

# MAKING AND KEEPING CONTRACTS

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## INTRODUCTION

CONTRACTS—and indeed *agreements* more generally, as I shall call contracts and promises when I refer to them together<sup>1</sup>—present two basic practical questions. First, what reasons exist for making agreements; and second, what reasons exist for keeping such agreements as have been made?

The second of these two questions is more familiar than the first, and it certainly establishes a more immediate claim on our unreflective curiosity about the morality of agreements. Questions concerning why one should keep one's promises, for example, and, inevitably, questions concerning when one might break them, are among the mainstays of casuistic moral philosophy and, indeed, figure prominently in everyday moral practice. And questions concerning why one should keep one's contracts, and when one might break them, figure prominently in everyday legal practice.

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<sup>1</sup> I am using "agreement" here narrowly, as a term of art. Others have of course used the term differently, and more broadly, as for example in Hume's observation that "[t]wo men, who pull the oars of a boat, do it by an agreement or convention, tho' they have never given promises to each other." David Hume, *A Treatise of Human Nature* 490 (L.A. Selby-Bigge ed., 1978) (bk. III, pt. II, sec. II). This broader usage, moreover, probably more nearly tracks ordinary language, which readily recognizes agreements entirely apart from promise and contract, as when a husband and wife, deliberating about what to do for dinner, agree to eat out. I employ the term more narrowly nevertheless, because the overlap between theories of promise and contract makes it helpful to treat them together, and *agreement* remains the best available word for the pair. The narrower usage will cause no problems as long as its unconventional nature is kept in mind.

The first question—the question about making agreements—might seem somehow more alien, but reflection reveals that it stakes no less immediate or firm a claim on our attention. Thus it is natural to ask whether individual persons should arrange their affairs and pursue their ends by means of promises rather than by some other means, and to ask what values are most effectively (or perhaps even distinctively) served by adopting promise-based forms of coordination and planning.<sup>2</sup> The institution of marriage, for example, is based on the idea that persons in a certain form of relationship should not merely display loyalty and fidelity but should also *promise* it. Conversely, some forms of trust highlight the value of dealing honestly with others entirely apart from any promise to do so.

Similarly, it is natural to ask what reasons a society has to promote or support contractual accommodations of its members' interests, as opposed to accommodations achieved by some other means—say, by bureaucratic regulation, by the tort system, or by less formal mechanisms of social control that lie outside the market and indeed beyond the law. When presented in this context, questions concerning the value of making contracts strike a familiar (and familiarly important) cord. Indeed, they have recently received extensive attention under a variety of headings—including the rise of the welfare state,<sup>3</sup> the tortification of contract law,<sup>4</sup> and

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<sup>2</sup> A surprisingly common answer is that there is never any independent reason to make promises—that promises have merely instrumental value—so that there is never any reason to employ promises insofar as people can achieve their ends without them. Richard Craswell, for example, observes that it is not surprising that the problem of making promises has “received little attention in philosophical writings about promising as such” because, as he puts it, “[i]f a person is wondering whether to promise money to the poor, the most interesting question (from the standpoint of ethics) is whether she ought to help the poor at all” rather than the “subsidiary question” whether she ought to do so by promising. Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 Mich. L. Rev. 489, 491–92 (1989). Others have adopted similar positions; for example, that it cannot be “a reason for someone to make a promise that she would be able to fulfill it later on.” Holly M. Smith, *A Paradox of Promising*, 106 Phil. Rev. 153, 183–84 (1997).

This view seems to me simply wrong: promises can have intrinsic value, so that there can be reasons—indeed, very strong reasons—for promising even when the consequences of the promises may be achieved just as effectively through other methods.

<sup>3</sup> See, e.g., Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (1979).

<sup>4</sup> See, e.g., Grant Gilmore, *The Death of Contract* (1974). Gilmore, needless to say, laments rather than celebrates this trend.

the development of a discourse of anticommodification<sup>5</sup>—although the connections among these subjects, and certainly their common connection to the general question of making agreements, have rarely been appreciated. Nor is this separate concern for making agreements in the end surprising. Agreements figure prominently in our moral and legal life, and not just in connection with economic matters. It is therefore important to ask what values this serves and, indeed, whether it is a good thing.

A sympathetic reconstruction of our moral and legal practices surrounding agreements—a reconstruction that aspires to give not an external account of how these practices have developed and where they are heading but instead an internal account of how the practices are valued by those who participate in them—must be open to both elements of the morality of agreements. That is, a sympathetic reconstruction must help to explain both why we think it important to honor the agreements that we make and why we sometimes seek, and in other circumstances avoid, agreement-based forms of coordination. An account of agreements that claimed either that principles of agreement-keeping play no independent role in moral life or that the question whether to promote agreement-making carries no moral freight would necessarily beat a significant retreat from the lived experience of agreements. It is of course open to moral and legal argument (expressing a reformist impulse) to reject aspects of moral and legal practice, but an argument that does so bears a greater burden of persuasion in this respect. Certainly such an account of agreements would threaten, at least temporarily, to unsettle the reflective equilibrium between theory and intuition to which we properly aspire in these matters. Partial accounts of agreements—which address one element of the morality of agreements while overlooking or even excluding the other—must therefore explain their patterns of neglect, even apart from defending whatever view they take of the element of the morality of agreements to which they attend.

Moreover, and more dramatically, I shall argue that partial accounts of agreements also fail adequately to explain even the elements of the morality of agreements on which they do focus. I shall

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<sup>5</sup> See, e.g., Margaret Jane Radin, *Market Inalienability*, 100 Harv. L. Rev. 1849 (1987).

propose, in other words, that the two questions with which I began—concerning, respectively, the reasons for making and for keeping agreements—are intertwined. The reasons for achieving coordination through making agreements cannot be understood except by reference to the special reasons that exist for keeping agreements, and these reasons for keeping agreements cannot be understood except by reference to the reasons that exist for making agreements in the first place. These suggestions are, in the end, two expressions of a single idea—namely, that the morality of agreements grows out of the value of the *relation* that agreements engender between promisors and their promisees. Partial theories of agreements may differ on many points, but they share in common that they ignore the value of the agreement-relation and concentrate instead on the effects of agreements for promisors or promisees taken severally. And this, I shall conclude, is the original source of the difficulties that the theories all share.

I develop these claims by illustrating their operation in connection with three familiar accounts of agreements, and in particular of contract: the consequentialist theory presented by the law and economics movement, and two non-consequentialist theories that propose to explain the morality of contract by reference to the harm suffered by disappointed promisees on the one hand and by reference to the will of the promisor on the other.<sup>6</sup> Each of these approaches addresses only one of the two elements of the morality of agreements, to the exclusion of the other: the economic view fo-

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<sup>6</sup> I shall not directly address another, and very different, kind of theory, which accounts for the morality of agreements by reference to the existence of practices concerning agreements. Theories of this kind, including most notably the theory advanced in connection with the principle of fairness in the mature work of John Rawls, propose that persons generally have a duty to support fair collective schemes in whose benefits they voluntarily participate. See John Rawls, *A Theory of Justice* 111–12 (1971). These theories argue that our practices concerning agreements are just such schemes, which persons support by making and especially keeping agreements in appropriate circumstances. See *id.* at 344–50.

I set practice-based theories aside because they recognize no distinctively agreement-based moral principles, preferring instead to find all the morality elsewhere, in general considerations in favor of supporting collective schemes and against free-riding. While it may be possible to account, in this way, for many of the moral obligations that arise in and around agreements, practice-based theories (unlike the theories that I consider) do not actually address the morality of agreements, properly so called, at all.

cuses exclusively on agreement-making; and the harm and will views focus on agreement-keeping.<sup>7</sup> I shall argue that each theory's failure adequately to address both elements of the morality of agreements, rather than just opening up a gap in the theory, instead undermines that theory's capacity to account even for the element of the morality of agreements that it does address.<sup>8</sup> the economic view's failure independently to address the morality of contract-keeping undermines its ability to explain the morality of contract-making; and the harm and will views' failures independently to address the morality of contract-making undermine their capacity to explain obligations of contract-keeping. Indeed, this unconventional framework usefully organizes the principal objections familiarly raised against all of these views, as well as some novel objections that I develop below, within a coherent and repeating structure.

I will necessarily argue from stylized versions of all three of the theories that I discuss, and I will therefore lump together variations that are (properly) the subjects of intense intramural disputes within each camp. This approach is suitable for a programmatic argument such as the one that I am developing, although it is important that my objections not be taken in the wrong way. I do not, nor could I plausibly, claim in these brief remarks dispositively to reject any of the theories of agreements that I address, which have been developed and refined over many, many iterations. Instead, I

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<sup>7</sup> This pattern finds a parallel in the contrast between consequentialist and non-consequentialist approaches to the regulative role of law itself. As Jody Kraus has observed, "[i]t is natural to align deontic theories with the *ex post* perspective, and economic theories with the *ex ante* perspective in adjudication." Jody Kraus, *Philosophy of Contract Law*, in *The Oxford Handbook of Jurisprudence and Philosophy of Law* 687, 701 (Jules Coleman & Scott Shapiro eds., 2002). Consequentialist theories insist that the parties may abandon their pledges when this is all-things-considered best and that judges may abandon past precedent when that is best. Non-consequentialist theories, on the other hand, insist that persons must display fidelity to their words and that judges must, looking backward, display fidelity to the law.

<sup>8</sup> I do not claim that it is impossible to say *anything* about one question without also addressing the other. In some circumstances—for example, involving the return performance of a reciprocal promise in which one party has already performed (say, a seller's promise to transfer a good pursuant to a contract of sale in which the buyer has already paid)—the obligation to keep an agreement may be so clear and so overdetermined that it can be explained without reference to the value of making the agreement. I claim only that it is impossible to construct a satisfactory general answer to either question without also taking up the other.

am attempting to articulate a general dissatisfaction with each of the theories that I take up. I believe this dissatisfaction is familiarly felt by many students of contract law and theory but is difficult to render persuasive because it has no obvious core. Rather, it involves a series of what seem severally to be quibbles whose whole is nevertheless greater than the sum of their individual parts.

The way to communicate the force of such a dissatisfaction (to overcome the skepticism that it is opportunistic hair-splitting or nit-picking) is to organize the many doubts that lie behind it into a pattern that suggests these doubts are neither isolated nor incidental but instead reflect a shared structural deficiency in the way in which the theories all approach the basic problems of the morality of agreements. To be sure, one or another of the theories may nevertheless be able to adjust itself to defeat the particular objections raised against it, but the fact that these objections fit into the pattern that I describe will make the adjustments seem less natural and the resulting theory less persuasive. My aim, then, is not to decide any questions in the morality of agreements against the orthodox views, but rather to suggest that these views, because of their shared structure, invite unnecessary difficulties and are, in this respect, less appealing than is commonly thought.<sup>9</sup>

Finally, although my principal purpose here is critical, the argument in these pages does invite reflections that take a broader view of agreements and aspire to address our reasons for making and for keeping agreements together as part of a comprehensive theory. And although the argument here is designed to stand alone, it inevitably connects, in this respect, to an ongoing effort to develop such a comprehensive theory.

In an earlier article,<sup>10</sup> I articulated a new theory that proposes to understand the morality of contracts by reference to a relation of community that arises among the persons who engage them, in which each participant respects the other participants by granting them a form of authority over her future conduct. The main bur-

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<sup>9</sup> My argument bears a formal resemblance, in this respect, to Richard Craswell's meditation on the difficulties faced by several familiar philosophical theories of contract. See Craswell, *supra* note 2. The substantive conclusions that I reach, particularly with respect to the economic approach to contract, are of course very different from (and indeed at odds with) Craswell's views.

<sup>10</sup> Daniel Markovits, *Contract and Collaboration*, 113 Yale L.J. 1417 (2004).

den of that article was to elaborate the form of respectful community that agreements involve and to render plausible that contract, in particular, participates in this form of community even as each party to a contract typically proceeds, in a competitive context, in the service exclusively of her own interests and without any independent motive to assist the other party in promoting his. It is not obvious how a contract that is motivated in this way can constitute a relation of respect or establish a form of community, and the theory sought to say how by elaborating a version of community, which I call *collaborative*, that is sufficiently thin to apply to contract and yet thick enough to be a form of moral life. Thus the collaborative view seeks to demonstrate that parties to contracts (even as they remain motivated by self-interest) adopt intentions such that each takes the other's as reason-giving for herself and seeks to cast the pattern of interlocking contractual intentions that it reveals as a form of reciprocal respect.

In the process of defending these claims, I observed that the theory I was developing has the appealing feature that it explains explaining the reasons both for making and for keeping contracts in a naturally unified way, specifically by grounding each in the value of the communal relations that making contracts invites and that breaking contracts betrays.<sup>11</sup> My energies were dominated by the effort of getting the collaborative theory of contract off the ground, however, and so I did not enlarge on the claim or even say why I took it to be appealing that my view underwrites a unified answer to the questions why make and why keep contracts. The argument in these pages provides the necessary background for those earlier observations, and insofar as it succeeds, it therefore gives a boost to the collaborative view of agreements that I prefer (although it is not my purpose here to promote that view, which remains subject to its own difficulties).<sup>12</sup>

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<sup>11</sup> See *id.* at 1420.

<sup>12</sup> Perhaps the most notable difficulty, which I have acknowledged, *id.* at 1464–73, and which others have pursued, see e.g., Ethan Lieb, *On Collaboration, Organizations, and Conciliation in the General Theory of Contract*, 24 *Quinnipiac L. Rev.* 1 (2005), is that the forms of respect that my theory emphasizes seem to depend on the mental qualities of natural persons, and therefore do not comfortably extend to contracts that involve organizations.

## I. THE ECONOMIC THEORY OF MAKING CONTRACTS

Perhaps the most prominent approach to contract today—certainly the approach that dominates the legal literature—seeks to understand contract law in terms of its economic consequences. This approach generates powerful insights, to be sure. But in spite of these insights, the economic approach to contract cannot sustain a sympathetic reconstruction of the central role that agreements play in contract law. In particular, the economic approach cannot naturally accommodate contract law's broad preference (in many doctrinal areas, some of which I address below) for coordination that takes the agreement *form*. Moreover, the difficulties that the economic approach faces in explaining the law's attachment to agreement-based coordination are not just expressions of the familiar fact that non-economic values such as freedom and justice properly inform contract law. Instead, I shall argue, these difficulties in explaining contract law's emphasis on making agreements are also products of the economic view's resistance to the idea that there exist independent reasons to keep agreements. The economic view of contract thus serves as the first illustration of my broader theme, namely that a successful account of agreements must address, together and in a unified way, reasons for making and for keeping agreements.

Although the economic approach does not style itself a philosophical argument, it nevertheless has philosophical foundations. These foundations are consequentialist and indeed roughly utilitarian,<sup>13</sup> so that the economic account of contract displays analogies to utilitarian accounts of promising, and it will be useful to treat them

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<sup>13</sup> I say *roughly* utilitarian in recognition of the difficulty that the economic idea of efficiency departs significantly from utility maximization in that it employs, in the Kaldor-Hicks test, a monetized rather than a direct measure of the individual benefits and burdens that, in aggregate, determine efficiency. This conception of efficiency enables the interpersonal comparability necessary for balancing the individual gains and losses that legal choices inevitably involve. But it achieves this end only at the cost of removing the economic approach from any direct focus on well-being. Indeed, people who are richer will place a higher dollar value on any absolute change in their well-being than people who are poorer, at the cost of importing into efficiency analysis what might be seen as a bias in favor of the rich. For a further discussion of this and related points, see *infra* notes 29–31 and accompanying text; see also Richard S. Markovits, *On the Relevance of Economic Efficiency Conclusions*, 29 Fla. St. U. L. Rev. 1 (2001).

together. This family of theories commences, one might say, from Hume's familiar observation that "experience has taught us, that human affairs wou'd be conducted much more for mutual advantage, were there certain symbols or signs instituted, by which we might give each other security of our conduct in any particular incident."<sup>14</sup> Making contracts, in particular, allows "individuals to bind themselves to a future course of conduct, to make it easier for others to arrange their lives in reliance on [a] promise,"<sup>15</sup> and in this way allows persons to coordinate their conduct to their joint advantage. Contract law is understood, on this view, as a social technology that enables such efficient coordination.

The economic view thus begins from the reasons for *making* contracts. It acknowledges, of course, that contracts can promote efficient investment, and support long-term, complex projects and plans, only insofar as they are expected to be performed, and therefore only insofar as they are (in general) actually performed. The economic view therefore supports practices of contract-keeping and a legal regime that enforces contracts. On the economic view, promisors should keep contracts, and contracts should be enforced against promisors who propose to break them, insofar as doing so (by increasing confidence in contractual promises) creates efficient incentives for reliance and planning and therefore maximizes the surplus associated with contractual arrangements.<sup>16</sup>

But these reasons for contract-keeping are entirely contingent—they are incidental consequences of the economic analysis of the efficient regime of contract-making—and certainly do not (in any way) apply automatically in connection with each particular contractual promise that is made. Moreover, it is famously difficult for utilitarian and economic approaches to agreements to account for the obligations of agreement-keeping that arise inherently in agreements.

On the one hand, incremental suggestions that agreement-breaking is almost never best overall—because it undermines people's faith in the institution of agreements more broadly and be-

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<sup>14</sup> Hume, *supra* note 1, at 522 (emphasis removed) (bk. III, pt. II, sec. V).

<sup>15</sup> Craswell, *supra* note 2, at 497. See generally Charles Goetz & Robert Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 Yale L.J. 1261 (1980).

<sup>16</sup> See, e.g., Alan Schwartz & Robert Scott, *Contract Theory and the Limits of Contract Law*, 113 Yale L.J. 541, 556 (2003).

cause of other knock-on effects—can sustain only a degenerate ideal of agreement-keeping. Such proposals cannot account for any number of familiar (if somewhat artificial) cases involving death-bed promises or other arrangements constructed to eliminate any chance of knock-on effects,<sup>17</sup> and efforts to bend the utilitarian approach to accommodate such cases inevitably look like artificial “just so” stories. Moreover, and much more importantly, these arguments cannot capture the way in which principles of agreement-keeping figure in our practical deliberations, not as summary reports of the balance of *other* reasons (for example, involving promise-making and the health of promissory practice) but as stating *freestanding* reasons.<sup>18</sup>

On the other hand, more sweeping and theoretically ambitious suggestions that considerations of what is best overall come into play only in determining what general rules should govern conduct, and that a freestanding principle of agreement-keeping represents the best such rule in the context of agreements, inevitably fail before utilitarianism’s unrelenting commitment to optimization. Although I shall not argue the point here, such rule-utilitarianism has, as Charles Fried observes, been “demonstrated” to be “incoherent.”<sup>19</sup> In the case of promising, either rule-utilitarianism requires that rules of promise-keeping be followed even when this undermines the ends that promising serves, in which case the utilitarian theory of promise-making is abandoned, or rule-utilitarianism accepts qualifications of the principle of promise-keeping to exclude individual cases as utility requires, in which case the freestanding obligation of promise-keeping is abandoned.<sup>20</sup>

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<sup>17</sup> See, e.g., William David Ross, *The Right and the Good* 39 (1988); A.I. Melden, *Two Comments on Utilitarianism*, 60 *Phil. Rev.* 508, 518–23 (1951); John Rawls, *Two Concepts of Rules*, 64 *Phil. Rev.* 3, 15 (1955).

<sup>18</sup> See J. Raz, *Promises and Obligations*, in *Law, Morality, and Society: Essays in Honor of H.L.A. Hart* 210, 221–22 (P.M.S. Hacker & J. Raz eds., 1977).

<sup>19</sup> Charles Fried, *Contract as Promise* 16 (1981).

<sup>20</sup> This formulation follows Charles Fried. See *id.* For the locus classicus of this argument, see generally David Lyons, *Forms and Limits of Utilitarianism* (1965).

It is sometimes suggested that rule-utilitarianism can serve as an adequate theory of how legislators ought to choose among legislation. But rule-utilitarianism succeeds as a moral theory for the legislature only by sleight of hand, because the only acts open to the legislature involve the adoption of rules, so that, in connection with legislative choices, rule- and act-utilitarianism might appear to coincide. And even with respect to the legislature, this sleight of hand succeeds only by artificially limiting the range of

These failed experiments in its utilitarian cognates suggest that the reticence of the economic view of contract with respect to contract-keeping is not accidental or shallow, but instead reflects the necessary structure of the broader class of theories of agreements to which it belongs, which cannot transcend a narrow focus on agreement-making to accommodate free-standing reasons for keeping agreements. Although the economic approach recognizes that keeping and enforcing contracts is usually efficient, it insists that promisors should break contracts, and contracts should not be enforced against promisors who propose to break them, insofar as *this* serves efficiency, either as a general rule (for example, by discouraging inefficient tendencies to rely too readily on insubstantial or ill-considered promises), or simply because of the way in which economic forces happen, in the totality of the circumstances, to align.<sup>21</sup>

This is a familiar drawback of the economic approach: as John Rawls observed in discussing its utilitarian counterpart a half century ago, the idea that a person has a reason to keep a promise only insofar as doing so is best overall “conflict[s] with the way in which the obligation to keep promises is regarded.”<sup>22</sup> Indeed, one might even think that the *whole point* of promising, on ordinary under-

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legislative choices that rule-utilitarianism purports to inform. As soon as a legislator steps back from the (for her) act-like choice among legal rules and considers, for example, the second-order question of what criteria she should apply in choosing legal rules, the incoherence of rule-utilitarianism (as applied to *this* choice by the legislator) reappears. The rule-utilitarian would have the legislator adopt the rule for legal rule selection that is generally best and then follow that rule even in those circumstances in which it turns out not to be best. But now the rule-utilitarian dilemma reasserts itself: either the legislator follows her rule-choosing rule even in this circumstance, in which case she has abandoned utilitarianism, or she disobeys the rule-choosing rule, in which case she has abandoned her rule (and returned to act-utilitarianism).

<sup>21</sup> This position should not be confused with the familiar proposal of the economic approach (discussed in greater detail *infra* in text accompanying notes 48–60) that the expectation remedy should be preferred over supracompensatory remedies, involving specific performance or disgorgement, because it encourages promisors to make efficient choices whether to perform or pay damages. However things stand with respect to this question, the economic view (because it recognizes no freestanding obligation of contract-keeping) also countenances that promisors should refuse to perform *without* paying any damages (that the contracts should not be enforced against them), insofar as this is efficient.

<sup>22</sup> Rawls, *supra* note 17, at 13.

standings, is that promisors remain obligated to perform their promises even when this turns out not to be best overall.<sup>23</sup>

This point is important, but I shall not belabor it here, preferring instead to develop a much less familiar objection to the economic theory of contract, according to which that theory's inability to explain the independent force of the obligation to keep contracts renders the economic approach unable to provide a satisfactory account even of the practices concerning *making* contracts that form its core subject. The economic view, that is, cannot satisfactorily account for contract law's emphasis on promoting coordination and securing efficient reliance by means specifically of *agreements* rather than in some other way. In this respect, the economic approach illustrates my general claim about the relationship between the reasons for making and for keeping agreements—namely that satisfactory explanations of each must include explanations of the other.

Certainly the economic theory of contract cannot make good the ambitions of early lawyer-economists to account for the precise ways in which agreements figure in the positive law by revealing, as Richard Posner variously put it, the "true grounds,"<sup>24</sup> "implicit logic,"<sup>25</sup> or "inner nature"<sup>26</sup> of particular legal decisions. The traditional doctrines of contract law are inefficient in any number of respects. Partly for this reason, contemporary lawyer-economists have largely abandoned the descriptive project in favor of an openly reformist agenda, whose core idea is not that the law is efficient but that it should be made so.<sup>27</sup> And although the abandoned explanatory claim probably contributed substantially to the law and economics movement's initial successes, this revisionist approach frees law and economics from any artificial conservatism and appealingly allows economic analysis to follow its own arguments to their logical conclusions.<sup>28</sup> Nevertheless, the transforma-

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<sup>23</sup> Joseph Raz, for example, places this feature of promising at the center of the structural architecture of our promissory practices. See Raz, *supra* note 18.

<sup>24</sup> Richard A. Posner, *Economic Analysis of Law* 23 (4th ed. 1992).

<sup>25</sup> *Id.* at 251.

<sup>26</sup> Richard A. Posner, *The Problems of Jurisprudence* 361 (1990).

<sup>27</sup> I would like to thank Barbara Fried and Richard Craswell for discussions on this point.

<sup>28</sup> The suggestion that law and economics is best understood as an effort to *justify* (and *reform*) rather than merely to *explain* contract law remains controversial never-

tions that the systematic pursuit of efficiency would impose on contract law are substantial, as lawyer-economists have increasingly recognized, and reformist efforts in the law and economics of contract carry burdens of their own.

To begin with, the reformist agenda forsakes the natural appeal of received wisdom and requires the efficiency norm to bear the weight of justifying a regime of contract law, all things considered, and there are good reasons to doubt whether it can. Thus, many have thought that contract implicates egalitarian and libertarian values that the efficiency paradigm improperly ignores.<sup>29</sup> And because economic efficiency departs from utility maximization,<sup>30</sup> even the utilitarian tradition that provides law and economics with its philosophical foundations remains skeptical of any suggestion that efficiency can directly justify a legal rule, as sophisticated proponents of efficient contract law acknowledge. Instead, the case for efficient contract law turns on the idea that it is generally counterproductive, or at least not optimal, to pursue equality, freedom, or even utility maximization through contract rules—that it is better to keep contract law efficient and promote these other values through other policies such as direct redistribution.<sup>31</sup>

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theless. Jody Kraus, for example, claims that “economic theorists are methodologically committed to undertaking the explanatory task first, and justifying the existence of contract law later.” Kraus, *supra* note 7, at 696. I suspect that Kraus, himself a philosopher, reaches this conclusion in part because, as he observes, many philosophers regard the principle of efficiency as “an implausible normative principle.” *Id.*

<sup>29</sup> A call for introducing egalitarian themes into contract appears in Anthony Kronman, *Contract Law and Distributive Justice*, 89 *Yale L.J.* 472 (1980). Libertarian approaches to contract include Fried, *supra* note 19, and Randy Barnett, *A Consent Theory of Contract*, 86 *Colum. L. Rev.* 269 (1986).

<sup>30</sup> See *supra* note 13.

<sup>31</sup> Various of the relevant difficulties are discussed in Posner, *supra* note 24, at 508–10; Bruce Ackerman, *Regulating Slum Housing Markets On Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 *Yale L.J.* 1093 (1971); Richard Craswell, *Passing On the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 *Stan. L. Rev.* 361 (1991); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 *Md. L. Rev.* 563 (1982); Richard S. Markovits, *The Distributive Impact, Allocative Efficiency, and Overall Desirability of Ideal Housing Codes: Some Theoretical Clarifications*, 89 *Harv. L. Rev.* 1815 (1976); Alan Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 *Va. L. Rev.* 1053 (1977).

Moreover, and in the context of the present argument more importantly, the transformations in contract law that the economic approach recommends are not friendly (or even neutral) to the promissory ideas that occupy the core of contract law as it is traditionally understood. Instead, across a wide range of doctrinal areas, considerations of efficiency are hostile to contract law's traditional roots in promising, including in particular its support for securing coordination distinctively through agreements. Indeed, although an efficient scheme of coordination would of course employ agreement-like mechanisms, it increasingly appears that such a scheme would abandon the connection that the law currently draws between contract and the promissory *form*, so that contract would no longer be the law of agreements at all. The economic approach to contract therefore does not just fail to explain agreement-keeping; it also cannot explain our practices specifically of agreement-making.

An efficient regime of contract would depart from the current law's emphasis on agreements in three main ways. To begin with, it would retreat from the law's current preference for reliance on promises over reliance on non-promissory representations. Moreover, it would abandon the law's more specific preference, even within the promissory realm, for agreements that take the narrower bargain form. And finally, even within the class of cases that involve promise- and indeed bargain-based reliance, an efficient law of contract would reject the current law's tendency to structure its interventions according to the dictates of the promissory form. In all three respects, an efficient law of contract (which recognized no freestanding duty of agreement-keeping) would cease specifically to encourage agreement-making. Indeed, this is well-known, and may be illustrated simply by collecting and reporting familiar results from the law and economics of contract.

First, the economic view cannot naturally explain why the law should encourage reliance specifically on *promises*—why the law should give promises special legal recognition and support that other methods of giving assurances and sustaining coordination do

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However these questions are resolved, it is worth remembering that economic efficiency is not intrinsically desirable (not even for a utilitarian) and that the connection between efficiency and other values must always be established.

not enjoy. The law generally is less respectful of non-promissory methods of coordination, and less solicitous of reliance on things other than promises, than contract law is in the promissory context. Such non-promissory forms of obligation, which sound in tort and in particular in one form or another of misrepresentation, are subject to a host of limitations that do not apply to contractual claims: doctrines of *scienter*<sup>32</sup> and *per se* rules rejecting liability for honest statements of present intention followed by a change of mind<sup>33</sup> function to render reliance on non-promissory statements less protected than reliance on promises. Moreover, the law strictly enforces the promissory threshold for invoking contract-based obligation, for example through the rule that even pre-contractual liability must have a firm basis in agreement. As one court has put it, in order for pre-contractual understandings to receive legal recognition, more is needed than *convergence* on the details of a plan—there must be “overall *agreement* . . . to enter into the binding contract.”<sup>34</sup> Indeed, even within the promissory realm, the law gives greater recognition to completed agreements than to merely preliminary ones: even when it recognizes pre-contractual liability, the law often forsakes the expectation remedy that applies to mature contracts and instead backs pre-contractual understandings with reliance damages only.<sup>35</sup>

Furthermore, the emphasis on promises reasserts itself even within doctrinal frameworks that might appear to diminish it, for example in the unorthodox theories of a contractual obligation that

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<sup>32</sup> The effect of this doctrine is summarized in W. Page Keeton et. al., *Prosser and Keeton on Torts* 741–45 (5th ed. 1984).

<sup>33</sup> See *id.* at 764 and the cases collected therein.

<sup>34</sup> *Teachers Ins. & Annuity Assoc. v. Tribune Co.*, 670 F. Supp. 491, 497 (S.D.N.Y. 1987) (emphasis added). Nor is this case an outlier. Alan Schwartz and Robert Scott report that in 87 percent of the cases they collected for a recent study, courts refused to impose liability (under theories of promissory estoppel or quantum meruit) in circumstances involving preliminary negotiations but no preliminary agreements. Alan Schwartz & Robert Scott, *The Law and Economics of Preliminary Agreements*, 120 *Harv. L. Rev.* (forthcoming Jan. 2007) (manuscript at 11, on file with the Virginia Law Review Association). They observe that “absent misrepresentation or deceit, there generally is no liability for reliance investments made during the negotiation process,” *id.* (manuscript at 12), and conclude that courts “make some form of agreement a necessary condition to promisee recovery.” *Id.* (manuscript at 8).

<sup>35</sup> See, e.g., E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 *Colum. L. Rev.* 217, 267 (1987).

have found their way into the law. Even as these theories support contracts without consideration, they continue to insist specifically on promises rather than more general representations of firm intentions or predictions of future conduct. The reliance-based theory of obligation arising under the heading "Promissory Estoppel" and codified in section 90 of the Restatement addresses only reliance *on a promise*,<sup>36</sup> and the restitutionary theory of obligation arising under the heading "The Material Benefit Rule" and codified in section 86 of the Restatement also applies exclusively in connection with *promises* made in recognition of benefits previously received.<sup>37</sup>

This insistent emphasis on promise-based reliance resists economic explanation. According to the economic view, there is nothing intrinsically special about promise-based reliance, so that it becomes a contingent, empirical question whether efficiency is best

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<sup>36</sup> Restatement (Second) of Contracts § 90 (1981). See generally Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 Yale L.J. 111 (1991). Admittedly, over the years courts have become increasingly generous concerning the range of speech acts that may properly be considered promises for purposes of Section 90-based obligation and now accept that this form of liability can arise not just out of *promises* but also out of their close cousins, *offers*. Compare *James Baird Co. v. Gimbel Bros.*, 64 F.2d 344 (2d Cir. 1933) with *Drennan v. Star Paving Co.*, 333 P.2d 757 (Cal. 1958). But courts do not, even today, generally apply Section 90 to generate obligation in connection with representations made entirely outside any promissory context.

There are exceptions to this rule in which courts have imposed legal liability entirely apart from any promise or agreement. See, e.g., *Hoffman v. Red-Owl Stores*, 133 N.W.2d 267, 274–75 (Wis. 1965) (imposing liability in the context of representations that were expressly judged too vague to constitute an offer). These cases have suggested to some that "a general obligation of fair dealing may arise out of the negotiations themselves," which may be triggered even without agreement. Farnsworth, *supra* note 35, at 239.

But these cases remain outliers, and are typically not followed, even in their own jurisdictions. See Schwartz & Scott, *supra* note 34, at 10 (pointing out that *Hoffman* itself was not followed in *Beer Capitol Distributing, Inc. v. Guinness Bass Import Co.*, 290 F.3d 877 (7th Cir. 2002) (Applying Wisconsin law)). A better account of such cases is that they present the rare circumstances in which tort liability for misrepresentation may be sustained quite apart from any contractual ideas. See, e.g., Fried, *supra* note 19, at 24; Mark P. Gergen, *Liability for Mistake in Contract Formation*, 64 S. Cal. L. Rev. 1, 34–36 (1990) (both cited in Schwartz & Scott, *supra* note 34, at 10 n.19). Indeed, even Farnsworth acknowledges that, in spite of these cases, the law generally remains *much* more solicitous of reliance based on agreements than it is of reliance more generally. See generally E. Allan Farnsworth, *Contracts* 189–201 (4th ed. 2004).

<sup>37</sup> Restatement (Second) of Contracts § 86 (1981).

served by offering greater encouragement to reliance on promises than to reliance on other representations. It would therefore be surprising if the answer to this empirical question lined up in any way precisely with the law's preference for agreements proper over mere convergence. As James Gordley has observed, the economic approach makes it "puzzling, to put it mildly, that the law enforces promises more readily than other commitments."<sup>38</sup> Indeed, the recent learning among lawyer-economists embraces the contingency of promise's role in contract and argues for diminishing it to the point of eliminating many of the boundaries that the law has traditionally established between the forms of promissory assurances that it supports and their non-promissory near neighbors that receive less support. Thus, one of the leading themes in recent economic analysis of contract has been to argue that the law should be more solicitous of reliance on pre-contractual representations than it traditionally is.<sup>39</sup> Some lawyer-economists have even suggested abandoning entirely the law's traditional insistence that mutual assent is a qualitatively distinctive basis for legal liability, so that the agreement ideal establishes a boundary between contract and other legal regimes.<sup>40</sup> They have proposed, instead, that the law should adopt a "no-retraction" principle, according to which legal liability grows continuously as pre-contractual bargaining gives rise to bilateral options under which each party may hold the other to its representations even when no agreement whatsoever has been

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<sup>38</sup> James Gordley, *The Philosophical Origins of Modern Contract Doctrine* 235 (1991). A similar point is made in Patrick Atiyah, *Promises, Morals, and the Law* 50–51 (1981).

<sup>39</sup> See, e.g., Lucian Arye Bebchuk & Omri Ben-Shahar, *Precontractual Reliance*, 30 *J. Legal Stud.* 423, 427 (2001); Omri Ben-Shahar, *Contracts Without Consent: Exploring a New Basis for Contractual Liability*, 152 *U. Pa. L. Rev.* 1829 (2004); Richard Craswell, *Offer, Acceptance and Efficient Reliance*, 48 *Stan. L. Rev.* 481 (1996); Jason Scott Johnston, *Communication and Courtship: Cheap Talk Economics and the Law of Contract Formation*, 85 *Va. L. Rev.* 385 (1999); Avery W. Katz, *When Should an Offer Stick? The Economics of Promissory Estoppel in Preliminary Negotiations*, 105 *Yale L.J.* 1249 (1996).

Schwartz and Scott, citing *Teachers Ins. & Annuity Assoc. v. Tribune Co.*, 670 F. Supp. 491 (S.D.N.Y. 1987), suggest that for the limited case of reliance based on preliminary *promises*, the law is moving in the direction that these economic models recommend. Schwartz & Scott, *supra* note 34, at 15–16.

<sup>40</sup> See Omri Ben-Shahar, *supra* note 39, at 1830.

reached (and entirely apart from the formalisms of offer and acceptance associated with the agreement paradigm).<sup>41</sup>

Second, the economic approach cannot naturally explain why, even within the promissory context, contract law recognizes some promises more readily than others. Most notably, the law's formal insistence, through the consideration doctrine, on giving special recognition to promises that have the form of a bargain (quite apart from the bargain's substantive fairness or adequacy) has famously resisted economic explanation, in spite of many prominent efforts. These efforts all propose instrumental accounts of the law's emphasis on bargains, according to which this focus effectively separates efficient from inefficient forms of giving assurance.<sup>42</sup> But such an instrumental approach cannot comfortably explain the law's persistent and precise emphasis on the bargain *form*. Whatever instrumental function the bargain form serves can surely also be served by the parties' express acceptance of legal enforcement, either by insisting (even if falsely) that they have struck a bargain or by employing a seal.<sup>43</sup> Accordingly, many lawyer-economists, impressed by the idea that efforts to manufacture consideration would not persist unless they were efficient,<sup>44</sup> finally reject what

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<sup>41</sup> See *id.* at 1830–35.

<sup>42</sup> See, e.g., Lon L. Fuller, *Consideration and Form*, 41 *Colum. L. Rev.* 799, 800–03 (1941) (proposing that the bargain form gives promises evidentiary support that eases resolution of possible disputes, cautions promisors against rash or impulsive conduct, and channels contracting behavior into reliable patterns); see also Melvin Eisenberg, *Donative Promises*, 47 *U. Chi. L. Rev.* 1, 13–16 (1979) (suggesting that gift promises often contain implicit excuses for non-performance that courts cannot easily adjudicate); Goetz & Scott, *supra* note 15, at 1304–05 (claiming that enforcing non-bargain promises will depress the supply of such promises in a way that causes inefficiently few assurances to be given); Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 *J. Legal Stud.* 411, 417 (1977) (proposing that non-bargain promises often arise against a backdrop of informal enforcement and that adding legal enforcement wastes resources and may even render promises inefficiently secure, causing inefficient over-reliance).

<sup>43</sup> As Peter Benson remarks, “[i]f the fundamental role of consideration is that it fulfills the functions of form, the fact that parties *expressly* treat something as a consideration for the shared reason of giving legal effect to their intentions should be sufficient or at least relevant” to enforceability at law. Peter Benson, *The Unity of Contract Law*, in *The Theory of Contract Law* 118, 167 (Peter Benson ed., 2001).

<sup>44</sup> Charles Goetz and Robert Scott, for example, observe that “[a]lthough devices such as seals and sham bargains entail significant administrative costs, the voluntary use of these formal mechanisms suggests that the benefits to both parties of the addi-

they see as the consideration doctrine's "mysterious"<sup>45</sup> emphasis on the formal properties of agreements in favor of a more open-ended regime under which legal enforcement of representations may arise independent of the agreement form.

Third, the economic approach to contract cannot naturally explain why, in addition to treating agreement as a necessary condition for triggering contractual liability to begin with, contract law returns to the agreement form to fix the contours of the liability that it imposes.

For example, the status of the expectation remedy as the preferred remedy for breach of contract<sup>46</sup> cannot be explained in economic terms. The expectation remedy—not understood narrowly as a damages formula based on contract-market price differentials but broadly as a general insistence that promisees receive the benefits of their bargains<sup>47</sup> (benefits that contract-market differentials sometimes, but not always, secure)—introduces the agreement form into the administration of contracts in ways that economic concerns for efficient reliance cannot accommodate.

To be sure, initial work in the theory of efficient breach drew a rough connection between expectation damages and economic efficiency.<sup>48</sup> Moreover, subsequent work has extended this connection to certain aspects of the law's administration of the expectation remedy: for example, developing efficiency-based explanations of doctrines that limit expectation damages to those that were foreseeable or foreseen at the time of contracting,<sup>49</sup> that

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tional reassurance from legal enforcement outweighs [sic] the transactions costs." Goetz & Scott, *supra* note 15, at 1303.

<sup>45</sup> Posner, *supra* note 42, at 420.

<sup>46</sup> See, e.g., Restatement (Second) of Contracts § 344 (1981). Non-economic theories have also found it difficult to justify the expectation remedy, as Richard Craswell has pointed out with respect to two prominent examples, see Craswell, *supra* note 2, at 517–20, and as I argue with respect to a third example in Part II, *infra*.

I establish the connection between the account of the morality of agreements that I prefer and the expectation remedy in Markovits, *supra* note 10, at 1511–14.

<sup>47</sup> See Restatement (Second) of Contracts § 344 (1981) (defining the "expectation interest" as a party's "interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed").

<sup>48</sup> See, e.g., Robert L. Birmingham, Breach of Contract, Damage Measures, and Economic Efficiency, 24 Rutgers L. Rev. 273, 285–86 (1970).

<sup>49</sup> The canonical statement of the foreseeability rule appears in *Hadley v. Baxendale*, 156 Eng. Rep. 145 (1854). For an economic account of this rule, see Gwyn Quillen,

impose duties to mitigate damages on disappointed promisees,<sup>50</sup> and even that determine when the uniqueness of a promised performance makes a contract specifically enforceable.<sup>51</sup>

But although these arguments establish a significant overlap between contract law's remedial rules and economic efficiency, the connection turns out to be imperfect and incomplete, and the law's *categorical* commitment to the expectation remedy (to securing a promisee the benefit of her bargain but declining to require promisors to disgorge any additional gains that they achieve through efficient breaches) outstrips the economic case for expectation damages and extends even to circumstances in which the expectation remedy is inefficient. The expectation remedy, for example, applies even when it induces promisees whose expectation diverges from their reliance costs to devote inefficient care to deciding whether or not to contract.<sup>52</sup> Similarly, the rule that supracompensatory liquidated damages provisions are invalid penalty clauses<sup>53</sup> applies even when such clauses function to induce efficient relation-specific investment.<sup>54</sup> Nor are these the only circumstances in which the positive law's focus on the expectation remedy departs from efficiency's recommendations.<sup>55</sup>

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Note, Contract Damages and Cross-Subsidization, 61 S. Cal. L. Rev. 1125, 1128 (1988).

<sup>50</sup> See, e.g., *Rockingham County v. Luten Bridge Co.*, 35 F.2d 301 (4th Cir. 1929). An economic explanation appears in Goetz & Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 Va. L. Rev. 967 (1983).

<sup>51</sup> See, e.g., *Van Wagner Adver. Corp. v. S & M Enters.*, 492 N.E.2d 756 (N.Y. 1986). The economic analysis appears in Anthony Kronman, *Specific Performance*, 45 U. Chi. L. Rev. 351, 355–65 (1978). Specific performance is, conceptually, a special case of the expectation remedy rather than a competitor remedial regime: it is the way to secure a promisee's expectation when a contract is best interpreted to deny her promisor the option of treating damages as a substitute form of performance. I develop this theme more fully in Markovits, *supra* note 10, at 1496–1501.

<sup>52</sup> See, e.g., Richard Craswell, *Precontractual Investigation as an Optimal Precaution Problem*, 17 J. Legal Stud. 401, 402 (1988).

<sup>53</sup> See, e.g., U.C.C. § 2-718(1) (2005); Restatement (Second) of Contracts § 356 (1981).

<sup>54</sup> See, e.g., Aaron S. Edlin, *Cadillac Contracts and Up-front Payments: Efficient Investment Under Expectation Damages*, 12 J.L. Econ. & Org. 98, 104–11 (1996); Aaron S. Edlin & Alan Schwartz, *Optimal Penalties in Contracts*, 78 Chi.-Kent. L. Rev. 33, 44–52 (2003); see also Steven Shavell, *Damage Measures for Breach of Contract*, 11 Bell J. Econ. 466, 472 (1980).

<sup>55</sup> See, e.g., A. Mitchell Polinsky, *Risk Sharing Through Breach of Contract Remedies*, 12 J. Legal Stud. 427, 433 (1983) (arguing that when both parties to contracts are

Much more importantly, the economic approach conspicuously cannot explain the law's insistence (which my earlier use of the word *categorical* was designed to capture) on administering the expectation remedy not just as a quantum of damages (the quantum associated with contract-market price differentials) but as a *formal category of value*.

This failure is directly reflected in the language that the economic approach employs in connection with contract remedies, including most notably in the misleading (or at least unhelpful) suggestion that the expectation remedy promotes efficient *breaches* of contract. This way of speaking encourages the thought that the expectation regime establishes a purely remedial rule, which fixes the quantum of damages available to promisees whose promisors divert an expected performance to third parties who value it more highly, but does not alter the promisors' primary obligations to perform or the promisees' legitimate disappointment at the diversion. Accordingly, even when the economic approach to contract recommends the expectation remedy as efficient, this is a coincidence only, as Richard Craswell has observed: the formal category *expectation damages*, the agreement-based idea of securing the benefit of a promisee's bargain, "will not have played any role in the analysis leading up to that conclusion."<sup>56</sup>

However, a better way to understand the expectation remedy is not solely in terms of contingently calculated quanta of damages, but rather as establishing a principle of contract interpretation under which contracts that are silent are construed to exclude promisors' possible gains from dealing with third parties from a promisees' entitlements, as in Holmes's famous suggestion that a contract just *is* a promise to perform or pay (expectation) damages.

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risk averse, efficiency requires a remedy that falls below expectation damages); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 936–38 (1998) (contending that when meritorious plaintiffs are less than certain to recover, the efficient remedy may exceed expectation damages).

<sup>56</sup> Richard Craswell, *Against Fuller and Perdue*, 67 U. Chi. L. Rev. 99, 107 (2000). This is really just a special case of the economic approach's broader disregard for doctrinal categories. As Jody Kraus has observed, the economic analysis of law "rejects the significance of traditional distinctions between apparently different bodies of law," such as contract and tort. Kraus, *supra* note 7, at 699. Moreover, the economic analysis of law "does not take the doctrinal invocations and restatements as legal data to be explained," but instead focuses its attention on explaining case outcomes. *Id.* at 692.

And on this understanding, a promisor who diverts her performance and pays expectation damages does not break the contract at all, but rather keeps it through paying the damages, which is just an alternate way of honoring her promisee's expectations, understood as a formal category of value. This conceptual account of the expectation remedy has practical consequences, moreover, which receive doctrinal expression in the positive law's insistence that promisees receive remedies that, whatever their size (large or small) or medium (in cash or in kind), are accurately characterized as providing the promisees with their contractual expectations; that is, as securing for promisees the benefits of contractual promises.

For example, where the law establishes that promisees may expect specific performance—and so includes the gains from “efficient breaches” within promisees’ expectations—then, to secure promisees’ full expectations, the full benefits of their bargains, it also requires promisors to disgorge any gains that they have received from efficient breaches (which are now truly breaches) that render actual performance somehow impossible. A typical example arises when a seller, breaching a land contract, conveys the land not to her buyer but rather to a third party who has made a higher offer.<sup>57</sup> If the rights of the third party preclude specific performance, then courts, treating the seller as a trustee for the initial buyer, award the proceeds from the second sale to this buyer as restitution. Even if the seller's behavior is efficient, it is now truly a breach, and the doctrinal structure of the expectation remedy looks to the breach and not to the efficiency, departing from the ordinary routine of contract-market differentials and instead awarding (restitutionary) damages that secure for the promisee the true benefit of the bargain that she had struck.

Moreover, the positive law is hostile to efforts to undermine this expectation principle in this formal application, even when such efforts are efficient. Thus, the law *generally* declines to enforce agreements that fix contractual remedies at levels that cannot be characterized as securing a contractual expectation,<sup>58</sup> either be-

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<sup>57</sup> See, e.g., *Gassner v. Lockett*, 101 So. 2d 33 (Fla. 1958). I take up these ideas in more detail, to elaborate their complexities and connect them to what others have written about the expectation remedy, in *Contract and Collaboration*. See Markovits, *supra* note 10, at 1497–1501.

<sup>58</sup> I develop this idea at greater length in Markovits, *supra* note 10, at 1505–11.

cause they are too large in a way that is penal rather than compensatory,<sup>59</sup> or because they are too small in a way that effectively abandons all forward-looking contractual commitments.<sup>60</sup>

The rule that there must be some agreement before contractual liability can arise out of pre-contractual negotiations, the consideration doctrine, and the expectation remedy therefore present three areas in which contract law focuses on agreements (both in identifying the obligations it will recognize and in administering these obligations) in ways that cannot naturally be explained, in terms of efficiency, by the economic approach. These examples, moreover, could be multiplied.<sup>61</sup> And although these examples and

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<sup>59</sup> The law denies punitive damages for ordinary breaches of contract, e.g., U.C.C. § 1-305(1) (2005), and the law is reluctant to enforce liquidated damages provisions that impose penalties. E.g., U.C.C. § 2-718(1) (2005); Restatement (Second) of Contracts § 356 (1981). Moreover, although punitive damages are sometimes available for breaches of certain special classes of contracts—for example, contracts, such as insurance contracts, that involve special relations of trust and dependency, e.g., *Crisci v. Sec. Ins. Co.*, 426 P.2d 173 (Cal. 1967), and contracts with common carriers, e.g., *Fort Smith & W. Ry. v. Ford*, 126 P. 745 (Okla. 1912)—these outcomes are best explained by reference to the special features of the contracts that they involve, which bring them within the gravitational pull of tort. After a brief flirtation, e.g., *Seaman's Direct Buying Serv. v. Standard Oil Co.*, 686 P.2d 1158 (Cal. 1984), the law has generally settled against awarding punitive damages for breach of contract in general commercial settings, e.g., *Freeman & Mills v. Belcher Oil Co.*, 900 P.2d 669 (Cal. 1995), at least in the absence of an independent tort.

<sup>60</sup> The Uniform Commercial Code, for example, insists that “[w]here circumstances cause an exclusive or limited remedy [agreed to by the parties] to fail of its essential purpose, remedy may be had as provided in this Act.” U.C.C. § 2-719(2) (2005). And the Official Comment elaborates that “where an *apparently fair and reasonable* clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this Article.” *Id.* § 2-719 cmt. 1 (emphasis added). Together these provisions suggest that even promisees who accept limitations on the remedies that they may recover, and in this way reduce the benefits of their bargains and diminish their contractual expectations, must nevertheless retain some distinctively promissory remedy, some remnant of the value of the bargain, something that may be cast, formally, as a contractual expectation.

<sup>61</sup> For example, it is difficult to construct an efficiency-based explanation of the *categorical* legal rule that contracts with certain substantive contents are void. Thus James Gordley observes that “as Posner notes, it is ‘puzzling from an economic standpoint’ . . . that Shylock cannot enforce his contract with Antonio, or that a person cannot sell himself into slavery.” James Gordley, *The Philosophical Origins of Modern Contract Doctrine* 235 (1991). It is similarly difficult for the economic theory to explain why contract law insists *categorically* that contracts are binding only if freely entered into, so that fraud and duress, for example, render contracts voidable rather than merely in need of reformation.

others like them do not, and are not intended to, undermine the modern, reformist approach to the law and economics of contract, they do suggest limits on the capacity of economic analysis sympathetically to reconstruct traditional contract law. In each case the nature of the gap between legal doctrine and economic analysis is the same—specifically in that in each case the law focuses more intently on coordination that is based on agreements than efficiency would recommend.

Moreover, these gaps between legal doctrine and economic analysis concerning contract-making may all be explained in terms of the economic view's reticence concerning contract-keeping. The distinction between the legal treatment of agreements and of other means of securing reliance and coordination may seem too obvious to belabor. It is tempting to say that the law *of course* emphasizes and encourages giving assurance through promises, and structures the obligations that it recognizes according to the promissory form, all for the straightforward reason that there exists a special obligation to keep promises (apart from any broader obligations to avoid misrepresentation or more generally to do as one has said one intends), whose free-standing force makes promises particularly effective mechanisms of coordination and assurance. On this view, the positive law's emphasis on the agreement form—its tendency to be more solicitous of agreements than other types of coordination and to attend, in its doctrines, to the entailments of the agreement form—is straightforwardly explained as an effort to tap into the practical resources associated with the obligation of agreement-keeping.

But this explanation is foreclosed by the economic approach's basic structure, which denies (as I have explained) that there can be a freestanding obligation of promise-keeping, insisting instead that talk of promise-keeping is merely a proxy for a general concern to encourage efficient forms of assurance and reliance. Having rejected any free-standing obligations of agreement-keeping, the economic approach is left without the resources needed to explain contract law's support for agreement-making. The several, seemingly disparate departures from contract law's traditional focus on making agreements that economic analysis recommends in fact all fit into a single pattern, which returns the argument to my central theme. Any satisfactory theory of agreements must answer two

questions, about making and keeping agreements, and a theory that ignores one question in favor of the other will, inevitably, fail to answer adequately even the one question that it does address. Although the economic approach powerfully illuminates conduct that is characteristically governed by the law of contract, it is less successful at providing a general account of the law's broader emphasis on agreement-making as a form of social coordination. The reason the economic approach is not naturally suited to this broader project is its inability to explain any free-standing reasons for agreement-keeping. Insofar as agreement-based forms of coordination have an intrinsic attraction whose appeal is reflected in the traditional view of contract as the law of agreements, this is another reason (apart from the more familiar egalitarian and libertarian reasons) for resisting the economic view of contract, at least in its hegemonic form. Certainly the abandonment of the agreement form places the economic approach to contract in tension with the pre-theoretical attitudes of the participants in contractual practice.

Finally, this pattern is cast into still sharper relief when the assumptions underlying the efficiency-based analysis of contract law are made explicit, and the economic theory of contract is presented in an integrated and theoretically coherent way. This is vividly illustrated in a recent attempt by Alan Schwartz and Robert Scott to construct a unified economic theory of the subclass of contracts that involve only firms—a modern law merchant, as it were.<sup>62</sup> Schwartz and Scott seek to discern what legal rules governing the conduct of economic firms owned by fully diversified shareholders will best “facilitate the ability of firms to maximize welfare [by which Schwartz and Scott mean contractual surplus] when making commercial contracts.”<sup>63</sup> Their narrow focus on firms is intentional and indeed self-consciously chosen to suit the efficiency standard that they apply. Firms are artificial entities, so that concerns about the intrinsic value of autonomy are irrelevant to regulating their behavior.<sup>64</sup> Moreover, the diversified holdings of the natural persons who own the firms similarly cause legal rules to have no dis-

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<sup>62</sup> Schwartz & Scott, *supra* note 16.

<sup>63</sup> *Id.* at 556.

<sup>64</sup> *Id.* Although firms are, of course, managed by natural persons, these managers are mere agents, who are charged to promote the projects of their principals—the firms' owners—rather than to develop and pursue any projects of their own.

tributive effects across owners, who hold shares in both firms that are benefited and that are burdened by every legal rule and so are indifferent to distributive effects across firms and look only to the total value of their portfolios.<sup>65</sup> The law merchant, as Schwartz and Scott observe, therefore need not accommodate concerns of freedom and justice that apply in contract law more broadly, and the economic analysis of commercial law can avoid the distortions and confusions that these values otherwise introduce.

This much tracks the familiar back-and-forth between economic and non-economic approaches to contract—the familiar dispute about the proper places in contract law of efficiency on the one hand and freedom and equality on the other. But the structure of Schwartz and Scott's theory also has entailments for the less familiar questions concerning making and keeping agreements that I have been emphasizing, and in particular it carries the abandonment of the agreement form—which the previous discussions have observed piecemeal—to its logical and systematic conclusion.

The firms that populate the legal regime Schwartz and Scott propose are, as they freely admit, mere instrumentalities of shareholders who are, because their holdings are diversified, all identically situated with respect to every transaction that contract law might regulate. Accordingly, Schwartz and Scott are asking, in effect, what rules a representative shareholder would choose to govern the interactions among the firms whose shares she owns. But this reveals that Schwartz and Scott's model abandons the most basic presupposition from which the study of contract law as the law of agreements ordinarily departs. Whereas contracts, intuitively understood, involve coordination among multiple parties, the transactions addressed by Schwartz and Scott's economic theory ultimately involve only *one*,<sup>66</sup> and they are, therefore, not in the end agreements *at all*.

There is, moreover, no point for the law merchant that Schwartz and Scott imagine to pay special attention to coordination that

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<sup>65</sup> Id. at 555–56.

<sup>66</sup> Schwartz and Scott's project belongs, in a way, less to contract law as it is traditionally understood and more to transaction-cost economics, and in particular to the Coasean theory of the firm. See generally R.H. Coase, *The Nature of the Firm*, in *The Firm, The Market, and the Law* 33 (1988). For a more detailed discussion of this interpretation of Schwartz and Scott's theory, see Markovits, *supra* note 10, at 1467–70.

takes the agreement form, and this leaves the law merchant with no reason to retain the legal doctrines that emphasize agreements in contract law more generally. Contract law more broadly emphasizes making agreements over other forms of coordination, both because of the intrinsic value of the agreement relation and because this emphasis allows the law to draft the freestanding obligation of agreement-keeping into useful service. But the logical structure of Schwartz and Scott's model eliminates by fiat both the opportunities for valuable relationships that the broader law of contract embraces and the problems of sustaining coordination to which the agreement ideal, including the free-standing duty of agreement-keeping, purports to provide an answer. Instead, the agreement relation is logically unattainable in the model that Schwartz and Scott imagine, and the functional equivalent of an obligation of agreement-keeping exists almost by stipulation, in the form of an implicit instruction, issued by the representative owner of all the firms to the agents she employs to manage her firms' affairs, to abide specifically by whatever legal rules of contract-keeping best serve her interests.<sup>67</sup> Schwartz and Scott's assumptions free them not just of the need to address considerations of freedom and equality, but also of opportunity to cast coordination as intrinsically valuable and of the need to explain how the forms of coordination that they contemplate might be sustained.

Schwartz and Scott's model, because it is so self-conscious about its assumptions, makes explicit something that is implicit in the genetic structure of economic approaches to contract more broadly. These approaches, as Schwartz and Scott's model so vividly illustrates, treat persons not as distinct individuals but as interchangeable components of an aggregate: like its utilitarian counterpart, economic efficiency "does not take seriously the distinction between persons."<sup>68</sup> Moreover, economic approaches to contract deny the separateness of persons in two ways. First, they deny that persons have separate interests apart from their contributions to overall satisfaction. (This is generally expressed by rejecting the rele-

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<sup>67</sup> This instruction from the owner to her agents will typically appear in a contract. Of course, this contract involves at least one natural person, which means that Schwartz and Scott's assumptions do not apply to it and that their theory cannot account for its force.

<sup>68</sup> Rawls, *supra* note 6, at 27.

vance of distributive considerations.) Second, the approaches deny that persons' separate agency is in itself valuable, as opposed to being merely a technology for increasing overall satisfaction. (This is generally expressed by rejecting the relevance of autonomy considerations.) Schwartz and Scott's model, because it is so clear about its assumptions, makes these features of the economic view explicit and casts them in the vivid form of a contract law that involves only one party.

But the same tendencies appear (albeit in a less pure form) in every economic analysis of contract law. This reveals that the economic approach's rejection of freestanding obligations of agreement-keeping and its inability to explain the law's preference for agreement-making over other forms of coordination are not just related but are in fact alternative expressions of a single idea. Freestanding obligations of agreement-keeping can sensibly be owed only to individual persons who stand apart from the general good in a way that economic efficiency categorically rejects. Furthermore, the distinctive value of agreement-making can sensibly be ascribed only to coordination among persons whose individual freedom and agency have intrinsic value in a way that economic efficiency rejects. The gap that exists between traditional notions of contract law as the law of agreements and the legal regime that economic analysis recommends as efficient therefore reflects the economic approach's indifference to the features of human individuality that agreements characteristically invoke, an indifference of which the rejection of freestanding obligations of agreement-keeping (from which my argument began) is itself only a symptom.

## II. THE HARM THEORY OF KEEPING CONTRACTS

An alternative approach to the morality of agreements emphasizes the burdens that broken agreements impose on disappointed promisees. These burdens may take the form of costs (including opportunity costs) that promisees have incurred in reliance on a promised performance that never materializes, so that the promisees are left worse off by the broken agreement than they would have been had the promise never been made. Or the burdens may arise, separately, in virtue of expectations that the agreement invited and the breach disappointed. In either case, if these burdens can successfully be classed as *harms*, then, as Craswell observes,

“[i]f there is a general principle that one ought not cause harm to others, that might be enough to justify some sort of rule against [agreement-breaking].”<sup>69</sup> And so the harm theory of agreements is born.<sup>70</sup>

It is plain from the outset (even from this rough formulation) that, in polar opposition to the economic theory discussed in the preceding section, the harm theory of agreements is exclusively a theory of agreement-keeping and says nothing at all about agreement-making. The theory’s theme—indeed, its only note—is that the morality of agreements presents a special case of the more general morality of harm. And while it is natural to think of breaking an agreement as harming a promisee (and especially a promisee

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<sup>69</sup> Craswell, *supra* note 2, at 499. This theory of agreement-keeping is at least as old as Adam Smith’s suggestion that contract is “founded on the reasonable expectation produced by a promise . . . [which is] a declaration of your desire that the person for whom you promise should depend on you for the performance of it.” Adam Smith, *Lectures on Jurisprudence* 472 (R. L. Meek et. al. eds., 1978), *quoted in* R. S. Downie, *Three Accounts of Promising*, 35 *Phil. Q.* 259, 263 (1985).

<sup>70</sup> In the legal literature on contract theory, lost reliance has stood in metonymically for harm more generally, at least since Fuller and Perdue’s famous suggestion that reliance-based contractual obligations are easier to justify than expectation-based obligations. See L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*: 1, 46 *Yale L.J.* 52, 53–57 (1936). Moreover, the near-exclusive association between harm and reliance received a boost from contract theorists who sought to reject contract as a *sui generis* form of legal obligation and, instead, to recast contract as a special case of tort. See generally, e.g., Atiyah, *Freedom of Contract*, *supra* note 3.

Grouping together harms based on lost reliance and disappointed expectations is therefore a little unconventional. But although Fuller and Perdue were surely right to point out that casting lost expectations as harms presents a separate problem for harm-based views, and indeed a problem that I take up in some detail in a moment, the basic structure of the harm-based view is the same whether harms involve lost reliance or disappointed expectations. Although contract and tort are indeed doctrinally and theoretically intertwined, stipulatively identifying harm with reliance does not illuminate the relationship between them, not least because it obscures the possibility that the two forms of obligation are structurally analogous in that they both proceed from a notion of harm, but stand on distinct substantive foundations, which give content to the idea of harm in different ways.

Finally, the term “reliance theory” (in place of “harm theory”) is itself misleading, because it unhelpfully encourages a confused belief that harm theories and economic theories of contract are close (and sympathetic) cousins. In fact, although both theories address the role of reliance in contractual relations, they proceed on very different terms: harm theories seek, fundamentally, to *protect* reliance (and perhaps also expectation); economic theories seek, fundamentally, to *encourage* it. This difference is a deep one and explains why, as I shall observe more closely in a moment, harm theories are theories of agreement-keeping, whereas economic theories are theories of agreement-making.

who has relied), it is not natural (nor is it even comfortable) to think of refusing to make an agreement as harming anyone. It has long been familiar to moral and political philosophers that, as a conceptual matter, the idea of harm carries no content except in connection with a baseline against which harm might be measured.<sup>71</sup> Although there is in general no conceptual difficulty in selecting a baseline that imposes positive duties on persons to benefit others (including perhaps a positive duty to benefit others by making certain agreements with them) and treats breaches of these duties as harms, a theory that proceeds in this way no longer contributes to the distinctive morality of *agreements*. The harm theory of agreements derives its appeal from the intuition that agreements change the baseline entitlements of promisees—in fact, the theory is simply an effort to elaborate and defend this intuition—and an effort to extend the theory to explain reasons for making agreements therefore deprives the theory of its intuitive foundations. Moreover, if such an extension succeeded, it would have produced an explanation for why persons are entitled to be the beneficiaries of agreements that cuts against the intuitive sense that the content of agreement-based obligations depends on what was agreed. Indeed, with this success in place, it would become unclear, as Charles Fried has argued in a related context,<sup>72</sup> why the theory should not dispense with the idea of an agreement, and the related obligation of agreement-keeping, entirely, and simply protect the entitlements that it has established directly, making every departure from them a compensable harm regardless of whether any agreement has been involved.

None of this is really news, of course, and the harm theory does not present itself as underwriting reasons for agreement-making. The purpose of emphasizing this here is not simply to indict the harm theory for being too narrow. Instead, and in keeping with the form of argument that I have pursued from the start, I seek to establish the predicate for an argument that the harm theory's neglect of agreement-making undermines its capacity to produce a satisfactory account, even of the obligations of agreement-keeping

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<sup>71</sup> As Joseph Raz observes, one harms a person "by denying him what is due to him." Joseph Raz, *The Morality of Freedom* 416 (1986).

<sup>72</sup> See Fried, *supra* note 19, at 5.

that it makes its focus. I shall argue, in particular, that the harm theory's inattention to the morality of agreement-making leaves the theory unable to explain how agreements change baseline entitlements of promisees, as is required in order for breaking agreements properly to be said to cause harm. This frustrates the harm theory's account of the obligation of agreement-keeping in two ways.<sup>73</sup> First, the harm theory finds it difficult, without the resources of a theory of agreement-making, to account for the *strictness* of the obligation of agreement-keeping. Second, the harm theory faces an additional difficulty (again connected to the theory's indifference to the morality of agreement-making) in explaining why agreements create entitlements specifically to promissory *expectations*, as our promissory and especially our contractual practices insist that they do. I take up each difficulty in turn.

The harm-based account seeks to ground the obligation to keep agreements in the burdens suffered by promisees when agreements are broken. But not every lost reliance or disappointed expectation is a *harm* that promisors have an obligation to avoid imposing. As Craswell observes, a person need only "[i]magine . . . that a complete stranger walks up to [her] and says that he has formed the belief that [she is] about to give him \$50,000—and, moreover, that he has relied on this expectation by incurring various debts and obligations" to see at once that not every act of reliance creates obligation.<sup>74</sup> Nor is it difficult to imagine less outlandish cases, in which reliance is natural, foreseeable—even foreseen—and still no obligation arises. Charles Fried provides an example of such a case, in which a musician convenes a string quartet in his apartment, and this causes a music lover to buy the unit next door. Fried is surely right to say that even if the musician knows of this reliance, she is

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<sup>73</sup> The harm theory must of course overcome other objections as well, including, for example, the intuitive sense (which the law confirms) that promises can bind even when they generate no reliance and indeed no subjective expectations in promisees, perhaps because they are disbelieved. A familiar example is an alcoholic's promise to stop drinking. See Atiyah, *supra* note 38, at 55–56. See also Páll S. Árdal, "And That's a Promise," 18 Phil. Q. 225, 236 (1968) (imagining a case in which "the promisee cannot be disappointed, because of ignorance, through death or some other cause" and concluding that "[f]rom this it clearly follows that one cannot derive the whole of the obligation to keep a promise from the obligation not to disappoint the promisee"). I shall not take up such matters here.

<sup>74</sup> Craswell, *supra* note 2, at 499.

under no obligation to continue to convene the quartet or to reject a suggestion (Fried imagines) to play at the cellist's house instead.<sup>75</sup> Finally, even when they are based on a promise, lost reliance and disappointed expectations do not necessarily count as harms as the harm-based theory of agreement-keeping requires. This may be seen from the fact that when a person other than the promisee overhears an agreement and relies or forms expectations based on it, no obligation of agreement-keeping is owed to the third person (not even when the promisor knows what has happened).<sup>76</sup>

Harm-based obligations of agreement-keeping therefore arise only insofar as agreements generate assurances that make reliance or expectations based on the agreements *justified*. But agreements seem to be able to generate such justified reliance and expectations only if they *obligate*. And this presents a problem for the harm-based view. Certainly the obligation that underwrites the required assurances cannot itself be a harm-based obligation of agreement-keeping. Although the existence of such an obligation would indeed justify reliance or a promissory expectation, the grounds of the obligation to keep agreements are precisely what is at issue. As Randy Barnett says in discussing the problem in conjunction with harm-based views of contract, "a person, rather than being entitled to legal enforcement because reliance is justified, is justified in relying on those commitments that will be legally enforced. Reliance theories [that is, harm theories] therefore must appeal to a criterion other than reliance to distinguish justified acts of reliance."<sup>77</sup> Promissory reliance, and also, for that matter, promissory expectations, are justified, and harm-based theories of agreement-keeping can get going at all, only if the justification for promissory reliance or expectation can be established on some independent ground.

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<sup>75</sup> See Fried, *supra* note 19, at 10–11. For further examples, see Raz, *supra* note 18, at 216–17.

<sup>76</sup> This example is presented by Raz, *supra* note 18, at 217, and taken up by J.P.W. Cartwright, *An Evidentiary Theory of Promises*, 93 *Mind* 230, 243 (1984).

<sup>77</sup> Randy E. Barnett, *A Consent Theory of Contract*, 86 *Colum. L. Rev.* 269, 276 (1986); see also Stephen A. Smith, *Towards a Theory of Contract*, in *Oxford Essays in Jurisprudence: Fourth Series* 107, 116–17 (Jeremy Horder ed., 2000). Smith observes that reliance can ground obligation only if the promisee is entitled to rely and claims that only a harm-independent account of promissory obligation could generate such entitlements.

To be sure, the required justification may be established by any number of circumstantial factors that arise in and around agreements. Thus, if one friend promises to drive another to an important meeting, our intuitions tell us that it is surely justified, in light of background norms of concern, cooperation, and trust between friends, for the second friend to rely on the promise.<sup>78</sup> Indeed, Patrick Atiyah has suggested that reliance may be justified based on substantive social and political values that stand entirely apart from the formal structure of agreements.<sup>79</sup> But the harm-based theory of agreements must do more than just show that agreement-based reliance (or expectations) can be justified when the surrounding circumstances are right. A genetic, and hence undiscardable, feature of agreements as a distinctive moral form is that making agreements generates obligations of agreement-keeping quite generally, without any need for support from considerations (such as friendship or some other form of solidarity) that come from outside the morality of agreements. The harm-based theory of agreement-keeping is thus in a difficult bind. On the one hand, the theory cannot bootstrap its way into validity by grounding promissory assurances in the very obligation of agreement-keeping that it is charged to explain. On the other, it must show that making an agreement—issuing an ordinary or contractual promise—can, at least ordinarily,<sup>80</sup> *by itself* render relying on, or forming expectations based on, the agreement justified, quite apart from any broader or richer attendant factors.<sup>81</sup>

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<sup>78</sup> Raz suggests that these norms underwrite reliance in such a case even in the absence of a promise, as when one friend simply informs the other that he intends to give her a ride. See Joseph Raz, *Voluntary Obligations and Normative Powers*, 46 *Aristotelian Soc'y* 79, 99 (Supp. vol. 1972); see also Craswell, *supra* note 2, at 500 n.30; F.S. McNeilly, *Promises Demoralized*, 81 *Phil. Rev.* 63 (1972).

<sup>79</sup> Atiyah claims that what “underlies” the reasonableness or justifiability of reliance “is the social and legal morality of a group of persons.” See Atiyah, *supra* note 38, at 121.

<sup>80</sup> This caveat is included to take account of cases in which the surrounding circumstances render reliance on a promise unreasonable and so defeat the effectiveness of an agreement at generating an obligation of agreement-keeping. Although it is necessary that a harm theory of agreement-keeping can render reliance on a promise standing alone ordinarily reasonable, it is not necessary that the theory treat every case as binding.

<sup>81</sup> Thus our folk understandings of promise and the doctrinal structure of our contract law both make plain that promisors need only make agreements to become obligated to keep them, where making an agreement is a very simple thing: in promising,

Threading this needle—establishing a justification for promissory reliance and expectations that is non-reductive without being circular—has proved an elusive goal, and even very sophisticated attempts seem inevitably to fail in one direction or the other. T.M. Scanlon's harm-based theory of agreement-keeping vividly illustrates the difficulty.<sup>82</sup> Very briefly, Scanlon proposes to ground promisees' faith in promissory assurances in pre-promissory moral principles that forbid certain forms of manipulating others and, moreover, require that persons exercise due care in leading others to form certain expectations.<sup>83</sup> Scanlon hopes, in this way, to explain the wrongfulness of making lying or careless promises through these pre-promissory values and then to defend a broader principle of promissory fidelity<sup>84</sup> by reference to the fact that pro-

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as simple as uttering a promise; in contract, as simple as offer and acceptance plus consideration. In particular, promisors need take no further measures to underwrite, or secure, their obligations. They need not, for example, bond themselves to do as they have promised.

<sup>82</sup> See T.M. Scanlon, *What We Owe to Each Other*, 295–327 (1998) [hereinafter Scanlon, *What We Owe to Each Other*]. This material originally appeared in Thomas Scanlon, *Promises and Practices*, 19 *Phil. & Pub. Aff.* 199 (1990) [hereinafter Scanlon, *Promises and Practices*]. Scanlon addresses the problem of circularity in Scanlon, *What We Owe to Each Other*, *supra*, at 307–08.

<sup>83</sup> Scanlon calls these principles against manipulation and in favor of due care M and D. Principle M states:

In the absence of special justification, it is not permissible for one person, *A*, in order to get another person, *B*, to do some act, *X* (which *A* wants *B* to do and which *B* is morally free to do or not do but would otherwise not do), to lead *B* to expect that if he or she does *X* then *A* will do *Y* (which *B* wants but believes that *A* will otherwise not do), when in fact *A* has no intention of doing *Y* if *B* does *X*, and *A* can reasonably foresee that *B* will suffer significant loss if he or she does *X* and *A* does not reciprocate by doing *Y*.

Scanlon, *What We Owe to Each Other*, *supra* note 82, at 298. Principle D states:

One must exercise due care not to lead others to form reasonable but false expectations about what one will do when one has good reason to believe that they would suffer significant loss as a result of relying on these expectations.

*Id.* at 300.

<sup>84</sup> This is Scanlon's principle F, which states:

If (1) *A* voluntarily and intentionally leads *B* to expect that *A* will do *X* (unless *B* consents to *A*'s not doing so); (2) *A* knows that *B* wants to be assured of this; (3) *A* acts with the aim of providing this assurance, and has good reason to believe that he or she has done so; (4) *B* knows that *A* has the beliefs and intentions just described; (5) *A* intends for *B* to know this, and knows that *B* does know it; and (6) *B* knows that *A* has this knowledge and intent; then, in the absence of special justification, *A* must do *X* unless *B* consents to *X*'s not being done.

misees may reasonably trust promisors to avoid these narrower wrongs.<sup>85</sup> Insofar as the obligations concerning manipulation and due care that the theory builds upon may be invoked (among other ways) simply by promising, the theory remains non-reductive, and insofar as the principles are truly pre-promissory, the theory avoids circularity.

But Scanlon's theory achieves these virtues only at the cost of being unable to account for the full scope of the obligation of promise-keeping, and in particular the fact that the obligation extends strictly to forbid even honest and careful promisors (who are subsequently overtaken by events) from changing their minds.<sup>86</sup> Even if it is, as Scanlon observes, justified for promisees to assume that they are not being lied to or treated carelessly, this does not justify the additional promisee reliance and expectations associated with the strict liability character of the obligation of promise-keeping. Scanlon needs another idea to explain this element of promissory obligation, and it is hard to see how the needed idea could avoid both invoking extraneous circumstances that are inconsistent with the independent nature of promissory obligation and importing the very obligation of promise-keeping that remains in need of a defense.

There is a way out of this dilemma, but it comes at the cost of abandoning the harm view's basic structural ambition of explaining the obligation to keep agreements as a special case of a more general duty not to harm others. If agreement-making could be shown to have value, then *this* value might underwrite promisors' strict li-

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Id. at 304.

<sup>85</sup> See id. at 308–09. Patrick Atiyah proposes a more simpleminded version of this argument when he suggests that reliance is justified where the persons whose representations are relied upon are known to be stable-minded and trustworthy and credibly represent that they will do what they say. See Atiyah, *supra* note 38, at 165–69, 192–93. Hanoch Sheinman has persuasively argued that the analysis of such special cases cannot be extended to produce a generally adequate harm-based theory of contract-keeping, roughly because contractual obligation extends even to promises among strangers whose representations are not credible in this way. Hanoch Sheinman, *Contractual Liability and Voluntary Undertakings*, 20 *Oxford J. Legal Stud.* 205, 214–16 (2000). The argument that I present in the main text can be extended to suggest that this approach cannot underwrite a non-circular harm-based view of agreement-keeping at all.

<sup>86</sup> For a similar criticism of Scanlon's view, see Niko Kolodny & R. Jay Wallace, *Promises and Practices Revisited*, 31 *Phil. & Pub. Aff.* 119, 140 (2003).

ability for agreement-keeping in a non-circular way, by providing a justification for the full range of promissory reliance and expectations (including even when these arise in connection with promisors' assurances that they will strictly keep their words) that does not depend on the very obligation of promise-keeping it is designed to sustain. Moreover, this justification does not depend on any contingent and external factors (for example, a context of trust and friendship) but arises organically whenever agreements are made, and it is therefore consistent with the independent character of the obligation to keep agreements. One version of this way out observes that the practice of promising serves useful purposes and that promise-breaking undermines or exploits this practice.<sup>87</sup> Another observes that the individual promissory relationship is intrinsically valuable and that promise-breaking offends against this value.<sup>88</sup> In each case, promisees are justified in accepting promissory assurances because they are justified in believing that promisors will respect the value of agreement-making. But in both cases, the resulting account of promise-keeping is no longer properly speaking a harm-based view because, as I argued earlier, the accounts of promise-making on which the hybrid view's account of promise-keeping depends cannot themselves plausibly be developed out of the idea of harm. The harm-based view's neglect of agreement-making therefore renders it unable to give a satisfactory account of even the obligations of agreement-keeping that it does address.

Moreover, this failure also appears at a second place in the harm view. Even if a harm-based theory can successfully explain strict liability for promise-keeping in a non-circular and yet non-reductive way, the theory faces an additional difficulty (again connected to the theory's indifference to the morality of agreement-making) in explaining the extent of the obligation of promise-keeping. The harm-based view, that is, cannot explain why agreements, as our promissory and especially our contractual practices clearly indicate, create entitlements in respect not just of reasonable reliance but also in respect of promissory expectations. This difficulty is

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<sup>87</sup> Kolodny & Wallace elaborate upon this approach in *id.* at 148–54.

<sup>88</sup> This is the approach that I prefer. See Markovits, *supra* note 10, at 1419–21.

once again illustrated in connection with Scanlon's sophisticated reconstruction of the harm-based view.

The need to account for the forward-looking, expectation-based character of promissory entitlements places significant pressure on harm-based views of agreement-keeping. The ordinary morality of harm, embodied for example in the law of torts, is backward-looking. The obligations it contemplates (including obligations associated with representations concerning current intentions or future actions<sup>89</sup>) are limited to preventing losses; and the remedies it recommends (for example, the damage awards contemplated in the law of torts) are limited to the compensation necessary to restore the status quo ante. The morality of agreement-keeping is different in each of these respects, and the harm-based view, as Scanlon recognizes, must explain each of these differences: first, that promise-keeping obligates promisors to perform their promises—to satisfy their promisees expectations—rather than merely to compensate disappointed promisees for lost reliance or merely to warn of non-performance in order to minimize such reliance losses;<sup>90</sup> and, second, that, with respect (roughly) to promises that are intended and understood by both promisor and promisee to be legally binding contracts, the law enforces the promisor's obligation to make good her promisee's expectation and not merely reimburse his lost reliance.<sup>91</sup> I shall argue that Scanlon's harm-based account of each of

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<sup>89</sup> Examples include obligations not to manipulate others by misleading them about one's intentions, obligations to exercise due care not to create false expectations in others on which they will rely to their detriment, and obligations to take reasonable corrective steps when one has intentionally or negligently led others to form false beliefs on which they might rely. See T.M. Scanlon, Promises and Contracts, *in* The Theory of Contract Law, *supra* note 43, at 86, 93–94 [hereinafter Scanlon, Contracts]; Scanlon, Promises and Practices, *supra* note 82, at 204–05.

<sup>90</sup> Scanlon says:

[I]t is reasonable to want a principle of fidelity that requires performance rather than compensation and that, once an expectation has been created, does not always recognize a warning that it will not be fulfilled as adequate protection against loss, even if the warning is given before any further decision has been made on the basis of the expectation.

Scanlon, What We Owe to Each Other, *supra* note 82, at 304.

<sup>91</sup> More precisely, Scanlon defends a principle, which he calls EF (for enforcing fidelity) which holds:

It is permissible legally to enforce remedies for breach of contract that go beyond compensation for reliance losses, provided that these remedies are not excessive and that they apply only in cases in which the following conditions hold:

these features of agreement-keeping once again cannot be sustained, save by recourse to an account of the independent value of agreement-making that is foreign to the harm-based approach.<sup>92</sup>

Scanlon defends each of these rules of agreement-keeping by comparing the benefits that the rules confer to the burdens that they impose and arguing that, given the balance between these, it would be unreasonable for promisors who must bear the burdens to reject the rules, and that promisees may justifiably claim the benefits of the rules, as the formal structure of the harm theory requires.<sup>93</sup> With respect to the rule that promisors are obligated to

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- (1) *A*, the party against whom the remedy is enforced, has, in the absence of objectionable constraint and with adequate understanding (or the ability to acquire such understanding) of his or her situation, intentionally led *B* to expect that *A* would do *X* unless *B* consented to *A*'s not doing so; (2) *A* had reason to believe that *B* wanted to be assured of this; (3) *A* acted with the aim of providing this assurance, by indicating to *B* that he or she was undertaking a legal obligation to do *X*; (4) *B* indicated that he or she understood *A* to have undertaken such an obligation; (5) *A* and *B* knew, or could easily determine, what kind of remedy *B* would be legally entitled to if *A* breached this obligation; and (6) *A* failed to do *X* without being released from this obligation by *B*, and without special justification for doing so.

Scanlon, *Contracts*, supra note 89, at 105. Scanlon believes that his argument shows only that such legal enforcement of contracts is permitted, not that it is required. *Id.* at 106.

<sup>92</sup> This argument, moreover, might also be applied, *mutatis mutandis*, to other features of Scanlon's harm-based view of agreement-keeping. One prominent further example is Scanlon's claim (which appears on the face of his principle of Fidelity) that the obligation of promise-keeping arises only when promisors know that their promisees "want[] to be assured" that the promised action will be performed. Scanlon, *What We Owe to Each Other*, supra note 82, at 304. Another is his belief that when a promise creates no expectations, perhaps because it is disbelieved, no obligation of promise-keeping arises. *Id.* at 311-14.

<sup>93</sup> Scanlon thus embeds these arguments about agreement-keeping in the broader moral theory that he calls "contractualism," according to which "[a]n act is wrong if its performance under the circumstances would be disallowed by any system of rules for the general regulation of behaviour which no one could reasonably reject as a basis for informed, unforced general agreement." T.M. Scanlon, *Contractualism and Utilitarianism*, in *Utilitarianism and Beyond* 103, 110 (Amartya Sen & Bernard Williams eds., 1982).

It is plausible that the objections I shall develop against Scanlon's arguments for the forward-looking character of agreement-keeping—and in particular my claim that Scanlon's arguments cannot succeed unless they are supplemented with substantive values from outside the frame that they establish—are special cases of a broader objection that claims contractualism writ large is underdetermined because it is a purely formal moral theory with no way of developing, out of its own resources, an understanding of the substantive considerations that are relevant to reasonable rejection.

satisfy promisees' expectations and not merely warn them of non-performance or compensate their lost reliance, Scanlon argues that the benefits to promisees of protecting promissory expectations are substantial<sup>94</sup> and that, given the conditions of mutual knowledge, etc., that are built into the general account of promising, the burdens that this rule imposes on promisors are slight.<sup>95</sup> Given this balance, Scanlon concludes, promisees have reason to insist on having their expectations protected, and promisors cannot reasonably reject this rule of promise-keeping.<sup>96</sup> Similarly, with respect to the legal enforcement of promisees' expectations, Scanlon argues that the benefits of legal enforcement are substantial,<sup>97</sup> while the costs of enforceability are much less weighty.<sup>98</sup> Scanlon therefore concludes, once again, that in light of this balance, no person could

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My own view is that this more ambitious criticism of contractualism is perhaps a little overdrawn, and that although contractualism cannot, as the argument in the main text demonstrates, produce determinate principles of agreement-keeping or corrective justice, it can produce determinate principles in other areas of morality, including most notably distributive justice. I do not, however, take up the issue here. A good general treatment appears in Rahul Kumar, *Consensualism in Principle: On the Foundations of Non-Consequentialist Moral Reasoning* (2001).

<sup>94</sup> The benefits that Scanlon mentions include the psychological benefit of the confidence such protection promotes as well as the more direct benefit of increasing the likelihood that promisors will perform as promised. Scanlon, *What We Owe to Each Other*, supra note 82, at 302–03. Here Scanlon might have added the benefits associated with encouraging reliance that figure so prominently in utilitarian and economic accounts of promise and contract.

<sup>95</sup> After all, a person can always avoid the obligation to satisfy expectations simply by warning that she is not making any promises.

<sup>96</sup> Scanlon, *What We Owe to Each Other*, supra note 82, at 304–05.

<sup>97</sup> These benefits accrue, moreover, not just to the promisees who receive them directly, but also to promisors who desire to be able to give firm assurances in order to increase the value of their promises and hence of what they can demand in exchange for them. See Scanlon, *Contracts*, supra note 89, at 108.

<sup>98</sup> The error costs that accrue when legal enforcement is ordered against a person who has not in fact made an enforceable contract are kept small, Scanlon asserts, by the strict and fairly formal requirements for entering into a contract. See *id.* The compliance costs that accrue when a promisor must make good the expectations created by a promise she has come to regret command little respect in the contractualist calculus, because they can be avoided *ex ante* at a low-cost by refraining from making contractual promises and can be avoided *ex post* only by neglecting a moral obligation imposed by the moral principle of promise-keeping, and this is not a cost that promisors can reasonably cite as a ground for rejecting the legal enforcement of contractual expectations. *Id.*

reasonably reject a legal regime that enforces contractual expectations.<sup>99</sup>

But it is hard to see how such an account of the balance of benefits and burdens associated with these rules of agreement-keeping could possibly sustain Scanlon's conclusions that the rules cannot reasonably be rejected. Although he sometimes presents the assessment of the burdens and benefits associated with these rules as measured against a baseline in which there is *no* rule of agreement-keeping, the appropriate comparison, for the purposes of the harm-based theory, is of course a baseline established by some *alternative* rule of agreement-keeping. One reasonable ground for rejecting a rule of agreement-keeping (or any other moral rule, for that matter) is surely that there exists another, inconsistent rule that may or indeed must (given its distinctive costs and benefits) reasonably be preferred to the rule in question.<sup>100</sup> Therefore, in order for it to be unreasonable to reject such a rule, there can be no alternative rule that may (and certainly none that must) reasonably be preferred.<sup>101</sup>

But once it is acknowledged that a principle of agreement-keeping may reasonably be rejected whenever *any* alternative rule may reasonably be preferred, it becomes natural to ask how the harm theorist can sustain the conclusion that no alternative principles may reasonably be preferred over rules of promise-keeping that extend to protecting promissory expectations and rules of contract law that extend to enforcing contractual expectations. One possible answer argues that the comparative benefits that alternative principles confer are smaller, either in aggregate or in person-by-person individual comparisons, than the comparative burdens that these alternatives impose.<sup>102</sup> But it seems implausible that this

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<sup>99</sup> Id.

<sup>100</sup> I abstract, in this formulation, from questions of the costs (practical or moral) of abandoning a familiar rule in favor of a novel one and hence from questions of the contractualist view of the authority of the status quo. Whatever its general merits, I feel secure in applying this abstraction to the case at hand. Scanlon clearly takes himself to be presenting something quite different from a precedential (or in some other way conservative) account of agreement-keeping.

<sup>101</sup> Scanlon ultimately recognizes this, for example when he defends the legal enforcement of contractual expectations against an alternative rule that would enforce contracts only to the extent of promisees' detrimental reliance. See Scanlon, *Contracts*, supra note 89, at 108–11.

<sup>102</sup> These two formulations—involving aggregate and individualized comparisons—are connected, respectively, to consequentialist and deontological conceptions of im-

approach would converge on the precise principles of agreement-keeping that our moral and legal practices invoke and that Scanlon wishes to defend. Indeed, it was a theme of the earlier discussion of the economic account of agreement-making that these conventional moral and legal principles of agreement-keeping cannot be shown to maximize the aggregate net benefits produced by agreements. (This, incidentally, undercuts any promise that a hybrid economic- and harm-based view might otherwise have.)<sup>103</sup> And there is no reason to believe, and every reason to doubt, that a more individualized accounting of comparative benefits and burdens would converge any more persuasively on these principles. Another possible answer argues that agreements are intrinsically valuable, most likely in respect of the relations among persons that they involve, and that the expectation-based principles of promise and contract-keeping that our practices adopt, and that Scanlon defends, best respect this value. Although this suggestion is appealing, it is also, given the present state of the argument, entirely conclusory. Certainly there is nothing in the balance of burdens and benefits that Scanlon, following the structural instincts of the harm theory, discusses that provides the materials necessary for elaborating agreements' intrinsic value.

These observations, finally, return the argument to its main theme, namely the interdependence of theories of agreement-making and agreement-keeping. The harm view's argument for both the strict liability and the forward-looking character of the morality of agreement-keeping—for a regime of agreement-keeping that condemns breaking even honest and careful promises,

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partiality. The broader contractualist theory of morality within which Scanlon embeds his harm-based theory of promise-keeping employs a deontological conception. See, e.g., Scanlon, *supra* note 83, at 229–41.

<sup>103</sup> It is tempting to suggest that the two views might support each other—that the harm-view of agreement-keeping provides the formalism that the economic view of agreement-making needs in order to justify an emphasis on agreement-based reliance; and the economic view of agreement-making provides the calculus of benefits and burdens that the harm-view of agreement-keeping needs in order to justify settling on the expectation-based principles that our practice incorporates. But the economic and harm-based views do not actually fit together as such a hybrid view requires. The economic view suggests that our practices' emphasis on the formal category expectation probably does not best serve the balanced interests of promisors and promisees. Given this economic result, the harm view cannot show it is unreasonable to reject our expectation-based practices of agreements in favor of some alternative.

protects expectations and not just reliance, and enforces these obligations through a remedy at law—can succeed only on the back of principles concerning agreement-making. Without such principles—perhaps concerning background ideas of efficiency and perhaps concerning the intrinsic, substantive value of agreement-making—a harm-based account of some of the most basic features of the moral practice of agreement-keeping simply cannot get off the ground. But these principles of agreement-making are foreign to the harm view's organic structure. They certainly cannot be derived from the idea of preventing harm, and introducing them into the morality of agreements may even deprive harm-based arguments concerning agreement-keeping of some of their point. The harm view therefore suffers the mirror-image of the inadequacies that I argued earlier plague the economic view. It presents an account that focuses narrowly on keeping agreements but, because of this very narrowness, it lacks the resources necessary to explain some of the most basic features of our practices of agreement-keeping.

### III. THE WILL THEORY OF KEEPING CONTRACTS

The will theory addresses agreements in terms of the power of the will to bind itself. This theory proposes that when, in appropriate circumstances, a person freely intends (by this very intention) to obligate himself to some future course of conduct, an obligation in favor of the course of conduct arises. The varieties of the will theory disagree about what count as appropriate circumstances. With respect to background conditions, they disagree, for example, about what range of alternatives a person must have in order to be free in the sense required by the will theory. Moreover, they disagree even in the "foreground," including, for example, about what might be called the degree of publicity that a promissory intention must have in order to underwrite an obligation of agreement-keeping. Thus, some versions of the theory propose that the intended obligation may be owed to the promisor himself (so that vows can create obligations), whereas others insist that it must be owed to another person. Some versions of the theory propose that even undisclosed intentions can create obligations of agreement-keeping, whereas others insist that the intentions must be communicated in order to be effective. Finally, some versions of the the-

ory propose that promisors' intentions can unilaterally create mature obligations of agreement-keeping, whereas others insist that they create obligations only conditionally, so that actual obligations do not arise without acceptance or some other form of uptake by promisees. But however these details are resolved, the will theory grounds the morality of agreements in the normative powers of the will. Moreover, all versions of the will theory share that they are, self-evidently, exclusively concerned with the reasons for keeping agreements. They begin from the act of agreement-making and seek to draw out its consequences rather than addressing its antecedents in the hope of explaining what agreements should be made.

The will theory is, in a way, the simplest of the approaches to agreements that I have canvassed. Unlike the other two approaches, it seems to have virtually no moving parts into which it can be decomposed. Nor, it might be thought, does it need any: Williston once remarked, purporting to report what was intuitively obvious, that he "[did not] see why a man should not be able to make himself liable if he wishes to do so."<sup>104</sup> But this simplicity is deceptive, as taking Williston's remark seriously quickly reveals. Although there are some things—such as affirming a cause—that a person may perhaps do by wishing it, there are also many things—including many moral things, such as being absolved of past wrongs—that a person cannot do simply because she wishes it. A question therefore arises regarding into which category acquiring an obligation of agreement-keeping falls, and Williston's remark is conclusory with respect to this question. Moreover, there are deep philosophical grounds for being skeptical of the suggestion that obligations of agreement-keeping can be willed into existence in this way, and pure forms of the will theory, because of their narrow focus on agreement-keeping, cannot meet this skepticism. Finally, and in keeping with my broader theme, the only plausible answers that a will-theory might give to the skeptic invoke ideas of agreement-making that are foreign to the will-theory's self-conception.

In spite of its simplicity and initial appeal, the will theory of agreement-keeping faces an old and powerful objection. It is hard

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<sup>104</sup> Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings 194 (1925).

to credit that the intentions in agreement-making can bring the obligation of agreement-keeping into existence on their own—the will seems, one might say, to lack the required potency. To be sure, persons can incur obligations in conjunction with intentional actions (including perhaps representations of their current intentions and plans) in any number of ways, in particular insofar as these actions harm others. But such obligations are grounded in the harms and not in the intentions in themselves. Persons do not *simply* will such obligations into existence; nor, it seems, could they possibly will anything so substantial as an obligation into existence. Indeed, Hume thought the will theory of agreement-making so implausible in this respect that he compared it to the mystery of transubstantiation.<sup>105</sup> Moreover, it does not solve the problem that the intentions involved in making an agreement are often, in practice, associated with the appearance of an obligation of agreement-keeping. As Elizabeth Anscombe observed, “if a door opens when I say to it: ‘I hereby open you,’ that doesn’t mean that my *saying* those words itself, in suitable circumstances, is enough to prove that the door is open.”<sup>106</sup> We still wish to know, in the case of the door, on what ground it might be open; and we still wish to know, in the case of the obligation of agreement-keeping, on what ground it might arise. The will theory’s suggestion that this ground is just the willing in itself seems simply implausible.

Answering this objection, and salvaging the suggestion that promisors will their obligations of agreement-keeping into existence, requires abandoning the simplicity and narrow focus of the pure will theory and embedding the intentions that it contemplates in an account of the values that are served by agreement-making. Promising candidates are available. For example, if making agreements were instrumentally valuable in supporting efficient coordination, as on the economic view discussed earlier, then the intentions involved in agreement-making might cause obligations of

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<sup>105</sup> Hume, *supra* note 1, at 524 (bk. III, pt. II, sec. V). For Hume, the mystery in the origins of the obligation of promise-keeping was compounded by his sentimentalist belief that “[n]o action can be requir’d of us as our duty, unless there be implanted in human nature some actuating passion or motive, capable of producing the action,” and his skepticism about whether the act of will involved in promising could ever give rise to any such motivation. *Id.* at 518.

<sup>106</sup> G.E.M. Anscombe, *Rights, Rules, and Promises*, in *Ethics, Religion, and Politics* 97, 99 (1981).

agreement-keeping to rise out of this backdrop, insofar as such obligations support the instrumental purposes that establish the value of agreements. Alternatively, if the moral worth of the agreement relation gave making agreements an intrinsic value, then respecting this value might call for keeping agreements simply, as the will theory proposes, in virtue of their having been made.<sup>107</sup> But although each approach avoids the difficulties associated with supposing that willing can on its own create an obligation out of nothing, both approaches do so only at the cost of abandoning the will theory's leading theme, namely that obligations of agreement-keeping arise at the will of promisors—that they are fixed according to the choices of promisors rather than by extraneous considerations.

The most prominent contemporary elaboration of the will theory, Charles Fried's "Contract as Promise," pursues a little of each strategy and so presents an excellent illustration of the difficulty that both involve. To be sure, Fried insists that through agreements "persons may impose on themselves obligations where none existed before,"<sup>108</sup> and that these obligations arise, moreover, "just because [they have] promised"<sup>109</sup> and entirely apart from more general obligations not to cause harm. But Fried develops this will-based account of agreement-keeping in connection not with the self-sufficient will, but rather with the will as it is embedded in rich and institutionalized conventions of agreement-making.<sup>110</sup> In particular, Fried identifies two features of agreement-making that explain the value of these conventions. First (and instrumentally), they promote freedom—as Fried says, "[i]n order that I be as free as possible, that my will have the greatest possible range consistent with the similar will of others, it is necessary that there be a way in which I may commit myself."<sup>111</sup> And second, our conventions con-

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<sup>107</sup> I have tried, I now believe unsuccessfully, to explain this possibility in more detail in Markovits, *supra* note 10, at 1442–46 (2004).

<sup>108</sup> Fried, *supra* note 19, at 1.

<sup>109</sup> *Id.* at 4.

<sup>110</sup> *Id.* at 11–13.

<sup>111</sup> *Id.* at 13. Fried's reasoning in this connection is not entirely instrumental. He observes that treating people as autonomous, by enforcing their contracts against them, is "a way of taking them seriously," *id.* at 20, and that not recognizing a person's contractual capacity "infantalize[s] him." *Id.* at 21. Here, Fried picks up on a theme that arises more vividly in Nietzsche, who spoke of the "proud consciousness" associated

cerning agreements constitute “a general regime of trust and confidence” that is intrinsically valuable, which is to say has a value that is “deeper than and independent of the social utility it permits.”<sup>112</sup> Insofar as these values are served by practices of agreement-making and undermined, and indeed betrayed, by breaking agreements, Fried’s version of the will theory no longer depends on a philosophically extravagant notion of the normative potency of the will.

But introducing these external principles concerning agreement-making into a will theory of agreement-keeping also has costs for the theory. To begin with, it is not so clear that Fried’s account of the obligation to keep agreements remains, formally, a will theory at all. It may well be that the rules that govern our conventions concerning agreements instruct that, as Fried says, obligations of agreement-keeping arise “just because [persons have] promised,”<sup>113</sup> but this does not mean that these obligations are, as under a true will theory, willed into existence. As Anthony Kronman points out in discussing Fried’s view, one must distinguish between the grounds of a convention and the grounds, within the convention’s frame, of particular conventional moves.<sup>114</sup> While a convention concerning agreements may, within its four corners, treat certain intentions as directly creating an obligation of agreement-keeping, this does not yet make the will itself into the ultimate ground of this obligation, which instead rests on whatever grounds justify the convention within which the will has operated.

Moreover, the interposition of an agreement-convention in between the will and the obligation to keep agreements renders the responsiveness of agreement-keeping to the will subject to constraints associated with the values and purposes that the agreement-convention serves. This may deprive the will of the substantive role in shaping obligations of agreement-keeping that the

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with the “right to make promises” and the disdain in which those who have acquired the right hold others, as they “reserve a kick for the feeble windbags who promise without the right to do so.” Friedrich Nietzsche, *On the Genealogy of Morals* 59–60 (Walter Kaufmann ed. & trans., 1967).

<sup>112</sup> Fried, *supra* note 19, at 17.

<sup>113</sup> *Id.* at 4.

<sup>114</sup> Anthony T. Kronman, *A New Champion for the Will Theory*, 91 *Yale L.J.* 404, 411 (1981) (reviewing Fried, *supra* note 19, and citing (unsurprisingly) John Rawls, *Two Concepts of Rules*, 64 *Phil. Rev.* 3 (1955)).

intuitions behind the will theory—concerning the will’s normative powers—latch on to, so that the theory no longer supports the intuitive idea that a person may obligate herself however she wishes.<sup>115</sup> Thus it is anything but clear that the autonomy of promisors is best served by extending obligations of promise-keeping to protect even pure expectations unbacked by reliance and by enforcing these obligations at law, as our conventions do.<sup>116</sup> It may well be that promisors’ freedom would be improved by limiting promissory obligations and legal remedies so that they hew more closely to promisee reliance.<sup>117</sup> In addition, it is unclear that the values associated with trust require, or indeed even allow, the insistent emphasis on promissory expectations that our agreement practices involve and that Fried seeks to explain. It may well be, instead, that the best account of trust within the agreement relation

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<sup>115</sup> The positive law, of course, does not recognize the unconstrained freedom of contract that this remark suggests, and one of Fried’s purposes in restating the will theory of contract-keeping was to criticize the positive law in this respect. Thus Fried rejects the consideration doctrine, which restricts legal enforcement of promises to the bargain context, for being an unjustified restriction on freedom of contract. See Fried, *supra* note 19, at 28–39. And although Fried approves of the law’s requirement that there be uptake before a contract becomes enforceable, see *id.* at 41–43, one might fairly ask whether the principle of autonomy in which he embeds his will-based view might not be better served by doing away with this requirement altogether, or perhaps establishing an institutional promisee to accept autonomy-enhancing promises (for example vows of self-control) that have no takers among natural persons and therefore cannot find enforcement under current law. These reflections suggest that, in addition to the objections presented in the main text, Fried’s view comes up against the further objection that it does not accord with our practice of contract-keeping.

This objection should not be ignored, of course, but it is much less damning than the line of argument that the main text pursues, which claims not merely that Fried’s approach fails in some respect to explain our particular practice of contract-keeping, but rather that it is structurally incapable of succeeding on its own terms.

<sup>116</sup> This occurs most dramatically in cases in which promisees seek to enforce contracts that are much more favorable to them than any available alternatives, for example because they involve purchases at dramatically below-market prices. In such cases, contractual expectations cannot be backed by reliance, because they are so much greater than the promisees’ next best offers. See, e.g., *Chatlos Sys. v. Nat’l Cash Register Corp.*, 479 F. Supp. 738 (D.N.J. 1979), *aff’d*, 635 F.2d 1081 (3d Cir. 1980) (ordering remedies that secure promisees’ contractual expectations even though the expectations are entirely unbacked by any reliance, including foregone opportunities); *Texaco Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. App. 1987) (same). But see *Overstreet v. Norden Labs.*, 669 F.2d 1286, 1295 (6th Cir. 1982) (refusing to protect contractual expectations unbacked by reliance).

<sup>117</sup> These points have been made before, for example in Craswell, *supra* note 2, at 517–18, and Kronman, *supra* note 114, at 412–13.

requires promisees to release promisors of burdensome obligations of agreement-keeping when the promisees have only expectations and no reliance to lose.<sup>118</sup>

In both these ways, the supplemental ideas about the value of agreement-making that are necessary to overcome skepticism about the self-sufficient will's normative powers and to make the will theory a going concern philosophically, ultimately undermine the theory that they are designed to enable. They insert themselves in between the intentions associated with agreement-making and the ensuing obligations of agreement-keeping in a way that renders the connection between these two merely contingent, and thereby betrays the will theory's motivating intuitions. Moreover, the purposes that such conventions of agreement-keeping serve exert a pressure for these conventions to depart, substantively, from the will theory's central commitment to giving the will free-reign in fixing the content of its contractual obligations. Once again, a theory of agreements that focuses narrowly on agreement-keeping faces objections that it cannot overcome without expanding its attention to include agreement-making as well. And once again, the ideas concerning agreement-making to which the theory must turn threaten to undermine its initial commitments concerning agreement-keeping.

### CONCLUSION

Contracts present two basic practical questions concerning the reasons that exist for making them and the reasons that exist for keeping them. In spite of this, the three most familiar approaches to agreements each address only one aspect of the morality of contracts and ignore the other. Moreover, this narrowness in their conception renders these theories not just incomplete but also unable, in the end, adequately to explain even the aspect of the morality of agreements that they do address.

The economic approach explains the reasons for making contracts in terms of efficient planning and reliance, and it expressly rejects the notion that there could be any free-standing reasons for keeping contracts. But without an independent obligation of contract-keeping, it becomes difficult to explain why planning and re-

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<sup>118</sup> Kronman makes a similar point. Kronman, *supra* note 114, at 412.

liance should be based specifically on agreements—elaborated through the characteristic forms of contract law—rather than on any number of other coordinating mechanisms. The harm-based approach explains the reasons for keeping contracts in terms of the burdens that broken contracts impose on disappointed promisees, adopting a style of argument that is structurally unsuited to addressing the reasons for making contracts. But without the resources that a theory of contract-making provides, the harm view is unable to sustain the *strict* obligations of contract-keeping that the law imposes or to explain when and to what extent contractual *expectations* (and not only reliance) are justified. And the approaches to contract-making that most plausibly fill this gap undermine the forward-looking account of harm that enabled the harm view to cast itself as a theory of contract. Finally, the will-based approach explains the reasons for keeping contracts in terms of the will's general capacity to bind itself and therefore again says nothing about how the will should exercise this power, that is, about what contracts should be made. But in order to proceed in this way, the will theory must attribute normative powers to the will that are philosophically implausible. And the conventional ideas by which the theory might support the will's normative powers all undermine the ideals of freedom of contract from which the will theory derives its appeal.

This pattern is perhaps not surprising. Whereas contracts create relations that have value in virtue of binding promisors and promisees *together*, the economic, harm, and will theories focus on the services that contracts provide the parties who make them, taken *severally*. Moreover, our contractual practices robustly encourage both contract-making and contract-keeping, often in the same breath. (Just think, here, of the law's willingness to find that ongoing exchange relations create implied-in-fact contracts, which then give the parties obligations of contract-keeping.<sup>119</sup>) This makes it natural to pursue integrated theories of making and keeping contracts, and makes it strange that the leading approaches so insistently segregate the two questions.

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<sup>119</sup> A concrete example is the willingness of courts to treat employee manuals and other management practices as generating implied-in-fact contracts to honor the policies that they establish going forward. See, e.g., *Wagenseller v. Scottsdale Mem'l Hosp.*, 147 Ariz. 370, 381–83 (1985).

The impulse to segregate may, perhaps, be explained by a methodological commitment that all three approaches share, despite their differences. In particular, these theories of contract all proceed as exercises in casuistry—that is, in the application of general, and antecedent, moral principles to the special case of contract in order to govern contractual practice. Because the moral principles from which the theories begin arise independently of contractual practice, they will not be influenced by the fact that making and keeping contracts are in fact intertwined. And so the familiar theories all bend contract in unnatural ways, according to the inclinations of the principles from which they begin.

A better approach would adopt a very different methodology, one that emphasizes reconstruction rather than casuistry. Instead of bending our legal practice to antecedent values, this approach seeks to divine the values that are, distinctively, immanent in our practices—to develop philosophical reconstructions of these practices by elaborating their genetic code. Under this approach, the theoretical integration of our reasons for making and for keeping contracts will follow organically from the practical integration of these two features of the law.

This methodological observation returns me to the collaborative theory of contract that I prefer, which employs this reconstructive methodology and, as I said at the outset, presents a unified account of making and keeping contracts. That approach has its difficulties, which I also mentioned earlier, and it may not in the end be the best way forward. But these pages, although they have been primarily directed elsewhere, have in one way advanced the case for the collaborative view. They have shown that, unlike its familiar alternatives, the collaborative view at least meets the formal demands that any theory of contract must satisfy in order to succeed. This might help to motivate the collaborative view even to those for whom collaboration has no immediate appeal of its own.