<sup>41</sup>

In circumstances such as these, rational parties deliberating behind the veil of ignorance would presumably favor a rule requiring specific performance instead of expectation damages—at least on the assumption that the person who specially values the relevant goods has made this fact clear to the other party. A rule of this kind would typically allow people to obtain the goods that they specially value, and rational parties behind the veil of ignorance will know in advance that, in these special circumstances, specific performance would provide them with something of more value than expectation damages. The only relevant cost of the rule would lie in the parties'

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41. See sources cited *supra* note 89.

corresponding inability to capitalize on the possibility of increased personal welfare gains, which might otherwise arise in cases of so-called “efficient breach.” The chances of such gains are, however, always speculative, and, in the present context, must be weighed against the known losses that the party receiving expectation damages rather than specific performance would face.

Other circumstances in which a rational person might plausibly forgo the right to pay expectation damages for nonperformance and favor specific performance would be instances in which expectation damages are especially hard to calculate, or are unlikely to make the victim of the breach whole. Rational persons deliberating behind the veil of ignorance would therefore presumably allow for specific performance in these limited classes of circumstances as well.

Interestingly, the law of contractual remedies does allow for specific performance in just these kinds of cases. Although expectation damages is the typical remedy for breach of contract,<sup>42</sup> parties may seek specific performance in cases where the items in question are “unique or in other proper circumstances.”<sup>43</sup> In practice, this test tends to cover situations in which one party has formed a special attachment to an item, as in cases of family heirlooms,<sup>44</sup> where expectation damages are unlikely to make the victim of the breach whole;<sup>45</sup> or when damages are difficult to calculate.<sup>46</sup> The

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42. RESTATEMENT (SECOND) OF CONTRACTS § 347 & cmt. a (1981); *see supra* Section III, Part A.

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

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

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

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

fact that contractualism about contract law would recommend a remedy of specific performance in just these sorts of circumstances provides a second reason to favor the present account.

A third and very important reason to favor the present contractualist account lies in its ability to account for another feature of the standard contract law remedies that has thus far received insufficient attention in the literature. In particular, the expectation damages remedy—and, indeed, the law of contract remedies more generally—reflects a conception of contractual obligation that is fundamentally “agent-centered” (rather than “agent-neutral”) in form. Under orthodox definitions, a principle is said to be “agent-centered” if it sometimes gives different persons different aims or goals, and “agent-neutral” if it gives all persons the same aim or goal.<sup>47</sup>

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

The distinction under discussion might seem slight at first, but, for reasons to be explained, contractualists can account for the agent-centered features of contractual obligations while efficiency theorists cannot. To see this, consider the highly unorthodox remedy that

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where damages would be difficult to calculate).

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

would require breaching parties to pay expectation damages *either to the victim of their own breach or to the victim of another similar breach that would otherwise go uncompensated*. In what follows, I will consider the relative power that contractualist and efficiency-based theories have to justify discarding this remedy in favor of the ordinary one, which requires breaching parties to pay the specific victims of their breaches instead.

For a contractualist, there is, in fact, a relatively straightforward answer to this question. As noted above, the primary circumstance in which rational persons behind the veil of ignorance will consent to the legal enforcement of their promises is when they seek to use these promises to induce one or more others to act in specific ways. Promises of this kind are, however, made *to* specific persons, and are intended to induce specific persons to act. In order to ensure that these promisors are not using the relevant legal rules to induce actions in a *coercive* manner, the contractualist will therefore need to ensure that rational persons deliberating behind the veil of ignorance would consent to being induced in these particular ways if they end up being in the position of the promisee. This condition will only be met when the promisee can expect to obtain more from the right to enforce the original promise than she will lose by being induced. (Only in these circumstances would a rational deliberator willingly trade the possibility of being induced for the standing to demand compliance with the inducing promise.) But these facts suggest that the contractualist justification for legally enforcing contracts extends only to those cases where the specific parties to a contract obtain the right to a remedy in case of breach.<sup>48</sup>

Are there any analogous arguments that efficiency theorists might raise to rule out the unorthodox remedy in question? As it turns out, the answer will be no, but to see why this is so will require some detailed treatment.

One initial tack that an economist might take in this area would be to insist that the relevant aim of contract law rules is to maximize Pareto-efficiency, rather than Kaldor-Hicks efficiency. The efficiency theorist might then point out that while a rule allowing

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<sup>48</sup> There are no analogous reasons for rational deliberators to consent to a broader rule granting standing to third parties. Indeed, for reasons already explained, rational deliberators would presumably opt for the narrowest rules of standing possible.

damages to third parties might be justified on Kaldor-Hicks efficiency grounds, it cannot plausibly be justified on Pareto-efficiency grounds. This is because the state of affairs in which a third party were to receive expectation damages after a breach would leave at least one person (namely, the particular victim of that breach) worse off than if the contract had been performed, thus revealing that the transition to this new state of affairs would not be Pareto-efficient.<sup>49</sup>

The more orthodox remedial rule—which requires breaching parties to pay expectation damages to the specific victims of their breaches—would, by contrast, leave no party worse off—or so goes the argument—than in the non-breaching situation and would still allow the breaching party to move to a state of affairs that is even more preferable to the breaching party. This orthodox rule would thus promote Pareto-efficient results, whereas the unorthodox rule would not. If the aim of modern contract law were to maximize Pareto-efficiency rather than Kaldor-Hicks efficiency, then the efficiency theorist might therefore rule out the unorthodox remedy requiring breaching parties to pay expectation damages either to the specific victims of their breaches or to other third party victims of breaches that would otherwise go uncompensated.

This first response is, however, only as strong as its central premise: namely, that the relevant aim of modern contract law is to maximize Pareto-efficiency rather than Kaldor-Hicks efficiency. What should we think of this premise? Certainly, there are reasons to favor the view. Perhaps the most important one arises from the fact that we can fashion rules that promote Pareto-efficiency even if we lack the ability to make interpersonal utility comparisons. In particular, we can rely on the weak epistemic premise that we reveal our preferences in voluntary choice and then recommend rules that allow all and only those transitions to new states of affairs in which at least one person would voluntarily choose this new state of affairs over the old. Rules that require the enforcement of voluntary exchanges appear to fit this basic description, whereas one must typically be able to make interpersonal utility comparisons to

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

identify Kaldor-Hicks efficient results.<sup>50</sup> For those who believe that we cannot make these comparisons,<sup>51</sup> there might thus be good reasons for insisting that the appropriate aim of modern contract law is to maximize Pareto-efficiency.

There are, however, a number of equally compelling reasons to reject this view. As an initial matter, economists have acknowledged the need to employ Kaldor-Hicks rather than Pareto criteria to account for every other area of the private law.<sup>52</sup> To insist on the use of Pareto criteria in this one area of the law would therefore result in a view that is at odds with the larger economic project of accounting for private law. Because one must typically be able to make interpersonal utility comparisons to identify Kaldor-Hicks efficient outcomes,<sup>53</sup> the view that we cannot make these comparisons is, moreover, also in tension with this larger economic project. In any event, the view is highly controversial.<sup>54</sup> Absent worries about our

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50. Coleman, *supra* note 23, at 1517 (“If the worries about interpersonal comparability are legitimate, Kaldor-Hicks reintroduces them; it does not solve them.”).

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

52. Coleman, *supra* note 23, at 1517, 1519.

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

54. *See, e.g.,* David Pozen, *Remapping the Charitable Deduction*, 39 CONN. L. REV. 531, 583 (2006) (“Interpersonal utility comparisons may be taboo in modern economic theory, but philosophers since Rawls have acknowledged that we inevitably make at least approximate.”); *see also* Leo Katz, *Choice, Consent, and Cycling*, 104 MICH. L. REV. 627, 632 n.9 (2006) (describing assumption that it is impossible to make

capacities to make interpersonal utility comparisons, it is, moreover, hard to imagine any satisfying consequentialist justification for insisting on the maximization of Pareto rather than Kaldor Hicks efficiency. This is because the transition from one state of affairs to another will produce more overall welfare if it is Kaldor-Hicks efficient, even if it is not Pareto-efficient.

Elsewhere, I have argued, moreover, that—despite what some economists have said—the orthodox account of the expectation damages remedy in terms of “efficient breach” implicitly rests on Kaldor-Hicks rather than Pareto criteria. Although I will not repeat the full argument here, it will be helpful to describe its major steps.

In *Contract Law from the Second Person Standpoint*, I first examine the standard economic account of the expectation damages remedy in terms of Pareto efficiency, and argue that it rests on a number of important assumptions concerning how people typically value things.<sup>55</sup> In particular, it assumes that contracting parties deem performance of their contracts as fungible for the market value of the performance, and that their evaluations of these performances do not change over time.<sup>56</sup> I then point out, second, that these assumptions cannot be derived from pure economic theory or from the weak epistemic premise that we reveal our preferences in voluntary choice.<sup>57</sup> Indeed, these assumptions are not even necessarily true,

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interpersonal utility comparisons as “controversial”); cf. Grant M. Hayden, *Resolving the Dilemma of Minority Representation*, 92 CAL. L. REV. 1589, 1625 (2004) (“The lesson, though, is not that objective interpersonal utility comparisons cannot be made, but that they necessarily involve normative decisions.”).

<sup>55</sup> See \_\_\_\_ (“Notice, first, that the standard economic account of the expectation damages remedy rests on a critical assumption. It assumes that, at the time of the breach, a party will be strictly indifferent between obtaining performance of the contract and obtaining the market value of that performance. Let us call this the “Strict Indifference Assumption.” The assumption can, in fact, be broken down into two further assumptions. First, there is a *fungibility* assumption, according to which contracting parties deem performance of the contracts fungible for the market value of that performance. Second, there is a *temporal stability* assumption, according to which contracting parties’ valuations of these performances do not change over time.”)

<sup>56</sup> Id.

<sup>57</sup> Id. (“Importantly, neither of these assumptions can be derived either from pure economic theory or from the weak epistemic premise that we reveal our preferences in voluntary choice. This is because economic theory purports to be neutral about what people’s utility functions look like and to identify these functions based on voluntary choice. While the parties to these contracts may have

and are very likely false in many particular cases—for reasons explained in that Article.<sup>58</sup>

There are, however, plausible reasons to think that, at least in the class of cases most commonly governed by modern contract law, these same assumptions may be true *not of each individual person but rather as a matter of statistics*.<sup>59</sup> The plausibility of these reasons depends on some ability to make interpersonal utility comparisons, however, and so relying on these statistical propositions will undermine one of the primary reasons for using

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entered into them voluntarily, the victims of efficient breaches typically have no choice but to accept expectation damages as a remedy at the time of breach.<sup>57</sup> Hence, their purported indifference between performance and receipt of expectation damages at the time of breach cannot be derived from any facts about their voluntary choices.”).

<sup>58</sup> See \_\_\_\_ (“Once these facts have been brought to light, it should be clear that the Strict Indifference Assumption is not even necessarily true in all cases. There is, after all, nothing obvious about the fact that two parties have entered into a contract voluntarily that would guarantee that the parties will value what they have bargained for exactly as much once the parties have begun performance.<sup>58</sup> If the victimized party no longer values the performance as much as when the party entered the contract, a payment of expectation damages may thus overcompensate the party, and a rule requiring expectation damages as a remedy might deter some Pareto-efficient breaches. If, on the other hand, the victimized party ends up valuing the performance more than at the time of contracting, then expectation damages may end up undercompensating this party, thereby making this party worse off and establishing that the breach is not Pareto-efficient. Additionally, our intuitions tell us that people sometimes begin to value items—even ones they have obtained through market transactions—in ways that surpass the market value, either because people have formed special attachments to the items or because people no longer deem them to be commodifiable.<sup>58</sup> Hence, people may not always be strictly indifferent, even from the start, between performance and expectation damages.”).

<sup>59</sup> See \_\_\_\_ (“Still, to say that the Strict Indifference Assumption is not necessarily true does not mean that it bears no important relationship to the truth. In my view, what the above considerations suggest is that the proposition should be viewed, at best, as a merely rough, and hence fallible, guide to the truth. There are a number of plausible reasons for viewing the proposition as such, although these reasons are rarely stated explicitly. The implicit argument would appear to go something like this: Although people’s utility functions might change over time, people’s evaluations of contractual performances are likely to change in approximately equal amounts, such that the typical increases for one party will—at least *statistically speaking*—be offset by the typical decreases of the other.”)

Pareto criteria in the first place.<sup>60</sup> Any account of the expectation damages remedy that is based on these statistical propositions will, moreover, establish at most that the remedy promotes Kaldor-Hicks rather than Pareto efficiency.<sup>61</sup> It is, however, ultimately these statistical propositions that give the economic account of expectation damages whatever force it has.

What this means is that the economist cannot consistently account for the expectation damages in terms of “efficient breach” while ruling out the unorthodox version of this remedy on Pareto grounds. So we must still ask: How, if at all, might the efficiency theorist account for the fact that courts give expectation damages remedies *to the victims of contractual breaches* rather than to the victims of other similar breaches that would otherwise go uncompensated?

A second response that the efficiency theorist might give is to argue that the orthodox rule, which requires breaching parties to pay expectation damages to the specific victims of their breaches, is *more likely* to produce Kaldor-Hicks efficient results than its unorthodox competitor. For reasons already discussed, the efficiency theorist must assume that we have more knowledge about the routes to human preference satisfaction than is derived solely from observations of people’s voluntary choices. The efficiency theorist might nevertheless argue that voluntary exchanges produce information about the routes to human preference satisfaction that cannot easily be reproduced in other manners.<sup>62</sup> This is presumably

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<sup>60</sup> See *id.* \_\_ (“Requiring the payment of expectation damages and nothing more to the victim of a breach will thus tend to promote gains in overall preference-satisfaction, even if in some cases one party is left worse off than in the non-breaching situation. If this argument is valid, then the economist can, in fact, provide a plausible rationale for the expectation damages remedy. Notice, however, that this argument has a number of special properties. It is probabilistic in nature; it depends upon a capacity to make credible interpersonal utility comparisons of a kind; and it relies on intuitions about people’s utility functions that cannot be derived strictly from facts about their voluntary actions.”)

<sup>61</sup> *Id.* (“Properly construed, the economic argument for the expectation damages remedy must therefore be understood as making implicit reference to *Kaldor-Hicks* rather than *Pareto*-criteria of efficiency.”)

<sup>62</sup>. See F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 524–26 (1945); see also Posting of Elizabeth Anderson, How Not to Complain About Your Taxes (III): “I deserve my pretax income,” Left2Right (Jan. 26, 2005),

why centralized state planning has proven far less efficient than modern market economies for the distribution of resources.<sup>63</sup> The voluntariness of an original transaction, when combined with the very minimal epistemic intuitions discussed above, can thus help to ensure that a breaching party's payment to the specific victim of his breach will very likely produce Kaldor-Hicks efficient results. Because there has been no analogous voluntary exchange between the breaching party and any given third party to the transaction, there is less credible evidence that payment to a third party would produce these same Kaldor-Hicks efficient results. If this argument is valid, then the orthodox expectation damages remedy is more likely to produce Kaldor-Hicks efficient results than the unorthodox one.

It is quite plausible, in my view, that voluntary market transactions sometimes produce information about the routes to human preference-satisfaction that cannot easily be reproduced in other manners.<sup>64</sup> Yet, even in circumstances where this contention is true, there is be nothing in principle to distinguish the evidentiary value inherent in one voluntary exchange from that of another similarly situated exchange. These same epistemic considerations should therefore equally support a very different doctrine of "efficient breach," which requires breaching parties to pay expectation damages either to the other party to the contract, or to some other person who is the victim of a similar breach that would otherwise go uncompensated. And this means that this second response by the economist is equally unavailing.

A third response that the efficiency theorist might try relates to the importance of trust for modern markets to flourish. Parties must presumably trust that they will obtain what they expect from a contract if they are to enter into the typical contract.<sup>65</sup> The efficiency

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[http://left2right.typepad.com/main/2005/01/how\\_not\\_to\\_comp\\_1.html](http://left2right.typepad.com/main/2005/01/how_not_to_comp_1.html) (proposing that taxation builds social insurance).

63. Anderson, *supra* note 49.

64. *Id.*

65. See Menachem Mautner, *Contract, Culture, Compulsion, or: What Is So Problematic in the Application of Objective Standards in Contract Law?*, 3 THEORETICAL INQUIRIES L. 545, 558 (2002) ("Trust, like contract-making, is future-oriented. '[T]o trust is to act as if the uncertain future actions of others were indeed certain.' 'In trusting, one engages in action as though there were only certain possibilities in the future.' Contract-making, therefore, is a *functional equivalent* of trust." (alteration in original) (citations omitted)); Kenneth J. Arrow,

theorist might therefore argue that only a rule requiring breaching parties to pay expectation damages *to the specific victims of their breaches* will produce this particular kind of trust.<sup>66</sup> This is because a person deciding whether to enter into a contract must trust that *he* or *she* will obtain a relevant remedy in case of breach, and a rule allowing damages to be paid to third parties would not produce this particular kind of trust. Given the undeniable fact that markets tend to produce vast increases in social welfare and average per capita income,<sup>67</sup> the more orthodox rule governing expectation damages might therefore be thought to conduce to Kaldor-Hicks efficiency by helping to produce the relevant trust needed for modern markets to operate.

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

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*Gifts and Exchanges*, 1 PHIL. & PUB. AFF. 343, 357 (1972) ("Virtually every commercial transaction has within itself an element of trust, certainly any transaction conducted over a period of time. It can be plausibly argued that much of the economic backwardness in the world can be explained by the lack of mutual confidence . . ."). For more information on the phenomenon of trust in general, see BARBARA A. MISZTAL, *TRUST IN MODERN SOCIETIES: THE SEARCH FOR THE BASES OF SOCIAL ORDER passim* (1996); FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* 152–53 (1995); JAMES S. COLEMAN, *FOUNDATIONS OF SOCIAL THEORY* 91–116 (1990); DOUGLAS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE* 55 (1990).

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

67. See *supra* note 33 and accompanying text.

matters for markets to flourish is the overall amount of trust that people have in the market, and the efficiency theorist's third response will therefore also prove unhelpful.

There are, no doubt, a number of other responses that an efficiency theorist might try to give. The failures of the last two responses nevertheless illustrate a more general point. In each case, the efficiency theorist has tried to justify the orthodox remedial rule by identifying specific features of the contracting situation that would appear to favor the orthodox remedy. Consequentialists do not, however, respect the *separateness of persons*, and the typical consequences that flow from one contracting situation are therefore evaluatively indistinguishable for them from the typical consequences that flow from any other similarly situated contracting situation. The efficiency theorist will therefore find it very difficult—if not impossible—to provide consequentialist reasons to reproduce concern for the separateness of these private relations. This concern is, however, fundamental to the law of contracts.

What the above considerations show, I think, is that efficiency considerations *cannot*—as is commonly supposed both by efficiency theorists and many of their critics—either explain or justify important features of our standard contractual remedies. They cannot explain why contractual remedies are owed to specific people, who are the specific victims of the contractual breaches. This aspect of contractual remedies is, moreover, so widespread and so basic that it would be almost unthinkable to reject it. Yet on closer scrutiny, there is nothing relating to efficiency maximization that would recommend that this particular feature of contractual remedies remain so robust. These facts provide a third and critically important reason to favor a contractualist account of these doctrines.

### *C. The Centrality of the Consideration Doctrine*

Another doctrine in modern contract law that has sometimes proven to be difficult to understand is the doctrine of consideration. As a general rule, only promises that are supported by consideration will be legally enforceable.<sup>68</sup> A promise is supported by consideration if there is some return promise or performance by another, which has been “bargained for,” in the sense that it was both

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68. RESTATEMENT (SECOND) OF CONTRACTS §§ 17, 71.

sought by the original promisor in exchange for the original promise and given by the promisee in exchange for the original promise.<sup>69</sup> There are also a number of familiar exceptions to this rule, but I want to begin by searching for a rationale for the basic rule.

We should begin by setting aside two well-known accounts of the doctrine. Lon Fuller has produced a highly influential account, but it is one that I have always found puzzling. Fuller suggests that we might understand the consideration doctrine as, in effect, serving the ordinary functions of a formality requirement, much like some of the historical doctrines that required certain covenants to be placed under seal to be enforceable.<sup>70</sup> Formality requirements are said to serve three main functions.<sup>71</sup> First, by creating conditions on the enforceability of promises, they help ensure that parties have properly deliberated before entering into them.<sup>72</sup> This is the so-called “cautionary” function.<sup>73</sup> Second, formalities help ensure that any enforceable promises made are better documented.<sup>74</sup> This is the so-called “evidentiary” function.<sup>75</sup> Third, formality requirements provide clear, bright line rules, which can help both parties and courts know precisely, and on the basis of clear, external signs, what needs to be done to make an enforceable promise.<sup>76</sup> This is the so-called “channeling” function.<sup>77</sup>

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69. *Id.* § 71 (“(1) To constitute consideration, a performance or a return promise must be bargained for. (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.”).

70. Fuller, *supra* note 23, at 799–803, 814–18.

71. *Id.* at 800–03.

72. *Id.* at 800 (“A formality may also perform a cautionary or deterrent function by acting as a check against inconsiderate action.”).

73. *See id.*

74. *Id.* (“The most obvious function of a legal formality is . . . that of providing evidence of the existence and purport of the contract, in case of controversy.” (internal quotation marks omitted)).

75. *See id.*

76. *Id.* at 801–03; *id.* at 802 (“One who wishes to communicate his thoughts to others must force the raw material of meaning into defined and recognizable channels; he must reduce the fleeting entities of wordless thought to the patterns of conventional speech. One planning to enter a legal transaction faces a similar problem.”).

77. *See id.*

Unfortunately, the consideration doctrine serves these functions very poorly, if at all. Gratuitous promises, for example, can be set forth in great detail, documented thoroughly, and entered into only after careful deliberation. They will still be unenforceable because they are not supported by consideration in the technical sense set forth above. This is what happened in *Dougherty v. Salt*,<sup>78</sup> where an aunt's written and carefully deliberated promise to help her nephew financially was deemed unenforceable for lack of consideration because she made her promise in return for past actions on the part of the nephew.<sup>79</sup> Similarly, many promises that are supported by consideration are entered into hastily and with no written record at all and no other evidence of the transaction.<sup>80</sup> They will still be enforced so long as there was a return promise or performance that was "bargained for" in the technical sense described above.<sup>81</sup> Finally, as anyone who has tried to teach the consideration doctrine can attest, the doctrine is not at all easy for most people to understand and apply, which suggests that it can only disserve a channeling function by making it less clear what must be done to make an enforceable promise. To my mind, facts like these suggest that Fuller's account of the consideration doctrine is not very plausible in the final analysis.

A second common view is that the consideration doctrine may have no real rationale at all, and may instead represent a series of historical accidents relating to the development of the common law. Judge Cardozo has expressed this thought quite nicely by saying that the consideration doctrine "came into our law, not so much from any reasoned conviction of its justice, as from historical accidents of practice and procedure."<sup>82</sup> But however accidental the origins of the doctrine may have been, the doctrine has proven too stable, too widespread, and too central to the modern law of contracts to

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78. 125 N.E. 94 (N.Y. 1919).

79. *See id.* at 94–95.

80. *See Fuller, supra* note 23, at 814–15 (explaining how a lack of consideration does not justify excluding enforcement of gratuitous promises because the formality provisions are equally applicable).

81. *See* RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981).

82. *Allegheny Coll. v. Nat'l Chautauqua County Bank*, 159 N.E. 173, 175 (N.Y. 1927) (citing 8 WILLIAM S. HOLDSWORTH, HISTORY OF ENGLISH LAW 7 (1926)).

plausibly think that it serves no function at all. What is still needed, in other words, is an explanation of the persistence of the doctrine, and an explanation of this persistence in terms of historical accident is not very plausible. The fact that these two accounts have nevertheless been so prominently featured in the literature shows—I think—just how difficult it can be to find a plausible rationale for the consideration doctrine, which links it up to principles underlying the modern law of contracts.

The discussions in the last subsection have nevertheless provided us with the materials to develop a contractualist account that meets these goals. According to the last subsection, the principal reason that rational persons deliberating from behind the veil of ignorance would agree to be legally bound by their promises was so that they could use these promises as tools to induce relative strangers into reciprocal promises or performances. If this is the reason why people would choose to be legally bound by their promises, however, then the reason will only extend to promises that are being used in this particular way. Which promises are these? They are precisely the set of promises that promisors are seeking to use to induce either a return promise or performance by another and which do in fact induce as much. They are, in other words, precisely the set of promises that meet the technical definition of being supported by consideration.<sup>83</sup> A contractualist about contract law can thus provide a straightforward account of this basic test, and thereby account for the consideration doctrine in a way that links it up with the deeper principles that it takes to underlie modern contract law.

Let us pause for a moment here, so as not to miss the real importance of the forgoing account of consideration. This lies not in its brevity, its capacity to grow in obviousness upon reflection, or its almost mathematical elegance. Indeed, these facts can distract one

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83. The *Restatement* states:

(1) To constitute consideration, a performance or a return promise must be bargained for. (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise. (3) The performance may consist of (a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification, or destruction of a legal relation.

RESTATEMENT (SECOND) OF CONTRACTS § 71.

from the more important fact that *there is as of yet no other plausible theoretical account of this doctrine in the literature.*<sup>84</sup>

We can, moreover, test the power of the present account by asking whether it illuminates any of the other nuances of the consideration doctrine. Consider, for example, the fact that courts have abandoned the earlier benefit-detriment test for consideration, under which courts would look for a return promise or performance that was a benefit to the original promisor and a detriment to the original promisee<sup>85</sup> and have replaced it with the technical test mentioned above.<sup>86</sup> Does this change make any sense? In the typical case, a promisor who is seeking to induce something from another

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<sup>84</sup> Promise-based theories can, for example, offer no rationale at all for this limitation. Indeed, these theories would recommend getting rid of the limitation altogether, because the doctrine is inconsistent with the idea that voluntary promises should be enforced in accordance with their terms, and because there is no analogue to the consideration doctrine in the ordinary morality of promise-keeping.<sup>84</sup> Fried has thus argued that the modern consideration doctrine is both analytically confused and inconsistent with the basic promissory rationales that he takes to underwrite modern contract law.<sup>84</sup>

Efficiency theorists, by contrast, will have a much easier time accounting for the centrality of the consideration doctrine. They can begin with the observation that the legal enforcement of promises is always somewhat costly. Modern markets nevertheless produce enormous increases in wealth and social welfare.<sup>84</sup> There are also good reasons to think that we must enforce promises that are parts of bargained-for exchanges if we hope to maintain the conditions of trust needed for strangers to enter into and fulfill market exchanges through promissory exchanges.<sup>84</sup> Because legal enforcement of these exchanges greatly expands the bounds of our cooperation, allows for modern markets to flourish, and allows for larger-scale cooperative efforts and divisions of labor, the benefits of enforcing these exchanges greatly outweighs the costs. The same cannot, however, be said for the enforcement of unilateral promises. Unilateral promises are by definition promises that seek nothing in return and, hence, are not being used to induce others to engage in any reciprocally advantageous exchanges. The stability of modern markets in no way depends upon enforcing these promises, and there are no other obvious large-scale social welfare benefits that depend upon their enforcement. The ordinary costs of their enforcement will therefore plausibly outweigh any benefits. By providing a rationale for the consideration doctrine, efficiency theorists can thus claim a second important explanatory advantage over promise-based theories.

<sup>85</sup> See Edwin W. Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929, 931 (1958).

<sup>86</sup> CHARLES L. KNAPP ET AL., *PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS* 45–47 (5th ed. 2003).

person will be seeking to induce something that is a benefit to the promisor and a detriment to the promisee, but this need not always be the case.<sup>87</sup> On the present account, enforceability would nevertheless be needed whenever the promisor is seeking to induce something period, however the benefits and detriments of the transaction work themselves out. The present account would thus help explain cases like the famous *Hamer v. Sidway*,<sup>88</sup> in which the court found that an uncle's promise to convey certain funds to his nephew was supported by consideration because it was conditioned on his nephew refraining from "drinking liquor[,] using tobacco, swearing, and playing cards or billiards for money until [he] should become twenty-one years of age."<sup>89</sup> The uncle in this case was trying to induce his nephew to engage in actions that would ultimately be beneficial to the nephew, and the uncle was promising to give something up that he valued himself, but the uncle still needed his promise to be enforceable to serve this function.<sup>90</sup> The promise in *Hamer v. Sidway* is thus one that a rational person deliberating behind a veil of ignorance would have chosen to render enforceable.

Another important nuance to the consideration doctrine lies in the fact that courts typically distinguish between *conditions* on promises and *consideration* for a promise.<sup>91</sup> A typical example of the former would be if someone were to promise a neighbor a used stereo, but only if the neighbor will pick it up herself. A typical example of the latter would be if someone were to promise the same neighbor the same used stereo, but only if the neighbor will give him her used CD player. As these examples suggest, it is sometimes hard to determine based on the language alone whether something is a condition on a promise or an instance of consideration. A good practical way to tell is to ask whether the relevant promisor is seeking to use his promise to induce some action or return promise

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87. RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. e.

88. 27 N.E. 256 (N.Y. 1891).

89. *Id.* at 257.

90. *Id.*

91. See *Plowman v. Indian Ref. Co.*, 20 F. Supp. 1, 5–6 (E.D. Ill. 1937) (holding that a contract to pay old employees pension for life was not supported by consideration even though payment was conditioned on the employees picking up their checks).

that he independently values. In the first case, where the promisor is willing to give his neighbor the used stereo if his neighbor will pick it up herself, the answer is presumably no. This is because the promisor presumably has no independent reason to want a visit from his neighbor, and is instead just telling his neighbor what to do to get what is in effect a gift. Coming to the house will thus be construed as a mere condition on the promise, and not as consideration for the promise. In the second case, by contrast, where the promisor is willing to hand over his used stereo if his neighbor is willing to give him her used CD player, the answer is presumably yes. This is because the promisor presumably wants the used CD player and is trying to use the promise of the stereo to induce the CD player's delivery. Delivery of the CD player will thus be construed as consideration for the promise and not as a mere condition on the promise. Once again, the contractualist account on offer here has proven illuminating.

One might think that the present account will nevertheless face grave difficulties when we turn to some of the well-known exceptions to the basic consideration doctrine. This is because the account explains why only promises supported by consideration would be enforceable, whereas the exceptions to this rule conflict with this basic premise. Perhaps the most important such exception lies in the modern doctrine of promissory estoppel.<sup>92</sup> Under this doctrine, a promise will typically be enforced through a reliance damages remedy, *even if it is not supported by consideration*, so long as the promisor should reasonably expect the promise to induce an action or forbearance, the promise does in fact induce such an action or forbearance, and the action or forbearance proves sufficiently detrimental (or when “injustice can only be avoided through its enforcement”).<sup>93</sup> Here, however, a contractualist might distinguish between two senses of enforcement. The arguments produced thus far aim only to account for the conditions under which contracts should be enforceable in the sense that expectation damages or specific performance should be given out for a breach. Hence,

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92. See, e.g., GRANT GILMORE, *THE DEATH OF CONTRACT* 78–81 (Ronald K.L. Collins ed., 2d ed. 1995) (1974) (suggesting that contract is being swallowed up by tort—due to this doctrine).

93. RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981). The reliance must typically be determined if injustice can only be avoided through enforcement.

nothing about the account will preclude a contractualist from articulating a second, independent reason why people deliberating from behind a veil of ignorance would choose a rule requiring enforcement through reliance damages in other circumstances.

I will therefore assume here, without trying to prove, that contractualists would support a basic principle of corrective justice,<sup>94</sup> under which people are required to compensate others for the harms caused by their wrongful or negligent acts.<sup>95</sup> A contractualist would presumably point to this principle as underlying much of modern tort law, and, given that we can harm people by making promises on which people rely, this principle will presumably apply to actions that are promises as well. Hence, this principle would presumably require us not to make promises too cavalierly, in the specific sense that we will be required to compensate others for any harms caused by their reasonable reliance on our broken promises. But this just is the doctrine of promissory estoppel. On the highly plausible assumption that contractualism would endorse familiar principles of corrective justice, contractualists can thus explain not only why we should typically enforce promises that are supported by consideration with expectation damages, but why we should typically allow for the recovery of reliance damages in cases of promissory estoppel.<sup>96</sup>

There are, finally, a number of other exceptions to the general rule that only promises that are supported by consideration are

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94. See Scanlon, *Promises and Practices*, *supra* note 43 (discussing promising in terms of reliance); Scanlon, *Promises and Contracts*, *supra* note 5 (discussing promising in terms of reliance); see also JULES L. COLEMAN, RISKS AND WRONGS 303–28 (1992) (discussing tort law as a matter of morality); Jules L. Coleman, *The Mixed Conception of Corrective Justice*, 77 IOWA L. REV. 427 (1992) (developing corrective justice as an underlying moral principal of tort law); Keating, *supra* note 92, at 197–202 (approving of Coleman’s concept of corrective justice). See generally Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403 (1992) (analyzing the disturbance in equality as it relates to right and duty represented within the structure of corrective justice).

95. Keating, *supra* note 92, at 197–98 & n.10.

96. The *Restatement* states:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981).

enforceable, and one might therefore try to base another objection to the present account on one of these exceptions. The exceptions in question typically fall under the heading of restitution,<sup>97</sup> the material benefit rule,<sup>98</sup> or quasi-contract.<sup>99</sup> Unlike the doctrine of promissory estoppel, these exceptions are quite narrow, and so tangential to the broad run of contract law cases that they may not require any contractualist account at all for the account to stand. In what follows, I will nevertheless articulate a contractualist account of these doctrines.

Importantly, the exceptions in question all involve instances where someone has conferred a material benefit on a relative stranger, and where one might think that the recipient of the benefit thereby acquires an obligation to repay the person who has conferred the benefit.<sup>100</sup> In small group settings, the provision of a gift often does in fact typically create a shared moral sense of a duty to reciprocate, and exchanges in small groups are often governed by informal processes of “gift-exchange.”<sup>101</sup> Gift-exchange is, however, a very poor route to identifying mutually beneficial exchanges among relative strangers because relative strangers typically know very little about one another’s concerns and interests. It would not make any sense to enforce the moral norms of gift exchange through the law, because the effect would be that any stranger could deliver items to one’s door and then demand payment, however useless the items turn out to be to the recipient. By limiting the legal enforcement of exchanges to promises that are supported by consideration, the law thus limits legal enforcement to exchanges between relative strangers that have more indicia of mutual benefit,

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97. *Id.* § 370 (“A party is entitled to restitution under the rules stated in this Restatement only to the extent that he has conferred a benefit on the other party by way of part performance or reliance.”).

98. *Id.* § 86 (“(1) A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice. (2) A promise is not binding under Subsection (1) (a) if the promisee conferred the benefit as a gift or for other reasons the promisor has not been unjustly enriched; or (b) to the extent that its value is disproportionate to the benefit.”).

99. *See id.* § 86(2); *Bowden v. Grindle*, 651 A.2d 347, 351 (Me. 1994).

100. *See, e.g., Webb v. McGowin*, 168 So. 199 (Ala. 1936); *In re Estate of Casey*, 583 N.E.2d 83 (Ill. App. Ct. 1991).

101. MAUSS, *supra* note 114.

arising from the processes of self-interested bargaining.

There are nevertheless a number of discrete circumstances in which courts can find other indicia that the recipient of the benefit will indeed benefit from the exchange. One indicium would be if the recipient subsequently promises to pay for the goods or services;<sup>102</sup> another would be if the recipient knows about the conferral and consents to it;<sup>103</sup> and a third would be in circumstances where consent to the material benefit is either impossible or immaterial—as, for example, when a person is unconscious and needs to be taken to a hospital—but where the goods or services are necessary to prevent serious bodily injury or pain, thus establishing that the exchange will very likely be mutually beneficial.<sup>104</sup> It is precisely in these and only these circumstances that the conferral of a material benefit to a relative stranger will give rise to a duty to pay the market value of the goods or services, even if there has never been any promise that was supported by consideration.<sup>105</sup> Given that the basic contractualist rationale for the rules of modern contract law account for these rules as facilitating mutually beneficial exchanges, a contractualist would presumably endorse these narrow exceptions to

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102. See, e.g., *Webb*, 168 So. 199; cf. RESTATEMENT (SECOND) OF CONTRACTS § 86(2) (1981) (“A promise is not binding under Subsection (1) (a) if the promisee conferred the benefit as a gift or for other reasons the promisor has not been unjustly enriched.”).

103. See, e.g., *Bowden*, 651 A.2d at 351 (“A successful claim of quasi-contract requires proof that (1) services were rendered to the defendant by the plaintiff; (2) with the knowledge and consent of the defendant; and (3) under circumstances that make it reasonable for the plaintiff to expect payment.” (citing *Bourisk v. Amalfitano*, 379 A.2d 149, 151 (Me. 1977))).

104. *Credit Bureau Enters. v. Pelo*, 608 N.W.2d 20, 27–28 (Iowa 2000) (holding that, under quasi-contract theory, a defendant was legally liable to pay for medical services provided to him when he was involuntarily committed to a private hospital); RESTATEMENT OF RESTITUTION: QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS § 116 (1937) (“A person who has supplied things or services to another, although acting without the other’s knowledge or consent, is entitled to restitution therefor from the other if (a) he acted unofficiously and with intent to charge therefor, and (b) the things or services were necessary to prevent the other from suffering serious bodily harm or pain, and (c) the person supplying them had no reason to know that the other would not consent to receiving them, if mentally competent; and (d) it was impossible for the other to give consent or, because of extreme youth or mental impairment, the other’s consent would have been immaterial.”).

105. See, e.g., *Webb*, 168 So. at 199–200; *Casey*, 583 N.E.2d at 86.

the consideration doctrine as well.

If the arguments produced thus far are valid, then contractualism about contract law can thus provide a particularly powerful and deep explanation of both the centrality of the consideration doctrine and a number of its otherwise puzzling exceptions. The explanation is more robust than either efficiency or promise-based accounts, and even helps to explain why distinct remedies are given out for different types of promissory breaches.

#### *D. Fairness v. Formation*

The final issue to address is whether the deference courts show to parties' voluntary actions, as embodied in the traditional principles of contract formation, can be squared with contractual fairness, as reflected in doctrines like the modern unconscionability doctrine. These two aspects of contract law are sometimes thought to be in tension with one another, and hence, to require a compromise between two distinct and fundamental values: liberty and fairness.<sup>106</sup> Contractualism about contract law would further the debates in this area if it could account for the deference that courts give to both values, in ways that clarify the legitimate scope of each.

To develop such an account, I begin with the Rawlsian proposition that rational persons deliberating from behind the veil of ignorance would allow for some inequalities, but only to the extent that such inequalities work to the benefit of the worst off.<sup>107</sup> When choosing rules to promote private exchange, they would therefore presumably prefer rules that tend to produce exchanges that are not only mutually beneficial, but also fair. They would, however, also presumably agree to deviations from this standard when such deviations tend to work to the benefit of the worst off. In the context of individual exchanges, the worst off will tend to be the one who risks obtaining the lesser share of the cooperative benefits from any given exchange.

Importantly, however, these last considerations are fully consistent with granting a great amount of deference to contracting parties' voluntary choices. One of the reasons why socialist-style, centralized state planning has worked so poorly is that the

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106. Kraus, *Legal Theory*, *supra* note 21, at 386.

107. RAWLS, *A THEORY OF JUSTICE*, *supra* note 1, at 130–34.

government often lacks the ability to identify individual exchanges that will be mutually beneficial, let alone fair.<sup>108</sup> By contrast, self-interested bargaining produces vast amounts of just this sort of information.<sup>109</sup> When parties bargain from equal starting positions, the results of their bargains will also tend to be fair. Given the costs involved in identifying fair bargains without relying on the contracting parties' voluntary choices, it would thus make sense for people in the origin position to choose a set of contract law rules that exhibit great deference to parties' voluntary choices, especially in circumstances where the parties begin from equal starting positions. Contractualism can thus be used to account for this deference.

But what about rules that allow or require courts to deviate from this deference and police bargains for fairness? The first point to recognize is that, given a number of plausible assumptions, this policing will only be legitimate in extraordinary circumstances. This is because, absent information produced by markets, it will often be very costly to determine whether a given exchange is either mutually beneficial or fair. To require such policing might thus undermine the benefits that both parties would otherwise obtain on an unregulated market, and rational persons deliberating behind the veil of ignorance would thus presumably allow for some unequal exchanges to persist on the open market.

At the same time, the above arguments critically rely on facts about our relative abilities to identify mutually beneficial and fair exchanges. It is thus worth noting that these abilities can change depending on the circumstances. For example, courts will be in a very different epistemic position once modern markets are in operation than they would be absent such markets. Courts might thus use the information produced by markets to identify exchanges that are likely unfair, and might do so without disrupting the informational benefits of modern markets—*so long as they police bargains as an exception rather than as the rule*. Similarly, courts will typically be in a very different epistemic position before an agreement has been entered than post-agreement. Once two parties have entered into an agreement, courts will typically be licensed to

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108. See Anderson, *supra* note 93; FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 32–42 (1944).

109. Anderson, *supra* note 93; Hayek, *The Use of Knowledge*, *supra* note 93, at 526.

presume that an exchange that occurs in accordance with the basic dickered terms will likely be mutually beneficial. Absent such an agreement, courts might not even know that.

We are now in a better position to determine when rational persons deliberating behind a veil of ignorance would choose rules that allow or require courts to police bargains for fairness. They will do so only when the costs of this policing would not undermine the parties' abilities to benefit from the rules of contract law. Additionally, they would presumably limit this policing to the extent necessary to preserve the information-producing features of modern markets.<sup>110</sup> Still, courts might identify unfair bargains in a way that meets these constraints by using a two-step process. First, they might check to see if there are any exceptional signs arising from the bargaining process that would suggest that one party had the ability to exploit the other. Signs of the relevant kind would include basic inequalities in bargaining positions, facts that render one of the parties' consent less than fully voluntary, and facts that suggest that there were asymmetries in information about the scope or nature of the agreement. Second, courts might, in these limited circumstances, use the more typical information gleaned from an open market to determine whether the agreement in question is wildly out of line with similarly-situated transactions.<sup>111</sup> If courts were to police transactions for fairness in these circumstances, their efforts would be perfectly legitimate on contractualist grounds.

A simple example will help to clarify what is being proposed here. Consider the case of an individual who hopes to capitalize on the devastating effects of Hurricane Katrina by flying a private helicopter over New Orleans and dangling bottles of water over victims who are left stranded on their rooftops. This person might exact exorbitant promises from these victims in return for these bottles of water. The circumstances of these bargains would, however, be so exceptional and indicative of possible exploitation that a court should—under the present suggested rules—look further into the terms of the bargains before enforcing them. Presumably, the market price for a bottle of water in the circumstances under discussion would be much higher than in ordinary situations, because

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110. See Anderson, *supra* note 93.

111. Hayek, *The Use of Knowledge*, *supra* note 93, at 525–27.

there will be costs involved with flying a private helicopter over New Orleans. Still, the market prices for both bottled water and services alike are settled enough that courts should be able to determine whether the owner of the helicopter has obtained promises of compensation that are exorbitant or fair. The suggestion here is that rational persons deliberating behind the veil of ignorance would endorse rules that require or allow courts to police bargains for fairness in just these kinds of circumstances.

Importantly, the present account would thus recommend a set of rules that allow, or require, courts to police bargains for fairness that are very much in line with the present law. Consider, for example, the modern doctrine of unconscionability.<sup>112</sup> Under this doctrine, courts will sometimes invalidate or reform contracts, but only in exceptional cases where they find an appropriate mixture of both “procedural” and “substantive” unconscionability—or unfairness in both the bargaining process and in the resulting terms of the agreement.<sup>113</sup> As a general rule, courts will require less evidence of procedural unconscionability to the extent that there is more evidence of substantive unconscionability and vice versa.<sup>114</sup> This is precisely the shape that this legal doctrine should take, on the present contractualist account of contract law. Indeed, if one looks at a number of doctrines in modern contract law that bring in considerations of fairness, one will find that they take a similar shape. The doctrines typically allow for increased scrutiny for substantive fairness in circumstances where facts about the bargaining process indicate that parties may be able to exploit the other party. Examples of such protections arise in things like fair

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112. See RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981); U.C.C. § 2-302 (2003); FARNSWORTH, *supra* note 80, § 4.28.

113. See FARNSWORTH, *supra* note 80, at 332–34; see, e.g., *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 502 (4th Cir. 2002); *Patterson v. Walker-Thomas Furniture Co.*, 277 A.2d 111, 113–14 (D.C. Cir. 1971); *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449–50 (D.C. Cir. 1965).

114. See *Burch v. Second Judicial Dist. Court of State ex rel. County of Washoe*, 49 P.3d 647, 650 (Nev. 2002) (“Generally, both procedural and substantive unconscionability must be present in order for a court to exercise its discretion to refuse to enforce a contract or clause as unconscionable. . . . Because the procedural unconscionability in this case is so great, less evidence of substantive unconscionability is required to establish unconscionability.” (citations omitted)).

lending practices and other consumer protection statutes,<sup>115</sup> the contra proferentem doctrine (which allows courts to interpret contractual ambiguities against the drafter in cases like this),<sup>116</sup> the reasonable expectations doctrine,<sup>117</sup> the scrutiny of contracts of adhesion,<sup>118</sup> the law of collective bargaining,<sup>119</sup> employment discrimination statutes,<sup>120</sup> and related doctrines.

Does policing of this kind end up trumping liberty? Not, in my view, on an appropriate understanding of liberty. There is a long tradition in political philosophy—going back through Rousseau and Kant—that begins with considerations of liberty and seeks to account for when constraints on our liberty might be legitimate for the sake of liberty itself.<sup>121</sup> The basic answer to this question is when we are acting under constraints that could be reasonably self-authored, and which give us a moral liberty that is far more valuable than the natural liberty we alienate to live under such a system.<sup>122</sup> Contractualist standards of the right are, moreover, meant to help us identify when such constraints could be appropriately self-authored.<sup>123</sup> This is very important for present purposes, because—for reasons discussed above—contractual promises are, by hypothesis, being legally enforced in part because their legal

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115. *E.g.*, UNIF. CONSUMER CREDIT CODE § 5.108 (1968).

116. *See* KNAPP ET AL., *supra* note 139, at 357–58.

117. *Id.* at 451–52.

118. *See* Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 639 (1943).

119. *E.g.*, National Labor Relations Act, 29 U.S.C. §§ 151–69 (2000).

120. *E.g.*, 42 U.S.C. § 2000e-2 (2006).

121. JEAN-JACQUES ROUSSEAU, *The Social Contract*, in THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS 41 (Victor Gourevitch ed., 1997), reprinted in CONTRACTARIANISM/CONTRACTUALISM, *supra* note 14, at 55–56 (“Man is born free, and everywhere he is in chains. . . . How did this change come about? I do not know. What can make it legitimate? I believe I can solve this question.”); KANT, *supra* note 42, at 19–44; IMMANUEL KANT, THE METAPHYSICS OF MORALS \_\_ (date).\*

122. ROUSSEAU, *supra* note 174, at 62–64; KANT, *supra* note 42, at 39; KANT, *supra* note 174, at 438.\*

123. RAWLS, JUSTICE AS FAIRNESS, *supra* note 52, at 18–24; RAWLS, A THEORY OF JUSTICE, *supra* note 1, at 221–27; DARWALL, *supra* note **Error! Bookmark not defined.**, at 305–07; *see* Scanlon, *Contractualism and Utilitarianism*, *supra* note 14, at 226–31.

enforcement gives us the capacity to use promises to induce others to act. If we are genuinely concerned with preserving liberty, we must therefore ask when the use of such promises might be coercive—in which case they will undermine liberty—and when their use might be legitimate and non-coercive. If the arguments in this subsection are right, then private persons seeking to induce others into exorbitant agreements, which can be identified in roughly the above manner, will be acting coercively because they will be inducing people into actions by employing rules that could not be endorsed from a contractualist perspective. Hence, considerations of liberty, properly construed, may require courts to police bargains for fairness in these circumstances.

As earlier sections have suggested, the role of contractual fairness in contract law is something that neither efficiency-based nor promise-based theories of contract have been able to explain. Contractualism about contract law thus provides a much more robust and integrated account than either of these theories can when it comes to the question of how to balance contractual fairness with contractual liberty.

### III. OBSTACLES AND CONSTRAINTS

The last section developed a contractualist account of contract law that harmonizes some of the central tensions in this area of the law. The best way to argue that one can produce a plausible account of this form is, of course, simply to produce it, and I have sought to do this in the last section. Still, there are a number of important obstacles that any such project will face, and it will be useful to handle these as possible objections to the present project. These obstacles likely explain the dearth of work that has been done in this area.

The obstacles I have in mind fall into three basic categories: (1) the comparative robustness of contemporary economic explanations of contract law doctrine, especially in relation to leading deontological alternatives; (2) the potential circularity or triviality of contractualism about this specific area of the law; and (3) the arguable consistency between contract law doctrines that are set up to promote efficiency and Rawls' contractualist account of justice in application to the basic structure of society.

Ultimately, I believe that all three of these obstacles can be

overcome. Their discussion will nevertheless be useful because it will yield a number of important constraints that any plausible contractualism about contract law must meet. In developing the particular contractualist standards applied in Section II, I have, moreover, been careful to ensure that the test meets these special constraints.

*A. The Comparative Robustness of  
Economic Explanations of Modern Contract Law*

One possible objection that one might raise to the present project arises from the relative comparative robustness of efficiency theories over promise-based theories. This section will describe exhibit this robustness by describing the three main doctrinal areas that form the object of the present inquiry. It will then consider why these facts might be thought to pose a particular challenge to contractualism, given certain common assumptions about the relationship between contractualism and the ordinary morality of promise-keeping.

[INSERT PARAGRAPH: Efficiency theory does better than promise-based theories with regard to expectation damages; promise-based theories do very poorly concerning the consideration requirement, while efficiency theorists can at least frame some plausible accounts of this limitation]

This brings us to the third central question in contract law that is under discussion here—namely, how to reconcile the deference to freedom of choice that arises in rules like those of offer and acceptance with considerations of fairness that courts sometimes use to police contractual bargains. Neither promise-based nor efficiency theories can claim any particular explanatory advantage here. For reasons discussed above, both can explain why we would employ the rules of offer and acceptance to identify voluntary exchanges and then enforce them according to their terms. But neither will typically view any policing for fairness as either required by or consistent with their proposed principles.<sup>124</sup> If the goal is to achieve wide reflective equilibrium, and if no principle can be found that would warrant the rules that allow courts to police bargains for fairness, then we should presumably either conclude that the goal may be unattainable and

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124. See FRIED, *supra* note 4, at 103–08; Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 293–95 (1975).

settle on a form of intuitive value pluralism<sup>125</sup> or extinguish fairness considerations from the modern law of contracts—as a number of laissez-faire capitalists, economists, and libertarians have argued.<sup>126</sup> Indeed, one of the central advantages of contractualism about contract law will lie in its ability to help us make sense of these fairness considerations.

The foregoing discussions have compared the explanatory power of efficiency-based theories with promise-based theories. It will thus be natural to ask how relevant this discussion is for our main topic, which is contractualism about contract law. On one view, contractualism might be thought of as inheriting the explanatory deficiencies of promise-based theories. Support for this view arises from the fact that contractualism is typically thought of as validating many of the ordinary rules of morality, including those of promise-keeping.<sup>127</sup> Indeed, T.M. Scanlon has produced a well-known and highly influential contractualist account of the moral norms governing ordinary promise-keeping.<sup>128</sup> If, however, contractualism would recommend a set of rules that reflect the

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125. See Kraus, *Reconciling*, *supra* note 21, at 390–422; Kraus, *Legal Theory*, *supra* note 21.

126. See, e.g., *Oki Am., Inc. v. Microtech Int'l, Inc.*, 872 F.2d 312, 316 (9th Cir. 1989) (Kozinski, J., concurring) (“Perhaps most troubling, the willingness of courts to subordinate voluntary contractual arrangements to their own sense of public policy and proper business decorum deprives individuals of an important measure of freedom. The right to enter into contracts—to adjust one’s legal relationships by mutual agreement with other free individuals—was unknown through much of history and is unknown even today in many parts of the world. Like other aspects of personal autonomy, it is too easily smothered by government officials eager to tell us what’s best for us.”); RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 78–79 (1995). See generally Jay M. Feinman, *Un-Making Law: The Classical Revival in the Common Law*, 28 SEATTLE U. L. REV. 1, 14–16 (2004) (discussing the classical revival in contract law); Amy J. Schmitz, *Embracing Unconscionability’s Safety Net Function*, 58 ALA. L. REV. 73, 90–103 (2006) (reviewing the major objections to the unconscionability doctrines).

127. See Rahul Kumar, *Defending the Moral Moderate: Contractualism and Common Sense*, 28 PHIL. & PUB. AFF. 275, 281–82 (2000); see also IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 14–15 (James W. Ellington trans., Hackett Publ’g Co. 3d ed. 1993) (1785) (discussing the importance of promise-keeping to morality).

128. Thomas Scanlon, *Promises and Practices*, 19 PHIL. & PUB. AFF. 199, 205 (1990) [hereinafter Scanlon, *Promises and Practices*]; Scanlon, *Promises and Contracts*, *supra* note 3, at 86–93.

ordinary morality of promise-keeping, and if these moral principles were to diverge greatly from those of modern contract law, then contractualism might be thought to inherit the explanatory deficiencies that have thus far been identified with promise-based theories. Facts like these may help to explain why there has been so little work developing a contractualist account of the rules of modern contract law.

Strictly speaking, however, the above considerations do not establish that contractualism inherits these problems. What they establish is that contractualism must, instead, meet certain constraints if it is to avoid these problems. In particular, contractualism must provide a *direct* account of the relevant rules of modern contract law, without any mediation through the ordinary morality of promise-keeping. Such an account will likely focus on specific features of the law that differentiate it from morality, and may include some reference to the special role that contract law plays in helping to sustain modern market activity. The account should also be either more robust, or at least as robust, in its explanatory power as efficiency-based theories. I therefore propose that we accept these two constraints as important restrictions on any plausible contractualist account of the rules of modern contract law. It should be clear that the contractualist account of contract law developed in Section II meets these important constraints.

### *B. The Threat of Circularity*

The preceding discussion suggested that contractualism about contract law should aim to provide a direct account of the rules of modern contract law, rather than seeking to account for them indirectly by reference to the morality of ordinary promise-keeping. But what exactly would a direct account of these rules look like? This brings us to the second potential obstacle facing the present project: the possibility that contractualism about this specific area of the law will end up being either trivial or viciously circular. If this were the case, then the theory would be incapable of providing any genuine explanatory or justificatory force at all.

Once again, this danger may help explain why there has been so little work trying to develop a contractualist account of modern contract law.<sup>129</sup> Once again, however, a more thoughtful response

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129. As far as I have been able to discern, only one other attempt has been

would view this danger as placing further constraints on the form that any plausible contractualism about contract law must take. Specifically, whether the view can avoid this danger will depend on three things: (1) the degree to which the specific contractualist standard that is employed diverges from the particular rules of contract law that it recommends;<sup>130</sup> (2) the degree to which this same contractualist standard finds independent theoretical and/or philosophical support; and, relatedly, (3) the degree to which the contractualist standard is capable of accounting for other areas of the law, which do not concern either contracts or promises. This last condition is related to the second because, when seeking to achieve wide reflective equilibrium, the fact that a standard can explain a wider range of legal doctrine will tend to provide some justification for that standard.<sup>131</sup>

To get a sense of how it might be possible to meet these criteria, consider Rawls' well-known contractualist account of justice, which asks us to choose principles of justice from an original position, in which a veil of ignorance has been imposed that prevents the relevant choosers from knowing any morally arbitrary features of their personal situations.<sup>132</sup> Although Rawls employs the metaphor of a "social contract" to describe this choice situation, it is clear that this is a metaphor only,<sup>133</sup> and that Rawls' main purpose is to proceduralize a number of our intuitions about fairness.<sup>134</sup> None of these intuitions directly involve our obligations to keep promises, and Rawls provides a number of independent theoretical and philosophical considerations that favor this procedural test as the one that best captures our intuitive sense of fairness.<sup>135</sup> As is familiar,

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made: Kordana & Tabachnick, *supra* note 3.

130. Thank you to Peter Railton for our discussions regarding this section.

131. RAWLS, A THEORY OF JUSTICE, *supra* note 1, at 15–17.

132. *Id.* at 16–18.

133. *Id.* at 14–15.

134. *See id.* at 15.

135. Rawls brings several common-sense considerations to bear on the reasonability of his assumptions in the original position. *Id.* at 16. He states that, in the choice of principles, "it seems reasonable and generally acceptable that no one should be advantaged or disadvantaged by natural fortune or social circumstances . . ." *Id.* Additionally, "it should be impossible to tailor principles to the circumstances of one's own case," as well as to one's particular inclinations, aspirations and conceptions of the good. *Id.*

Rawls also argues that we would choose a number of distinctive principles from the original position, which would, in turn, explain both the priority that our law gives to a number of familiar civil rights and liberties<sup>136</sup> and a number of other distinctive features of our political and economic system, including our uses of a graduated taxation scheme and our systems of social security and social welfare.<sup>137</sup>

If we were able to construct an account of the modern rules of contract law from this starting point, we would thus be able to exhibit the relationship between these rules and a separate procedure for justification that not only finds independent theoretical and philosophical support, but that would also show these rules to be deeply consistent with a much broader range of legal doctrine.<sup>138</sup> The fact that efficiency theorists have tended to concede that their theory explains only a more limited range of doctrine (typically in the private law areas) would, by contrast, tend to call their deep explanatory project into question. To avoid the charge of circularity, I have thus adopted a broadly Rawlsean framework in Section II and have sought to account for a number of more specific contract law rules that diverge in substance from anything stipulated in the original position.

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136. See RAWLS, *POLITICAL LIBERALISM*, *supra* note 1, at 291–99; RAWLS, *A THEORY OF JUSTICE*, *supra* note 1, at 52–53.

137. See RAWLS, *A THEORY OF JUSTICE*, *supra* note 1, at 21; JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 124, 135–40, 158–61 (Erin Kelly ed., 2001) [hereinafter RAWLS, *JUSTICE AS FAIRNESS*].

138. Or consider Scanlon's contractualist account of the ordinary morality of promise-keeping. It meets these criteria because his contractualist standard is set forth in terms of rules that could not be reasonably rejected as the basis of an informed, uncoerced, general agreement. Scanlon, *Contractualism and Utilitarianism*, *supra* note 14, at 227. Scanlon provides a number of philosophical considerations, which are independent of anything that has to do with promising, to suggest that this appropriately characterizes the standard governing what we owe to one another. *Id.* at 226–31. These include the fact that this standard can provide a satisfying account of the subject matter of morality, which gives it truth conditions and makes sense of its objective purpose, while still capturing the important link that our moral judgments have to a plausible source of human motivation. *Id.* at 229–31. This standard can also be used to explain and justify a much larger set of obligations than just those dealing with promises. Seeing the ordinary morality of promise-keeping as reflective of a distinctive principle that helps us see how this part of morality coheres with many others is thus both helpful and illuminating.

### *C. Efficiency, Contractualism and Liberalism*

In the last subsection, I explained some of the reasons why I have used a modified Rawlsian framework to try to account for the rules of modern contract law. Ironically, however, a third fact that may help explain the paucity of work developing such an account derives from features of Rawls' own contractualist account of justice. In particular, his account can be read as harmonizing contractualism with a set of contract law rules that are explicitly set up to promote efficiency. To see this, let us begin by assuming that such a system of rules exists, and then ask what it would take to render them consistent with Rawls' explicit theory of justice as fairness.

The initial point to recognize is that Rawls' theory is limited in scope. In arguing for justice as fairness, Rawls famously employs the same method of wide reflective equilibrium that we have adopted in this Article.<sup>139</sup> He is, however, careful to limit the claims he is defending to ones concerning the appropriate principles for governing what he calls the "basic structure of society."<sup>140</sup> He describes the basic structure as "the way in which the main political and social institutions of society fit together into one system of social cooperation, and the way they assign basic rights and duties and regulate the division of advantages that arises from social cooperation over time."<sup>141</sup> He further clarifies that this structure includes "[t]he political constitution with an independent judiciary, the legally recognized forms of property, and the structure of the economy (for example, as a system of competitive markets with private property in the means of production), as well as the family in some form . . ."<sup>142</sup> Rather than applying his contractualist standard directly to the rules of contract law, however, Rawls suggests that his theory does not apply to individualized interpersonal transactions.<sup>143</sup>

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139. RAWLS, A THEORY OF JUSTICE, *supra* note 1, at 17–18.

140. *Id.* at 17.

141. RAWLS, JUSTICE AS FAIRNESS, *supra* note 52, at 10.

142. *Id.*

143. See, e.g., JOHN RAWLS, *A Kantian Conception of Equality*, in JOHN RAWLS: COLLECTED PAPERS 254, 262 (Samuel Freeman ed., 1999) ("Thus the difference principle holds, for example, for income and property taxation, for fiscal and economic policy; it does not apply to particular transactions or distributions, nor, in general, to small scale and local decisions, but rather to the background against which these take place."). I am indebted to Noam Glick for this reference.

These questions—he suggests—are beyond the purview of his theory.

This does not mean that Rawls' explicit theory would place no constraints at all on how modern contract law operates. It just means that any relevant constraints will derive from the principles of justice that he articulates as applicable to the basic structure of society, along with any relevant prioritization rules. So, let us take a look at these issues more closely. The two well-known principles that form Rawls' "special conception of justice" are as follows:

First Principle: Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.

Second Principle: Social and economic inequalities are to be arranged so that they are both:

- a. to the greatest benefit of the least advantaged; and
- b. attached to offices and positions open to all under conditions of fair equality of opportunity.<sup>144</sup>

Rawls' special conception of justice also contains two familiar prioritization rules. According to the first—*the Priority of Liberty*—the principles of justice are to be ranked in lexical order and therefore liberty can be restricted only for the sake of "liberty" itself.<sup>145</sup> By "liberty," Rawls is not referring to a broad set of liberties that Fried, or other libertarians, consider as foundational, and which might include an absolute right to freedom of contract. He is referring to what he calls the "basic liberties," which are the standard civil and political rights recognized in liberal democracies:

[A]mong these are political liberty (the right to vote and to hold public office) and freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person, which includes freedom from psychological oppression and physical assault and dismemberment (integrity of the person); the right to hold personal property

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144. RAWLS, A THEORY OF JUSTICE, *supra* note 1, at 266. According to Rawls's general conception of justice, in application to the basic structure of society, "[a]ll social values—liberty and opportunity, income and wealth, and the social bases of self-respect—are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage." *Id.* at 54.

145. *Id.* at 53–54.

and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law.<sup>146</sup>

According to the second priority rule—*the Priority of Justice over Efficiency and Welfare*—“[t]he second principle of justice is lexically prior to the principle of efficiency and to that of maximizing the sum of advantages; and fair opportunity is prior to the difference principle.”<sup>147</sup>

This special conception of justice would, in fact, place a number of important constraints on an efficiency-based system of contract rules. Two important constraints follow directly from his prioritization of justice over efficiency and welfare. First, a system of contract law rules that promotes efficiency will only be just within the context of a larger legal system that protects individuals’ basic civil and political liberties. In fact, we see such restrictions in our constitutional system. Second, the law should presumably prohibit parties from inducing one another to waive these important rights in exchange for economic benefits or opportunities.<sup>148</sup> We see this kind of limitation as well in phenomena like the doctrine of unconstitutional conditions, which prohibits the government from inducing people to waive their basic constitutional rights;<sup>149</sup> and in prohibitions against things like vote buying.<sup>150</sup>

A third set of consequences derives from the prioritization of equality of opportunity over the principle of efficiency and that of maximizing the sum of advantages. This limitation is needed in any society, like ours, which “make[s] use of differences in authority and responsibility.”<sup>151</sup> The principle of equality of opportunity thus requires that “positions of authority and responsibility must be

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146. *Id.* at 53.

147. *Id.* at 266.

148. “It is this kind of exchange which the two principles rule out; being arranged in serial order they do not permit exchanges between basic liberties and economic and social gains . . .” *Id.* at 55.

149. *Bourgeois v. Peters*, 387 F.3d 1303, 1324–25 (11th Cir. 2004); *see also Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (discussing how certain constitutional interests cannot be denied by the government).

150. *See Burroughs v. United States*, 290 U.S. 534, 548 (1934) (“[P]ublic disclosure of political contributions . . . tend[s] to prevent the corrupt use of money to affect elections.”); Richard L. Hasen, *Vote Buying*, 88 CAL. L. REV. 1323 (2000).

151. RAWLS, A THEORY OF JUSTICE, *supra* note 1, at 53.

accessible to all.”<sup>152</sup> To meet this constraint, some limitations on private contracting will, however, presumably be necessary, especially in situations where the markets in question tend to have great bearing on peoples’ access to such positions. These will plausibly include employment markets, markets for education, housing markets, and the like.<sup>153</sup> Importantly, we do in fact see limitations like these in our antidiscrimination statutes, which prevent people from refusing to contract with people based on morally suspect grounds in these kinds of contexts.<sup>154</sup>

Finally, a fourth set of consequences derives from the principle that social and economic inequalities are to be arranged so that they are to the greatest benefit of the least advantaged. In order for a system of contract law rules that are set up to maximize efficiency to be just, they must therefore operate in the context of a set of institutions that guarantee that this difference principle has been met. This would occur if these markets were to operate in the context of a social welfare state, funded by a system of tax-and-transfer that guarantees that markets work to the advantage of the least well-off. Rawls’ discussions of the difference principle are thus typically viewed as providing a principled justification for the social welfare state.<sup>155</sup>

It should be clear, however, that Rawls’ two principles of justice provide no further grounds for constraining a system of contract law rules that are set up to promote efficiency. It might thus be tempting to conclude that such a system would be consistent with contractualism. Indeed, on this reading of Rawls, contractualism might even be viewed as endorsing and justifying the use of efficiency principles in many of the limited domains of private law where efficiency theory has been most successful. And facts like these may, once again, help explain why there has been so little work developing an alternative and direct contractualist account of the

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152. *Id.*

153. See John Rawls, *Distributive Justice*, in *LAW AND PHILOSOPHY: A SYMPOSIUM 58* (Sidney Hook ed., 1964), reprinted in *JOHN RAWLS: COLLECTED PAPERS*, *supra* note **Error! Bookmark not defined.**, at 130, 138–44 (Samuel Freeman ed., 1999).

154. See, e.g., Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2(a) (2006).

155. See WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION* 57–60 (2nd ed. 2002).

rules of modern contract law.

I think the issues raised here run much deeper, however, and that a failure to address them will create larger problems for liberal theory than has sometimes been acknowledged. Rawls is, after all, quite clear that he does not believe that his contractualist framework yields principles of efficiency maximization.<sup>156</sup> These principles are also inconsistent with his two principles of justice. But if contractualism is indeed the right way to account for the deep principles that legitimately govern what we owe to one another, then it is not obvious why the theory would not apply equally to the rules of contract law.<sup>157</sup> In order to justify the application of efficiency principles to our decisions about what contract law rules to adopt, one must thus believe either that there are important reasons to limit the scope of contractualism, which render the theory inapplicable to the rules governing private transactions, or that there are contractualist grounds for permitting efficiency maximization to govern these transactions.

Notice that neither of these last claims can be established merely by defining the basic structure of society in a way that leaves the rules governing private transactions out. Nor can I find any other arguments in Rawls' work that would establish these claims.<sup>158</sup> To the contrary, Rawls suggests that he limits his attention to the basic structure of society only because he has limited the scope of the

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156. RAWLS, *A THEORY OF JUSTICE*, *supra* note 1, at 135.

157. As Seana Shiffrin recently put it, “[t]he content and normative justifications of a legal practice—at least one that is pervasive and involves simultaneous participation in a moral relationship or practice—should be capable of being known and accepted by a self-consciously moral agent.” Shiffrin, *supra* note 28, at 712. If our self-understanding of the long-standing principles that justify many areas of the law were to diverge too strongly from those that shape our contract law rules, it would create a deep divergence in our understanding of the law. Additionally, as Shiffrin has suggested, “[l]aw’s justification should not depend on its being opaque or obscure or upon the ignorance, amorality, or split personality of the citizens it governs.” *Id.* at 717–18.

158. There are—I believe—plausible arguments that would limit the scope of contractualism to questions of what we owe to one another, or to issues of interpersonal obligation. See SCANLON, *WHAT WE OWE TO EACH OTHER*, *supra* note 2, at 189–91; DARWALL, *supra* note **Error! Bookmark not defined.**, at 301–02. However, both the obligations that arise from our private agreements and the obligations that we have to contribute to the welfare of those of us who are the most disadvantaged fall within this subject matter.

problems he is addressing. According to Rawls:

Justice as fairness begins . . . with one of the most general of all choices which persons might make together, namely, with the choice of the first principles of a conception of justice which is to regulate all subsequent criticism and reform of institutions. Then, having chosen a conception of justice, we can suppose that they are to choose a constitution and a legislature to enact laws, and so on, all in accordance with the principles of justice initially agreed upon. Our social situation is just if it is such that by this sequence of hypothetical agreements we would have contracted into the general system of rules which defines it. . . .

[But] [j]ustice as fairness is not a complete contract theory. For it is clear that the contractarian idea can be extended to the choice of more or less an entire ethical system, that is, to a system including principles for all the virtues and not only for justice. Now for the most part I shall consider only principles of justice and others closely related to them; I make no attempt to discuss the virtues in a systematic way. Obviously if justice as fairness succeeds reasonably well, a next step would be to study the more general view suggested by the name "rightness as fairness." . . . We must recognize the limited scope of justice as fairness and of the general type of view that it exemplifies.<sup>159</sup>

Under a more plausible reading of Rawls, his definition of the basic structure of society is thus meant to focus attention on a specific set of problems in political philosophy. These problems concern the status of our basic civil and political rights and the justice and legitimacy of the social welfare state. Rawls' work suggests that some form of a social welfare state is necessary to render modern markets legitimate, because they produce vast increases in social welfare but also distribute these gains in morally arbitrary ways. Yet on a more plausible reading, Rawls' work has no direct bearing at all on whether additional constraints on efficiency maximization would be needed to legitimate the more specific rules

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159. RAWLS, A THEORY OF JUSTICE, *supra* note 1, at 11–12, 15.

that govern private transactions. Rawls' arguments about the justice of the basic structure of society simply do not address these issues head on.

Although I favor this latter reading of Rawls, it will ultimately create an even greater need for a contractualist account of the rules of modern contract law. As noted earlier, Rawls explicitly denies that his brand of contractualism will yield a consequentialist standard of the right, and principles of efficiency-maximization are inconsistent with this brand of contractualism. If efficiency principles offer a better explanation of contract law doctrine, however, and if, in the process of seeking wide reflective equilibrium, we must ultimately try to render the rules governing contract law consistent with the principles that govern the basic structure of society, then we would appear to be facing a very deep conflict. Given the importance of modern markets to flourishing modern economies, and given the equal importance of distributive justice, this conflict may even be one that makes us feel forced to choose between principles of justice and social welfare. It is—I believe—a conflict that is commonly felt not only at the theoretical level but also at the level of ordinary political disagreement.<sup>160</sup>

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160. Indeed, the problem for liberal theory may run deeper, given recent events that have been leading to the dismantling of the social welfare state. *See generally* PAUL PIERSON, *DISMANTLING THE WELFARE STATE? REAGAN, THATCHER, AND THE POLITICS OF RETRENCHMENT* (1994) (discussing the elements of political retrenchment and the difficulties of a standard analysis). Rawls's difference principle is, after all, justified partly on the basis of its power to explain a feature of the modern social welfare state. *See* KYMLICKA, *supra* note 70, at 88–89 (discussing the “link” between philosophy of liberal equality and the politics of the welfare state).

There are, however, other explanations for the dismantling of the social welfare state that would be consistent with modern liberalism. For example, one might simply insist that these historical developments are instances of injustice and point to the resistance we sometimes see to them as evidence. Or, one might follow Will Kymlicka and suggest that while Rawls's basic approach is meant to articulate a standard of justice that is ambition and endowment sensitive, in practice, our present system of tax-and-transfer sometimes diverges from these criteria. *Id.* at 70–75, 91–92. Then one might view the dismantling of the social welfare state as partly generated by our sense of the injustice in how it is implemented. *Id.* at 91–92. Still, at the very least, the plausibility of arguments like these will depend, in part, on whether we can harmonize contractualism with the rules governing our private market transactions. A proper understanding of Rawls's work should not, therefore, render contractualism about contract law

For all the above reasons, foundational questions in contract theory may have broader implications for the cogency of modern liberal theory than has sometimes been recognized. In my view, more work therefore needs to be done trying to render the principles underlying contract law consistent with larger principles of political justice. In the next section, I turn to that task by developing a contractualist account of modern contract law that meets the constraints thus far identified.

#### IV. CONCLUSION

Despite the prominence of contractualism in most other areas of normative inquiry, contractualism has not yet found a systematic place in theoretical discussions of the rules of modern contract law. As discussed above, there are seemingly good reasons for this absence, but none that should be taken as determinative. In the course of this Article, I hope to have used these considerations instead to derive important constraints on the form that any satisfying contractualist account of modern contract law must take; and to have sketched out the basic contours of a view that meets these constraints. I also hope to have established the view as a serious contender in theoretical debates about this area of the law. Indeed, this promise is, in my view, independent of any of the particular argument developed thus far, and rests ultimately on the fact that contractualism may have the power harmonize a number of seemingly inconsistent but central contract law doctrines. At minimum, the arguments set forth in this Article should thus be sufficient to warrant further time and effort developing the view.

The implications of developing this view are, however, more than theoretical. Before concluding, I would like to point to four such implications, which have been touched upon in the body of this Article but deserve further highlighting.

First, contractualism about contract law may have the power to help depoliticize, and then answer, questions about the appropriate role that fairness considerations should play in the rules of modern contract law. It might do this by providing a unified account of the

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irrelevant. Quite to the contrary, the plausibility of liberalism may depend in part on our ability to articulate just such a theory.

rules of modern contract law, which shows precisely when contractual fairness and contractual liberty are appropriate expressions of the deeper principles underlying this area of the law. Second, contractualism about contract law may have the power to meet an important but underappreciated challenge to modern liberal political theory. Specifically, if the rules of modern contract law are ultimately governed solely by efficiency considerations, then this fact would appear to create tensions with some of the basic principles of contractualism as we seek to achieve wide reflective equilibrium on our legal practices. Third, given the potential robustness of contractualist accounts of many areas of public law, contractualism about contract law may help yield a unified theory of when precisely the rules of private contracting should yield to rules arising from public law—as when contracts are deemed void as against public policy. This question can appear intractable, however, if we view public and private law as distinct legal domains, which are governed by distinct and inconsistent fundamental principles.

Finally, fourth, contractualism about contract law may help address an important concern that Seana Shiffrin has recently raised, which arises from the fact that modern contract law diverges from the ordinary morality of promise-keeping in a number of important ways.<sup>161</sup> Shiffrin is concerned about this fact because she believes—rightly, in my view—that “[t]he content and normative justifications of a legal practice—at least one that is pervasive and involves simultaneous participation in a moral relationship or practice—should be capable of being known and accepted by a self-consciously moral agent.”<sup>162</sup> It should be remembered, in this regard, that part of Rawls’ own project was to generate a reconciliation between the content and normative justification that are capable of being known and accepted by self-consciously moral agents and modern markets, at least in the context of a social welfare state.<sup>163</sup> Shiffrin’s concern might thus be usefully restated as highlighting that Rawls himself achieved only a partial reconciliation, in this regard, because he left the modern rules of contract law unanalyzed.

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161. See Shiffrin, *supra* note 28.

162. *Id.* at 712.

163. See RAWLS, A THEORY OF JUSTICE, *supra* note 1, at 239–42; see also KYMLICKA, *supra* note 70, at 88 (describing the “link between the philosophy of liberal equality and the politics of the welfare state”).

Contractualism about contract law may have the power to close this gap, and effect a deeper reconciliation. To effect this reconciliation, we will—however—likely need to begin viewing contract law as a partly technical area of the law, which is related to the ordinary morality of promise-keeping but that cannot be reduced to it. We will also need to begin understanding contracting and promising as operating in distinct but compatible realms, and to acknowledge the legitimate role that fairness considerations should play in policing some individual bargains.