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Reliance as Promise

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Abstract

In the face of powerful criticism, the "reliance interest" continues to hold an impactful position in judicial and academic treatment of contract damages. And yet, the theoretical foundation of reliance damages for breach of contract remains unsettled. This Article exposes the inability of the reliance scholarship to coherently explain and justify the widespread judicial practice of awarding reliance damages in lieu of expectation damages. Considering this failure, the Article offers a hitherto overlooked promise-based conception of the reliance interest. Under reliance-as-promise, the right to be reimbursed for one's reasonably foreseeable performance costs is a secondary remedial right grounded in an implied contractual promise which the law attributes to every contracting party. When due to a total breach it becomes clear that the contract will not be performed, the background duty to reimburse comes into play. The Article presents and develops this promise-based account. It claims that reliance as promise can provide a more coherent normative and explanatory account of the phenomenon of awarding reliance damages for breach of contract. Apart from its explanatory force, and the normative support it can find in major contract theories, reliance as promise finds support in basic psychological insights and in the findings of a preliminary empirical study conducted by the authors.

1 | INTRODUCTION

When courts award reliance damages as a sole remedy for breach of contract, why do they do so? This Article claims that no extant account of reliance damages provides a satisfactory answer to this question and suggests one: reliance damages are awarded because this enforces an *implied* promise that every contracting party undertakes when entering a contract. More concretely, upon forming a contractual agreement, contracting parties tacitly promise each other that, if worst comes to worst, and one of them breaches in a way that leads to the total failure of the contractual plan, the breaching party will reimburse the other party for their reasonably foreseeable investment in the contract up to the breach. We call this promise-based concept *reliance as promise*. This idea has managed to escape close scrutiny by the many scholars who have heretofore explored the underpinnings of contractual remedies in general and reliance damages in particular.

No legal taxonomy has influenced the analysis of contract damages as profoundly as Lon Fuller and William Perdue's three-fold interest classification (*restitution*, *reliance* and *expectation*).[1] At the heart of Fuller and Perdue's thesis stood their invitation to recognize an independent contractual interest.[2] This interest, they argued, is theoretically and normatively distinct from the non-breaching party's

[1]Lon L. Fuller & William R. Perdue, *The Reliance Interest in Contract Damages: 1*, 46 Yale L. J. 52, 53–54 (1936) [hereinafter Fuller & Perdue I]; Lon L. Fuller & William R. Perdue, *The Reliance Interest in Contract Damages: 2*, 46 Yale L. J. 373 (1937) [hereinafter Fuller & Perdue II]. The immense impact of this Article has been widely recognized. *See, e.g.*, Robert Hudec, *Restating the "Reliance Interest,"* 67 Corn. L. Rev. 704, 733 (1982) (claiming that the Article has "served a generation of contracts scholars as a model of how to think about contract law"); Avery Katz, *Reflections of Fuller and Perdue's the Reliance Interest in Contract Damages: A Positive Economic Framework*, 21 U. Mich. J. L. Reform 541, 541 (1988).

[2]For a summary of Fuller & Perdue's normative and descriptive claims, *see* Richard Craswell, *Against Fuller and Perdue*, 67 U. Chi. L. Rev. 99, 102–05 (2000) [hereinafter Craswell, *Against Fuller*]. For other summaries of Fuller & Perdue's contributions, *see generally* Todd D. Rakoff, *Fuller and Perdue's The Reliance Interest as a Work of Legal Scholarship*, 1991 Wis. L. Rev. 203 (1991); Robert Birmingham, *Notes on the Reliance Interest*, 60 Wash. L. Rev. 217 (1985).

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widely recognized interest in securing the benefit of the bargain, namely, the expectation interest. The goal of the reliance interest is to restore the aggrieved promisee to its pre-contract position.[3] Importantly, to Fuller and Perdue, the reliance interest seemed more worthy of protection than the expectation interest. The idea of undoing the harm caused by reliance on a broken promise seemed to them better aligned with corrective justice.[4] It also better explained, they believed, certain doctrinal limitations on the right to expectation damages.[5] Ultimately, they argued, the desire to protect contractual reliance is often the true motivation behind recoveries of expectation damages which, indirectly, protect the reliance interest.[6] In this Article we call this account *pure reliance* to highlight the theoretically independent and central status it grants the reliance interest.[7]

Despite its scholarly acclaim, and its undeniable influence on legal education and judicial rhetoric, few contract scholars have fully endorsed the pure reliance approach.[8] On the contrary, many able scholars have criticized it for being normatively weak, descriptively unconvincing, or both.[9]

Considering such powerful critiques, an alternative account of reliance damages gradually emerged, to which we shall refer as *instrumental reliance*. Under this alternative approach, protecting reliance should not be considered an independent goal of contract damages, as envisioned by Fuller and Perdue. Rather, awarding reliance damages in lieu of expectation damages (or as a component thereof) should be understood as an *instrument* in the fulfillment of the *expectation interest*. Thus, in a profitable contract, the expectation measure of damages covers not only the injured party's lost profits but, in addition, reasonable expenses incurred in reliance on the contract up to the breach.[10] In the same vein, this view goes, where the injured party's contractual expectancy cannot be established with reasonable certainty, a court may legitimately assume that the contract was profitable. Hence, awarding full reliance damages can be seen as a minimal approximation of the expectation damages to which the injured party would have been entitled, had the expectation interest been verifiable.[11] Consistent with this line of reasoning, if the breaching party can prove that the contract was a losing deal for the promisee, in which case the reliance measure exceeds the expectation measure of damages, the latter is considered an upper limit to the former.[12]

At the end of the day, the debate over the role of reliance in contract damages is far from being conclusively resolved. Generally speaking, modern-day academics seem to side with the instrumental approach more often than with the pure approach. However, there can be little doubt that the reliance interest remains an important organizing principle of contract damages and a recognized aim of compensation. Indeed, the judicial and academic modern-day discourse reflects this theoretical uncertainty. On one hand, as mentioned, today few would commit to the pure reliance approach in its original version. On the other hand, it is revealing that the demise of the pure reliance approach has not resulted in the abolition of the *reliance interest* discourse.[13] This tension is nicely illustrated in the Second Restatement of Contracts which recognizes the "reliance interest" as an alternative measure of damages, and yet subjects reliance damages to a cap dictated by the expectation interest.[14] This complexity might indicate that the instrumental account, which denies the existence of an independent reliance interest, is also somewhat

[3]Analytically, reliance damages cover two possible heads of damage: *out of pocket expenses* and *forgone opportunities*, namely – gains lost by the inability to enter into an alternative transaction. Fuller & Perdue I, *supra* note 1, at 55–56, 60–61, 78; Dan B. Dobbs, Law of Remedies: Damages–Equity–Restitution 773–75 (2d ed. 1993) [hereinafter Dobbs, Remedies] (noting, though, that "[c]ourts and writers usually do not consider lost opportunities when they discuss reliance expenses").

[4]Fuller & Perdue I, *supra* note 1, at 56. In contrast, the protection of the expectation interest, according to them, deviates from the principle of corrective justice and rests at most on distributive justice. *See*, Fuller & Perdue I, *supra* note 1, at 56–57.

[5]E.g., the requirements of reasonable certainty and foreseeability, and the tendency to protect reliance under doctrines such as impracticability, frustration, and mistake. Fuller & Perdue I, *supra* note 1, at 84–88; Fuller & Perdue II, *supra* note 1, at 373–76, 379–86.

[6]Fuller & Perdue I, *supra* note 1, at 60–62.

[7]This term was coined by Michael B. Kelly, *The Phantom Reliance Interest in Contract Damages*, 1992 Wis. L. Rev. 1755, 1768 (1992). An alternative expression is "injurious reliance." *See infra* note 20.

[8]The keenest adherent of the pure account of reliance was Professor Atiyah. *See, e.g.*, patric . atiah, promie, moral ad la (1981). *See also* Mark Pettit Jr., *Private Advantages and Public Power: Reexamining the Expectation and Reliance Interests in Contract Damages*, 38 Hastings L. J. 417, 427 (1987) (protecting reliance is easier to justify than protecting expectancy).

[9]*See, e.g.*, Kelly, *supra* note 7 (launching a full-scale attack on the very presumption that a reliance interest, as understood by Fuller & Perdue, has any practical or normative significance); Daniel Friedmann, *The Performance Interest in Contract Damages*, 111 L. Q. Rev. 628 (1995) [hereinafter Friedmann, *Performance Interest*] (forcefully criticizing Fuller & Perdue's thesis, both descriptively and normatively); David W. Barnes, *The Net Expectation Interest in Contract Damages*, 48 Emory L. Rev. 1137 (1999) (similar conclusion); Craswell, *Against Fuller*, *supra* note 2, at 125–27, 144–51 (arguing, normatively, that Fuller & Perdue have failed to prove the corrective justice case for protecting the reliance interest; and, descriptively, that the "reliance interest" is not helpful as a way of describing what courts do, even when they award reliance damages in various cases); Eyal Zamir, *The Missing Interest: Restoration of the Contractual Equivalence*, 93 Va. L. Rev. 59, 108–10 (2007) (reliance damages do not necessarily promote corrective justice) [hereinafter Zamir, *Restoration*].

[10]*See infra* text accompanying note 35.

[11]*See* Craswell, *Against Fuller*, *supra* note 2, at 144 (the use of reliance damages in order to estimate the expectation interest is the "most frequent in cases decided today."); Eyal Zamir, *Loss Aversion and the Law*, 65 Vand. L. Rev. 829, 853 (2012) [hereinafter Zamir, *Loss Aversion*] ("The reliance measure of damages is sometimes used instrumentally as a minimal approximation of the injured party's expectation interest"); Barnes, *supra* note 10, at 1153 (reliance damages are "simply the closest provable approximation of the net expectancy amount"); Kelly, *supra* note 7, at 1758 (awarding reliance damages represents courts' efforts to come "as close as possible" to expectation damages); Melvin E. Eisenberg, *Probability and Chance in Contract Law*, 45 UCLA L. Rev. 1006, 1058 (1998) ("A principal rationale for allowing the promisee to recover costs . . . is that the promisee's costs serve as a surrogate for expectation damages"); Eyal Zamir, *Contract Law and Theory: Three Views of the Cathedral*, 81 U. Chi. L. Rev. 2077, 2083–84 (2014) [hereinafter Zamir, *Three Views*] (reliance damages are better explainable as a means to protect the expectation interest than as protecting an independent interest); Gregory Klass, Contract Law in the United States 227–78 (2d ed. 2012) [hereinafter Klass, Contract Law]. For similar analysis under English law, *See, e.g.*, Gunter H. Treitel, The Law of Contract 1132 (15th ed. Edwin Peel ed., 2020) [hereinafter Treitel, Contract Law].

[12]L. Albert & Son v. Armstrong Rubber Co., 178 F.2d 182, 189–90 (2d Cir. 1949) (the promisee's reliance recovery is "subject to the privilege of the promisor to reduce it by as much as he can show that the promisee would have lost, if the contract had been performed."); Scott v. Grinnell Mut. Reinsurance Co., 653 N.W.2d 556, 562–63 (Iowa 2002) ("Reliance damages are not designed to rescue the plaintiff from the consequences of a bad bargain, but to compensate him for gains unrealized as a result of the breaching party's conduct"); Agam v. Gavra, 236 Cal. App. 4th 91, 105–07 (Cal. Ct. App. 2015). For scholarly recognition of this limitation *see* e.g., E. Allan Farnsworth, Contracts 284 (3d ed. 2004); Klass, Contract Law, *supra* note 11, at 227–78; Eisenberg, *supra* note 11, at 1058–59; Zamir, *Restoration*, *supra* note 9, at 80; Kelly, *supra* note 7, at 1768. In English law, *See, e.g.*, Treitel, Contract Law, *supra* note 11, at 1132–33.

[13]*See, e.g.*, Zamir, *Restoration*, *supra* note 9, at 64 (noting that despite powerful normative and descriptive attacks, Fuller & Perdue's analytical framework has maintained its dominant status).

[14]Restatement (Second) of Contracts § 349 (1981) (implying that reliance damages are a valid alternative goal of compensation). *See also*, Brian H. Bix, Contract Law: Rules, Theory, and Context 99–101 (2012) (Restatement § 349 implies that reliance damages are a valid alternative goal of compensation).

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deficient and may have missed something important. The search for this something is at the heart of this Article's inquiry.

The most striking weakness of the instrumental account is revealed in the many cases in which reliance damages are pursued and awarded as a *sole remedy* for breach of contract. In these cases, reliance damages are awarded as an alternative remedy to an injured party who has failed to prove their expectation interest.[15] Hence, the expectation measure of damages plays virtually no role in such cases. This Article argues that if this is the case, then reliance recoveries cannot truly be understood as any approximation of the expectation interest. Thus, we argue, instrumental reliance fails as a coherent account when it is most needed, namely, where courts award reliance damages with no (actual) reference or linkage to the expectation interest.[16]

To avoid the deficiencies of both the pure and the instrumental accounts, this Article develops an alternative approach to reliance damages. By proposing *reliance as promise* as an alternative account, the Article offers a plain but hitherto overlooked view of the reliance cathedral. It offers a fourfold contribution to reliance scholarship: First, it develops a new lens through which the phenomenon of reliance damages can be re-conceptualized. Second, it argues that this fresh perspective can improve our ability to understand, justify, and criticize entrenched judicial practices in the area of contract damages. Third, it offers an empirical framework to validate its underlying premises. Fourth, it examines the extent to which the new concept is consistent with major theories of contract law.

Under reliance as promise, reliance damages are awarded simply for the sake of enforcing an implied contractual obligation. The obligation is to reimburse the other party, under certain conditions, for any reasonably foreseeable reliance costs that the other party may incur. Importantly, the promise to reimburse is not contingent but rather inherent. In other words, it does not necessitate a specific expression of will from which it can be derived in specific cases. Rather, the promise is so intimately associated with entering into a contractual relationship that it is automatically implied by contract law into that relationship, unless the parties indicate their will to free themselves from its grip.[17]

Viewed in this way, then, reliance damages do not represent a non-consensual entitlement to be restored to one's pre-contract position, as proponents of pure reliance assume. Nor do they serve as merely servants of the expectation interest, as reliance instrumentalists would have it. Rather, the right to be compensated for out-of-pocket costs and for opportunities lost in reliance on a contract is simply a reflection of a specific remedial promise, the enforcement of which aggrieved promisees are *entitled* to pursue. Just as contracting parties have a legitimate promissory expectation with regards to their expected profit, so do they have, in certain cases, a legitimate, and independent, *promissory expectation* to be reimbursed for their contractual investment. To be sure, the interrelationship between these two expectations is complex, and may involve tensions or contradictions calling for resolution (*e.g.*, when full protection of the first expectation exceeds that of the second).[18] The point of reliance as promise is simply to shape the way we think when addressing these tensions, highlighting the importance of taking the parties' intentions seriously.

This Article proceeds in four steps. Part 2 sets the stage by pointing out the inability of extant accounts of contractual reliance to explain or justify the widespread phenomenon of awarding reliance damages to aggrieved promisees.

In light of this failure, Part 3 presents our proposed solution to the reliance damages puzzle. We articulate the basic argument, characterizing the duty to reimburse as an implied-in-law remedial obligation that comes into play when, following breach, it is clear that the contract will not be performed.[19] We then emphasize the differences and likenesses between reliance as promise and each of the prevailing accounts of reliance damages. Following these clarifications, we explain why contract as promise overcomes the failures of the prevailing accounts of reliance and provides the most coherent explanation for awarding independent reliance damages. It also addresses the limit of recovery issue, namely the question whether, under reliance as promise, a reliance award may exceed an expectation damage award.

Parts 4 and 5 are an effort to substantiate the empirical and normative validity of reliance as promise. Part 4 presents a *preliminary* empirical study we conducted to reveal what ordinary people think about the promise to reimburse. The findings suggest that most people recognize such an implied contractual promise and perceive it as independent from the promise to advance each party's expectation interest. Part 5 points out the robust normative foundations of reliance as promise by demonstrating their compatibility with major contract theories such as the will theory, corrective justice, and economic efficiency. Part 6 concludes by noting the potential ramifications on legal discourse and legal doctrine of endorsing reliance as promise.

[15]United States v. Behan, 110 U.S. 338, 345–46 (1884) (when profits lost by breach cannot be proved, nonbreaching party is entitled to damages for "actual outlay and expenditure"); Chicago Coliseum Club v. Dempsey, 265 Ill. App. 542, 553–54 (Ill. App. Ct. 1932) (reasonable and necessary expenses incurred in preparing for a boxing match are recoverable by promoter against boxer, if profits from holding match are speculative); Glasscock v. Wilson Constructors, Inc., 627 F.2d 1065, 1068 (10th Cir. 1979) ("Kansas cases indicate that reliance damages will be awarded under appropriate circumstances where they were reasonably within the contemplation of the parties at the time the contract was made"); Kizas v. Webster, 532 F. Supp. 1331, 1332 (D.C. Cir. 1982) ("[W]here the value of the expectancy is admittedly speculative, the reliance measure of damages is the appropriate measure of damages"); Boulevard Ass'n v. Sovereign Hotels, Inc., 861 F. Supp. 1132, 1138 (D. Conn. 1994) ("[P]laintiff is entitled to damages for the expenditures it incurred in reliance on the contract"); Atacs Corp. v. Trans World Commc'ns, 155 F.3d 659, 669 (3d Cir. 1998) ("[W]here a court cannot measure lost profits with certainty, contract law protects an injured party's reliance interest"); Glendale Fed. Bank, FSB v. United States, 239 F.3d 1374, 1383 (Fed. Cir. 2001) ("[I]n reliance damages the critical event is the breach itself. Damages consequent to that breach may be the result of actions before or after the breach"); Drysdale v. Woerth, 153 F. Supp. 2d 678, 383–84 (E.D. Pa. 2001) ("[C]ourts will allow the recovery of such expenditures if the breach of contract renders them valueless to the plaintiff, lost profits cannot be awarded because they appear speculative, and those expenses were foreseeable. . ."); Int'l Brands USA, Inc. v. Old St. Andrews Ltd., 349 F. Supp. 2d 256, 262 (D. Conn. 2004) ("Where a court cannot measure lost profits with certainty, contract law protects an injured party's reliance interest. . ."); Amoco Oil Co. v. Gomez, 379 F.3d 1266, 1277 (S.D. Fla. 2004) ("Under Florida law, a party . . . suing for breach of contract has two alternatives for calculating its damages. The party may seek lost profits . . . or it may . . . prove instead [its] actual expenditures made before the [defendant's breach]"); Summit Props. Int'l, LLC v. LPGA, 2010 U.S. Dist. LEXIS 128825, at *15 (S.D.N.Y. 2010) ("Under New York law, reliance damages are also available as an equitable remedy for breach of contract").

[16]*See infra* Section 2.3.2.

[17]The features of the promise to reimburse and its preconditions are discussed *infra* Section 3.2.

[18]*See infra* Section 3.4.

[19]*See infra* text accompanying notes 51–53.

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2 | THE RELIANCE DAMAGES PUZZLE

Prevailing accounts of contractual reliance have failed. Neither *pure* nor *instrumental* accounts offer a coherent justification for the entrenched judicial practice of awarding reliance damages for breach of contract. This part of the Article seeks to establish this claim. To do so, we group the extant accounts of reliance damages into two families. We then explain why none of these accounts is satisfactory.

2.1 | Setting the scene

To demonstrate the deficiencies of the prevailing reliance accounts, let us consider the following hypothetical: David enters into a contract with Rachel. Relying on the contract (be it a sale contract, a services contract, or any other type of contract), David begins to perform his obligations and to prepare for Rachel's performance. After David has incurred expenses in the amount of $10,000 (on materials, work, advertisement, etc.), Rachel repudiates. Following Rachel's refusal to revoke her repudiation, David lawfully terminates the contract.

Assume now that David files a claim against Rachel, but is unable to assess with sufficient certainty the extent of his expectancy losses, either because his expected revenues from the contract are too speculative or because the total expenditure he would have had to incur in its performance is hard to assess with reasonable certainty. Facing this evidentiary challenge and after consulting his lawyer, David claims $10,000 as reliance damages. Would a civil court accept David's claim? If so, on what basis?

Under American law, the answer to the first of these two questions is crystal-clear: because Rachel breached her contract with David, David is entitled to damages in response to the breach. Under section 349 of the Restatement (Second) of Contracts, instead of claiming expectation damages, which require establishing David's expected profit from the full performance of the contract, David can claim damages based on the extent of his contractual expenditure.[20]

Note that, under Restatement §349, David is entitled to reliance damages not only when there is uncertainty as to his expectation interest, but even when Rachel can prove that David made a bad bargain when he entered the contract with her. In the latter case, however, the Restatement caps David's reliance recovery so that it will not put him in a better position than if there had been no breach.[21]

But why is David entitled to an award of reliance damages in the first place? What is the legal rationale behind such an award? Is it that David has a vested right to be returned (economically speaking) to his pre-contract position after such a breach? If so, why, on the basis of what policy or rationale? Is it that the reliance award simply represents an approximation of David's expectation damages, to which he is no doubt entitled under the law of contract damages? Let us take a quick look at the two prevailing accounts of reliance damages, to see why neither of them provides a satisfactory ground for awarding David reliance damages in such a case.

2.2 | The failure of pure reliance

As mentioned, scholarly accounts of reliance damages can be grouped under two dominant families. The first regards the reliance interest as analytically distinct and normatively independent from the expectation interest. Under this approach, which Fuller & Perdue endorsed in their celebrated article, the protection of the reliance interest is not (or not only) a means to realize the aggrieved promisee's interest in reaping the benefit of the bargain. Rather, by restoring the aggrieved promisee, in monetary terms, to their pre-contract position, reliance damages compensate for actual out-of-pocket losses and thus represent a much stronger moral claim than the claim for the loss of a pure expectancy, from the standpoint of corrective justice.[22]

Notwithstanding its repute, the pure reliance account has attracted significantly fewer adherents than critics.[23] It has been accused of biting off more than it can chew in attempting to portray the reliance interest as a more powerful idea than it actually is, at least in the contractual context.[24]

On the normative level, the main critique was that contrary to what Fuller and Perdue suggested, protecting contractual reliance after breach is in fact *inconsistent* with the idea of corrective justice. Corrective justice requires the wrongdoer to rectify the wrong, or the wrongful losses that emanated from it.[25] Fuller and Perdue assumed that the relevant baseline for measuring an aggrieved party's injury is the pre-contract position. However, the baseline that needs to be restored following breach is, arguably, not the pre-contract position but rather that of full performance. Thus, under corrective justice, what needs to be compensated for is the harm caused by the (unlawful) breach rather than by the (lawful) formation

[20]Restatement (Second) of Contracts § 349 (1981) ("As an alternative to the measure of damages stated in § 347, the injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed").

[21]*Id*., cmt. a. *See also* Dobbs, Remedies, *supra* note 3, at 773; Bix, *supra* note 14, at 99–101.

[22]In other words, reliance damages seek to restore a disrupted equilibrium rather than "to bring into being a new situation." Fuller & Perdue I, *supra* note 1, at 56–57. Interestingly, the "injurious reliance" idea, namely the view that the basis of contract is the protection of reliance injuries, was discussed in the contracts literature that preceded Fuller & Perdue and was even elevated to the degree of a "theory." *See*, *e.g*., Morris R. Cohen, *The Basis of Contract*, 46 Harv. L. Rev. 553, 578–80 (1933) ("There can be no question about the soundness of *the injurious-reliance theory* in accounting for a dominant phase of the law of contract") (emphasis added).

[23]*See*, respectively, *supra* notes 8 (adherents) & 9 (critics).

[24]The role of reliance damages in the law of torts and in the context of precontractual negotiations is outside the scope of the present article.

[25]"Corrective justice is the principle that those who are responsible for the wrongful losses of others have a duty to repair them[.]" Jules L. Coleman, *The Practice of Corrective Justice*, 37 Ariz. L. Rev. 15, 15 (1995); *see also* Jean Hampton, *Correcting Harms* Versus *Righting Wrongs: The Goal of Retribution*, 39 Ucla L. Rev. 1659, 1663 (1992) ("[C]orrective justice. . . requires those who cause losses by acting in wrongful ways to repair, correct, or annul such losses."). Under a broader view, corrective justice targets wrongs or injustices, rather than wrongful losses. *See*, *e.g*., Ernest J. Weinrib, Corrective Justice 9 (2012) [hereinafter Weinrib, Corrective Justice] ("The point of liability [in corrective justice] is to undo the injustice that the plaintiff suffers at the defendant's hand").

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of the contract.[26] And therefore, the restoration must be to the state which would have existed had the contract been fully performed.

A closely linked corrective justice challenge is that reliance damages compensate for losses that, prima facie, are factually unconnected to the breach, because they typically occur prior to it.[27] Absent factual causation, it is impossible to attribute liability for wrongful loss under corrective justice.[28] To be sure, the non-breaching party's expenditure may be depicted as an investment that, following breach, has been wasted. According to this line of reasoning, although the breach is not the effective cause of the expenditure being incurred in the first place, it may be seen as the effective cause of the waste involved in the failure of the contract.[29]

As creative as this construction may be, its logic is only applicable in winning contracts, in which, by definition, every reliance cost could have been recouped but for the breach. Such logic is clearly inapplicable, however, if the aggrieved party has made a bad bargain in the first place, or when it is unclear whether full performance would have resulted in a net gain to the aggrieved promisee. In these scenarios, there is no basis for such an assumption. On the contrary: here the assumption is that the plaintiff would have suffered a certain deadweight loss even if there had been no breach. Thus, even under the wasted expenditure idea, reliance damages are only consistent with corrective justice in profitable contracts. In losing contracts, or in cases of uncertainty as to the promisee's gains from performance, that idea is seemingly unable to reconcile an award of full reliance damages with the causation requirement.

One may still argue that even in losing contracts, partial reliance damages are consistent with corrective justice, as long as they are capped by the expectation interest. This is because *this specific part* of the reliance award (and only it!) represents an expenditure that would have been recouped had the contract been performed. While this description is formally valid, it is practically meaningless. Awarding reliance damages capped by the contractual expectancy is exactly the same as awarding full expectation damages. If the only reason for capping the reliance recovery is that it exceeds the expectation interest, reliance ceases to be the rational basis for the award.[30]

This brings us to the basic failure of pure reliance on the explanatory or descriptive level. As noted, reliance recoveries are traditionally capped by the injured party's expectation interest.[31] Clearly, pure reliance cannot account for this conventional limitation: If reliance is an independent basis of liability, then there is no reason for a cap based on the expectation measure of recovery. Pure reliance is thus clearly inconsistent with contract doctrine.[32]

2.3 | The deficiency of instrumental reliance

Instrumental reliance rejects the pure approach and regards reliance damages as a mere instrument for the protection of the expectation interest. In other words, the reliance interest is not a protected interest at all. To the extent that it is satisfied, this is merely because this is required in order to protect the expectation interest. Nonetheless, alongside its clear strength, the instrumental reliance account is not without its weaknesses, as demonstrated below.

2.3.1 | The strength of instrumental reliance

The instrumental approach to reliance, in a sense, seeks to remedy the failures of the pure reliance account. Thus, from a normative standpoint, if reliance damages are understood as means to protect the expectation interest, they are clearly justifiable by all of the major theories that support the protection of that interest, including corrective justice.[33] On the descriptive or explanatory level, the instrumental approach is seemingly more consistent with judicial rhetoric, which commonly highlights expectation, rather than reliance, as the leading contractual interest.[34]

Thus, to the challenge presented by the phenomenon of reliance damages, instrumental reliance offers a simple and straightforward answer: compensation for reliance losses is justified only because it promotes the fulfillment of the expectation interest.

The instrumental approach is most compelling where the injured party's expectation interest can be established with sufficient certainty. In such cases, the injured party's reliance costs are ordinarily

[26] *See, e.g.*, Peter Benson, *The Unity of Contract Law, in* The Theo o Cotract La: Ne Ea 118, 127–38 (Peter Benson ed., 2001); Ernest J. Weinrib, *Punishment and Disgorgement as Contract Remedies*, 78 Chi. Kent L. Rev. 55, 62–70 (2003) [hereinafter Weinrib, *Punishment*]; Craswell, *Against Fuller*, *supra* note 2, at 121–27; Zamir, *Restoration*, *supra* note 9, at 109–10.

[27] Pettit, *supra* note 8, at 420–21 (acknowledging the causation problem). *See also* Gregory S. Crespi, *Recovering Pre-contractual Expenditures as an Element of Reliance Damages*, 49 S.M. U. L. Rev. 43, 51–63 (1995) (same, in the context of precontractual expenditures).

[28] Weinrib, Corrective Justice, *supra* note 25, at 44 (explaining the vitality of factual causation to establishing a defendant's liability under corrective justice); *see also* Larry A. Alexander, *Causation and Corrective Justice: Does Tort Law Make Sense?* 6 Law & Phil. 1, 1 (1987) (noting that factual causation "is a necessary condition for the plaintiff's recovering corrective damages from the defendant. . .").

[29] In Sec. Stove & Mfg. Co. v. Am. Ry. Express Co., 227 Mo. App. 175, 51 S.W.2d 572 (1932), reliance damages were awarded on the basis of such a construction. For scholarly discussion *See, e.g.*, Marc Owen, *Some Aspects of the Recovery of Reliance Damages in the Law of Contract*, 4 Oxford J. Leg. Stud. 393, 400 (1984); Kelly, *supra* note 7, at 1816; Pettit, *supra* note 8, at 426.

[30] The case may be different, however, if there could be an alternative justification for imposing such a cap. *See infra* Section 3.4.

[31] *See supra*, notes 12 & 14.

[32] *See, e.g.*, Zamir, *Three Views*, *supra* note 11, at 2084 ("Had the reliance interest played an independent role . . .there would be no convincing reason to cap reliance by expectation"). For similar argumentation *see* Efi Zemach & Omri Ben-Zvi, *Contract Theory and the Limits of Reason*, 52 Tulsa L. Rev. 167, 195 (2017); Kelly, *supra* note 7, at 1762–63; Pettit, *supra* note 8, at 445–48.

[33] These theories, including the will theory, corrective justice, and economic efficiency, are discussed *infra* Part 5.

[34] The expectation measure is universally acknowledged to be the basic measure of contract damages. *See, e.g.*, *Robinson v. Harman* (1848) 1 Exch. 850, 855 (endorsing the expectation formula as the basic principle); Richard A. Lord, Williston on Contracts, Vol. 24, at 22 (4th ed. 2002) ("contract damages are ordinarily calculated based on protection of the disappointed promisee's expectation interest"); Farnsworth, *supra* note 12, at 149–50; Dobbs, Remedies, *supra* note 3, at 763 ("The objective [of money compensation] is not to put the plaintiff in the position he would have been in with not contract at all, but instead to give him the benefit of the bargain. . ."). *See also* Friedmann, *Performance Interest*, supra note 9, at 628; Richard Craswell, *Contract Remedies, Renegotiation and the Theory of Efficient Breach*, 61 S. Cal. L. Rev. 629, 636 (1988) [hereinafter Craswell, *Remedies*]; G.H. Treitel, Remedies for Breach of Contract: A Comparative Account 82–83 (1988).

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taken into account as part of calculating the expectation damage award.[35] Taking the actual reliance costs of the injured party into account is justified under the instrumental approach, not because the latter is *entitled* to be reimbursed for the contractual investment. Rather, the injured party is incidentally reimbursed only because this is vital for the full restoration of their contractual expectancy.

To illustrate, assume that in our hypothetical (in which David incurred $10,000 in reliance costs), he could prove that the full performance of the contract would have left him with a net gain of $7000. In such case, David would be entitled to an expectation damage award of $17,000 (his $10,000 costs + $7000 anticipated gain = $17,000). The fact that David will be incidentally reimbursed or compensated for his actual expenditure is merely a contingent byproduct of satisfying his expectation interest.

Under the instrumental approach, the same analysis is applicable in losing contracts where, by definition, reliance damages exceed expectation damages. Here, just as in the case of a profitable contract, the promisee is only entitled to the protection of their expectation interest. Nonetheless, the expectation damage award will have the effect of incidentally reimbursing David for *part* of his reliance interest.

2.3.2 | The weakness of instrumental reliance

When the expectation interest of the injured party is unverifiable, or too speculative to be determined with reasonable certainty, the instrumental approach faces a more serious challenge. These, in fact, are the *paradigmatic cases* in which the courts have ordinarily awarded reliance damages as a sole remedy, that is, *instead* of expectation damages, rather than as a component thereof.[36] In such paradigmatic cases, reliance costs are recoverable not incidentally (as a component of expectation damages) award but independently, that is, without any concrete reference to the injured party's expectation interest.

As noted earlier, the instrumental approach perceives reliance damages in these cases as a means of coming as close as possible to, or an approximation of, the expectation measure of damages.[37] This reasoning is hardly compelling: if there is no evidence as to the injured party's expectation interest, there is no way of knowing if the injured party's reliance losses truly *approximate* their expectation losses. Hence, awarding reliance damages in these cases becomes prima facie arbitrary as a means for protecting the aggrieved party's expectation interest.

To illustrate, in our hypothetical, there is surely a chance that full performance would have resulted in a net gain to David. If that is so, awarding David only $10,000 in reliance damages would not fully restore David's expectation interest. In such a case, a $10,000 reliance recovery is inevitably an *under*-compensatory remedy. If, on the other hand, full performance would have resulted in a net loss to David, the award would do *more* than just protect his expectation interest, and thus would be *over*-compensatory. In either event, awarding David $10,000 seems to be a very poor method of approximating his expectation interest.

To overcome this obvious challenge, the instrumental approach typically assumes that absent evidence to the contrary, any broken contract is a profitable one.[38] This, however, is a pure fiction: there is no a priori reason to assume that, statistically, profitable contracts are more common than losing contracts. Notably, the instrumental approach does not even attempt to defend this assumption on empirical or statistical grounds.

Furthermore, even given an assumption of a profitable contract, the injured party's actual expenditure up to the breach seems a very arbitrary measure for the approximation of their expectation interest: Because breach can meet the promisee at any point in time, the injured party's reliance costs up to the breach can be either very high, very low, or even nil (if the breach occurs immediately after the origination of the contract). In any event, there is no rational basis for the assumption that the extent of the injured party's reliance losses at any particular phase even remotely correlates with the aggrieved promisee's expectation interest.[39]

Of course, if one assumes, as some scholars have,[40] that the contractual venture would have *broken exactly even*, neither earning a profit nor suffering a loss, then an award of reliance damages would give the injured party no more, and no less, than expectation damages would. Such an assumption, however, turns the expectation interest into a meaningless remedial category. If the only reason for awarding reliance damages is an arbitrary and, indeed, fictitious assumption of an exact break-even scenario, then expectation ceases to be the real basis for the award.

Hence, the instrumental approach fails to supply a coherent justification for awarding reliance damages where such a justification is most needed, namely in those cases where reliance damages are sought and awarded instead of expectation damages. Rather than

[35]Under the basic formula for calculating expectation damages, the injured party's net expectancy is added to their actual reliance expenditure. *See, e.g.*, W. David Slawson, *The Role of Reliance in Contract Damages*, 76 Cornell. L. Rev. 197, 228 (1990); Barnes, *supra* note 9, at 1150–53 (arguing that the reliance interest provide[s] information relevant to ensuring the injured party her surplus); Craswell, *Against Fuller*, *supra* note 2, at 102; Pettit, *supra* note 8, at 419–22.

[36]The rule is widely recognized. For a detailed discussion, and a useful survey of the case law, *see*, e.g., Joseph M. Perillo, Corbin on Contracts 241–54 (rev. ed. 2005) [hereinafter Perillo, Corbin]; Robert E. Scott & Jody S. Kraus, Contract Law & Theory 889–902 (4th ed., 2007). For succinct surveys *See, e.g.*, Joseph M. Perillo, Calamari & Perillo on Contracts 500–02 (6th ed. 2009) [hereinafter Perillo, Contracts]; Lon L. Fuller & Melvin A. Eisenberg, Basic Contract Law 13–15 (8th ed. 2006); Craswell, *supra* note 2, at 144–51; *see also supra* note 15 and accompanying text.

[37]*See supra* text accompanying note 11.

[38]For judicial support of this presumption *See, e.g.*, Holt v. United Security Life Ins. & Tr. Co., 72 Atl. 301, 76 N.J.L. 585, 597 (1909) ("Ordinarily, the performance of agreements results in advantage to both parties over and above that with which they part in the course of its performance"); Beefy Trail, Inc. v. Beefy King Int'l, Inc., 267 So.2d 853, 859–60 (Fla. Dist. Ct. App. 1972) (Owen, J. concurring in part) (same). The presumption is often mentioned in the literature. *See* e.g., Perillo, Corbin, *supra* note 36, at 241; Zamir, *Restoration*, *supra* note 9, at 80.

[39]For support *see* Eisenberg, *supra* note 11, at 1062 (reliance damages fall short as a method for assessing expectation damages). Eisenberg notes that the difficulty is aggravated where the injured party incurred little expenses compared to the value of the expected performance (or no expenses at all). *Id.* at 1059.

[40]For the "break-even" presumption *see* Craswell, *Against Fuller*, *supra* note 2, at 144; Kelly, *supra* note 7, at 1811–25; Treitel, Contract Law, *supra* note 11, at 1132.

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providing an approximation of the expectation interest, awarding reliance damages in these cases reflects a lack of concern for this interest.

To address the concern of *overcompensation*, the instrumental account highlights the fact that under contract doctrine, the breaching party is free to raise the defense that the contract was unprofitable for the injured party, thus cutting the reliance award to ensure that the latter is not rescued from a bad bargain. In so doing, however, the courts transfer the onus of proof from the plaintiff to the breaching party.[41] In theory, of course, the latter may stand to the challenge. However, in practice, it is almost impossible for breaching parties to meet the burden of proof.[42] Hence, a rule that is portrayed as based on a refutable evidentiary presumption has turned in fact into a non-refutable legal presumption. If this is true, then the recovery of reliance expenditures is not truly, but rather only by fiction, constrained or affected by the expectation loss.

Note that, in principle, better methods exist for assessing expectation damages in the uncertainty scenarios. Such methods include, for example, measuring expectation by reference to chance or probability,[43] relaxing the standards of proof and allowing courts broad discretion to assess the damage,[44] ordering specific performance whenever feasible, or enforcing an applicable liquidated damages clause.[45] Whether or not such methods present viable solutions to the challenge of evidentiary uncertainty, applying any of these is clearly more consistent with the goal of protecting the expectation interest than an arbitrary reliance recovery. When courts refrain from resorting to such techniques and award full reliance damages instead, their decision to do so is hardly explainable as a sincere attempt to *approximate* the injured party's lost expectancy.

Let us conclude that in numerous cases courts have awarded reliance damages as an alternative to expectation damages. Whether or not a normative justification exists for such practice, one thing should by now be clear: instrumental reliance cannot provide that justification.

3 | RELIANCE AS PROMISE

If by awarding reliance damages courts do not truly attempt to estimate the expectation interest, what is their rationale for doing so? In response, this Part presents the following thesis: awarding reliance damages reflects a silent motivation of judges to enforce a particular promise that every contract implies. This (unspoken) promise is the reciprocal obligation of each party to reimburse the other if a breach of the contract happens to lead to the contract's failure for their contractual investment.[46] While certain elements in this formulation require further elucidation, the basic idea is simple: by forming an enforceable contract, contracting parties tacitly express their willingness to provide each other with an assurance that their reliance investments will not be entirely lost if, due to a breach, it is clear that the contract will not be performed. The following paragraphs elaborate and illustrate the concept of reliance as promise.

3.1 | The promise to reimburse

The liability of a contract breaker to pay an aggrieved promisee reliance damages is the law's manifestation of recognizing a special remedial obligation: the promise to reimburse the other party for their contractual investment, fully or partly, if following a breach by the first party, performance of the contract is no longer relevant (hereinafter: the promise to reimburse).

The basis for such a promise to reimburse is simply the parties' reasonable expectations at the time of contracting. Imagine a reasonable person pondering whether to enter a specific contract, knowing that in the face of breach by the other party, she would be entitled to compensation only for her net expectancy, namely her pure expectation interest (hereinafter: the profit element). Would such a person be willing to incur costs in performance of her primary obligations, without reassurance that such costs will be reimbursed upon a total failure of the contract following its breach?

The negative answer to this rhetorical question seems to us obvious. The ability to rely on a contract is the ability to rely on the assumption that one's expectation interest would be realized even in the face of breach. To satisfy the realization of that interest thus requires that, upon breach, both the profit element as well as reasonable reliance cost will be recovered. This *twofold* guarantee must be honored by the breaching party. Thus, following breach, the contract

[41]Eisenberg, *supra* note 11, at 1059 ("the promisor is allowed to show that the promisee's revenues would actually not have covered its costs, so that promisee would have incurred a loss on the contract."); Beefy Trail, Inc., 267 So. 2d at 860 ("The proof that full performance would have resulted in a loss to the plaintiff is a matter of defense; there is no burden on the plaintiff to prove that there would not have been any loss."); L. Albert & Son v. Armstrong Rubber Co., 178 F.2d 182, 190 (2d Cir. 1949) (". . .yet it does not follow that the breach should not throw upon him [the promisor] the duty of showing that the value of the performance would in fact have been less than the promisee's outlay."); *Agam v. Gavra*, 236 Cal. App. 4th 91, 105–07 (Cal. Ct. App. 2015). The English rule is similar. *See, e.g.*, Treitel, Contract Law, *supra* note 11, at 1133 ("The burden of proof. . . is on the defendant"); *CCC Films (London) Ltd. v Impact Quadrant Films Ltd*. [1985] Q.B. 16.

[42]Typically, the relevant information is more accessible to the non-breaching party than to the breaching party. *See, e.g.*, L. Albert & Son, 178 F.2d at 189 (stating, in this context, that "[i]t is often very hard to learn what the value of the performance would have been"); Treitel, Contract Law, *supra* note 11, at 1133 (noting that the breaching party "may find this burden a hard one to discharge"). James Edelman, Jason Varuhas & Andrew Higgins, McGregor on Damages 66 (22d ed. 2024) (noting the same problem "to which it will often be difficult, if not impossible. . . to offer a resolution").

[43]For such use *see generally*, Miller v. Allstate Ins. Co., 573 So.2d 24 (Fla. Dist. Ct. App. 1990); cf. under English law, *Allied Maples Groups v. Simmons & Simmons*, 1 W.L.R. 1602 [1992] (awarding damages for loss of chance); *Parker v. SJ Berwin & Co.* [2008] EWHC 3017 (QB) (compensation for loss of chance is a preferable approximation of the expectation interest compared to reliance damages). *See generally* Restatement (Second) of Contracts § 348(3) & ill. 5 to § 348(3); Eisenberg, *supra* note 11; Treitel, Contract Law, *supra* note 11, at 1151–61.

[44]*Commonwealth of Australia v. Amann Aviation Pty Ltd.* [1991] 174 CLR 64, at 83 ("Where precise evidence is not available the court must do the best it can. And uncertainty as to the profits to be derived from a business by reason of contingencies is not a reason for a court refusing to assess damages."); *Jones v. Schiffmann* [1971] 124 CLR 303 (Austl. High Ct. Manzies, J.) ("assessment of damages does sometimes, of necessity involve what is guess work rather than estimation").

[45]Craswell, *Against Fuller*, *supra* note 2, at 145–46 (discussing these methods as preferable techniques for approximating the true expectation damages).

[46]Contractual investments take two main forms: 1) investment aimed at enabling the promisor to perform her promises; 2) investment aimed at enhancing the promisor's gains from counter-performance (i.e., performance by the promise). Fuller and Perdue – as well as the Restatement – recognized these two forms of reliance and named them, correspondingly, "essential reliance" and "incidental reliance." Fuller & Perdue, *supra* note 1, at 78; Restatement (Second) of Contracts § 349 cmt. a; Perillo, Contracts, *supra* note 36, at 500.

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should be seen as giving rise not to a single expectation, but rather to *two* separate expectations of the injured party:

I. The expectation of receiving the surplus value of the contract.
II. The expectation of being reimbursed for any reasonable reliance costs.

This logic is arguably reflected in the way expectation damages are measured, namely, by adding the promisee's net expectancy to their actual reliance costs.[47]

Because our argument may seem at first blush as stating the obvious, we must clarify the fundamental qualitative difference between our understanding of the reliance element (in a claim for full expectation damages) and the traditional understanding of that element. Under the all-too-familiar convention, the actual reliance of the injured party is simply a technical component in the expectation damage award. It does not, however, make the promisee's reliance a protected interest *in and of itself*. Under reliance as promise, instead, consideration of the reliance element is not merely an arithmetical necessity. Rather, the actual reliance is an *independent element* of recovery, corresponding to an *independent promise*, which the promisee may seek to enforce *as a matter of right*, independently of any claim for the enforcement of the expectation interest. To be sure, where the injured party's contractual expectancy is verifiable, this independence will not ordinarily have practical ramifications. However, as we shall shortly explain, when the expectation measure cannot be ascertained, the conceptual independence of the reliance element becomes crucial.[48]

3.2 | Some features of the promise to reimburse

Before we consider the normative features of reliance as promise (Sections 3.3 and 3.4), we first provide some clarifications regarding the analytical nature of the promise to reimburse.

3.2.1 | A second-order obligation

To begin, it should be noted that the promise to reimburse is, analytically, a secondary (or second-order) contractual obligation. Contrary to primary (first-order) contractual obligations, which represent the parties' ideal plan, secondary obligations come to life when things go wrong.[49] As opposed to primary obligations, secondary obligations or promises are not part of the ideal contractual plan. Rather, they regulate deviations from the optimistic scenario of full and punctual performance. These are, in a sense, dormant promises. Ideally, they are not supposed to be performed at all. However, in the face of disagreement or failure to perform the primary obligations, secondary obligations become operative.

3.2.2 | An implied remedial promise

Remedial promises are usually secondary obligations because they foresee a need in offering a remedy to an aggrieved party. Such promises can be either explicit or implicit, and implied in fact or in law. A typical example of an explicit remedial promise is the promise to pay compensation under a liquidated damage clause. The duty to pay expectation damages, on the other hand, is an implicit secondary obligation, which the law imparts to contracting parties even in the absence of an explicit provision to that extent.

The promise to reimburse is an implied remedial promise. It is a secondary obligation which comes to life under certain conditions (to be discussed shortly). It puts the breaching party under a legal duty to reimburse the injured party for their reliance costs. Just like the duty to pay expectation damages, and contrary to an obligation to pay liquidated damages, the promise to reimburse is an *implied* obligation rather than an explicit contractual provision.

3.2.3 | A promise implied in law

Notably, the promise to reimburse, just like the promise to pay expectation damages, is implied in law rather than implied in fact. These remedial promises are attributed to the parties based on general legal presumptions, rather than on any specific statement or act of a contracting party.[50] Unlike implied in fact promises, which by their very nature are contingent, the promise to reimburse is an *inherent* one, in the sense that reliance as promise presupposes its existence in *every* contractual relationship, unless the parties positively agree otherwise.

3.2.4 | A conditional promise

Like every secondary obligation, the promise to reimburse is conditional upon a disruption of the ideal contractual plan or a dispute as to its content or execution. Like most remedial obligations, it is conditional upon a breach of the contract. Indeed, the conventional treatment of reliance damages seems to presuppose that (reasonably foreseeable) reliance losses, if proven, may be recovered for *any* breach of contract.[51] This presumption is, however, inaccurate. In fact,

[47] *See supra* text accompanying note 35.

[48] See *infra* text accompanying notes 53–54.

[49] Unfortunately, the analytic distinction between primary and secondary rights and duties is not as familiar to lawyers as it should be. One of the first to highlight its vital importance was the 19th century English philosopher John Austin: "Rights and duties are of two classes: 1st. Those which exist *in* and *per se*: which are, as it were, the ends for which law exists. 2ndly, those which. . . are merely conferred for the better protection and enforcement of those other rights and duties whose existence they so suppose. . . Those which I call secondary or sanctioning. . . arise from violations of other [primary] rights and duties. . .". John Austin *Lectures on Jurisprudence*, Lecture 45, 374–75 (Campbell & Murray, eds., 13th ed. 1920).

[50] For discussion of the interaction between private contractual ordering and state supplementation of implied terms *see generally* Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions between Express and Implied Contract Terms*, 73 Calif. L. Rev. 261 (1985).

[51] Under Restatement (Second) of Contracts § 346(1), cmt. a, "[e]very breach of contract gives the injured party a right to damages against the party in breach. . .". The term "damages" in this context clearly applies to reliance as well as to expectation damage claims. See *id*. § 345, cmt. b. ("Damages may be based on either the expectation or reliance interest. . .").

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the right to reliance damages seems to be available only for a *total* breach of the contract, which results in the irreversible failure of the contract, that is, a situation in which, following repudiation or termination, it is clear that the contract will not be performed.[52] Until this condition is met, the promise to reimburse remains dormant and inoperative.[53]

3.3 | Distinguishing reliance as promise from pure and instrumental reliance

To grasp the uniqueness of reliance as promise, it is essential to distinguish our perception of the right to be reimbursed through an award of reliance damages from that of extant accounts of contractual reliance. Reliance as promise differs substantially from both the *pure* and *instrumental* reliance. The most fundamental difference is that reliance as promise, as its name discloses, is a promissory account. By emphasizing the promissory basis of a claim for reimbursement, our account highlights a feature that has largely been obscured in contractual reliance discourse.

The uniqueness of *reliance as promise* compared with pure reliance seems evident. Obviously, the pure reliance conception does not offer anything close to a promissory account of reliance awards. On the contrary, at its heart lies the claim that the protection of contractual reliance, as opposed to that of contractual expectation, has nothing to do with the idea of consent or free will. Pure reliance views reliance damages as a means of protecting a negative interest, a tort-like norm that necessitates the removing of harm to an existing asset, rather than a positive interest in enhancing one's fortune by another's performance. In this sense, pure reliance damages are akin to tort damages, which compensate tort victims by restoring them to their pre-wrong position.[54]

Nonetheless, in at least one sense reliance as promise is somewhat analogous to the pure reliance approach. Under both accounts, the right to be reimbursed for expenses is *independent* rather than *instrumental*, in the sense that its justification does not depend on the satisfaction of any other interest of the promisee. It is thus an independent claim, which the promisee can bring as a legitimate alternative to a claim based on an alleged injury to the expectation (or restitution) interest. And yet, the approaches do differ. Whereas pure reliance takes the reliance interest to be normatively superior to the expectation interest, no such hierarchy exists under reliance as promise: because the source of both interests is the same, they are treated as equally normatively important. Under reliance as promise, insofar as a tension exists between two claims corresponding to these two interests, that tension should be resolved on the basis of interpreting the contractual promises rather than on any predetermined normative ranking of *interests*.

Distinguishing reliance as promise from the instrumental account is, at first blush, more challenging. Because reliance costs are a vital component in any expectation damage award,[55] one might be tempted to conclude that instrumental reliance is in some sense promissory, akin to reliance as promise.

To a limited extent, we accept this supposition. Indeed, we do not deny that the instrumental account connects the concept of reliance with that of expectation and, in this sense, connects reliance with contractual expectations. However, as we have already seen, instrumental reliance fails to establish such a connection in cases where the expectation interest cannot be measured, which are the paradigmatic arena for awarding reliance damages.[56] Reliance as promise, in contrast, can justify the award of reliance damages in these cases quite easily, without any reference to or dependence on the expectation measure. The aggrieved party is entitled to reliance damages simply because such a damage award enforces the breaching party's promise to reimburse. The instrumental account, on the other hand, misses the mark and fails to take reliance damage awards for what they really are by attempting to construe these awards as if they reflected a genuine attempt to restore the expectation interest.

Under reliance as promise, contractual parties may have a legitimate reimbursement claim against each other, whether or not satisfying this claim will protect their contractual expectancy. This claim is simply not founded on the extent to which reimbursement satisfies the claimant's expectation interest. Rather, it is founded on the notion that reimbursement is due simply because it was promised, and only to the extent that is consistent with the hypothetical intention of the parties. Under reliance as promise, just as under pure reliance, protecting contractual reliance is not merely a means towards another end, but *an end in and of itself*.

Under reliance as promise, then, reliance damages are promissory in a much stronger sense than under instrumental reliance. They are not merely a technical component which serves the injured party's expectation interest. Rather, reliance damages are the embodiment in the law of contract remedies of an independent concept: a promissory reliance interest. In other words, the difference between the two accounts of reliance conceals a substantive normative gap: whereas instrumental reliance *denies* the existence of an independent reliance interest, reliance as promise does *recognize* such an independent interest. As the following section demonstrates, these theoretical distinctions may produce important normative, explanatory, and doctrinal implications.

3.4 | The promise to reimburse—To what limit?

Our assertion that reliance as promise recognizes an *independent* reliance claim calls for some clarifications as regards a focal issue in reliance doctrine, namely the limit of recovery.

[52]For rare recognition of this precondition *See, e.g.*, Farnsworth, Contracts, *supra* note 12, at 835 (mentioning "total breach" as a precondition for a reliance damage claim).

[53]In this respect, reliance damages resemble compensation for lost expectancy. Such a claim can only be brought if there is no prospect of future enforcement.

[54]Harvey McGregor, McGregor on Damages 766 (18th ed. 2009) ("The measure of damage in tort is therefore to be assessed on the basis of restoring as far as possible the *status quo ante*").

[55]*See supra* text accompanying note 35.

[56]*See supra* Section 2.3.2.

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As already mentioned, there is a broad consensus that reliance awards should never give the injured party more than is necessary for the full protection of their expectation interest.[57] This common view reflects the instrumental approach, under which reliance damages have no independent justification except the satisfaction of the expectation interest. If, however, the normative foundation of reliance damages is to be ascribed to an implied promise to reimburse, as we argue, then the answer might differ.

Under reliance as promise, the answer to the limit on recovery question depends on the interpretation of the promise to reimburse in any given case. Indeed, if the source of the obligation to reimburse is the parties' common (implied) intention, the scope of that obligation must naturally be dictated by that common intention. Theoretically, that intention can be either to subject the duty to reimburse to a cap dictated by the injured party's expectation interest, a result consistent with the instrumental approach; or to recognize an uncapped reliance claim, a result consistent with the pure approach. For if reliance damages are indeed grounded in a *promise* to reimburse, there is no a priori reason to *rigidly* cap these damages at the value of the expectation interest. Indeed, the content of any particular promise is inherently contingent since it ultimately depends on the interpretation of the specific contract in which the promise is arguably included.

Furthermore, there is no logical way to infer from the mere existence of a certain promise, once it is deduced (or presumed), the parties' intention as to how to enforce that promise or to what level. In other words, the fact that A promised B to do an act C does not, in itself, solve the question which remedy best suits A and B's hypothetical preferences as to the appropriate remedy or sanction for the breach of that promise.[58] Hence, if there is no a priori limitation on the content of contractual promises, there should be nothing peculiar in contemplating an unlimited duty to reimburse a non-breaching party if such an interpretive conclusion is in line with the common intention of the parties.

Back to our point: at least in theory, contractual parties may wish, in certain circumstances or in certain categories of cases, to free themselves from the conventional ceiling dictated by their (reciprocal) expectation interests. As a matter of principle, there is no apparent reason to deny them the power to do so if their actual or hypothetical wills support such an interpretive conclusion.

The question then becomes: under reliance as promise, what are the cases in which contracting parties may desire to limit the duty to reimburse by reference to the non-breaching party's expectation interest? Does the characterization of the promise to reimburse as an independent obligation entail the conclusion that ordinarily the parties would object to any limit of recovery on the duty to reimburse?

In our view, if, following the failure of the contract, the injured party's expectation interest is relatively easy to verify, there should be no reason to assume, absent ad hoc indications to the contrary, that the duty to reimburse, though independent, is limitless in its scope. Arguably, the natural understanding of reasonable contracting parties is that such a limit does exist; that limit is defined by the injured party's expectation interest. Let us explain.

In every contract, the expectation interest is defined upon formation, that is, prior to any possible breach.[59] Its scope is defined by the primary obligations of each party. These obligations, and especially the explicit core obligations of the contract, allocate the risk and level of responsibility undertaken by each party. Generally speaking, it would therefore be reasonable, from the standpoint of typical contracting parties, to subject the risk of having to reimburse one another in case of breach to the limit of liability dictated by the contract's primary obligations. Arguably, absent special reasons, a reasonable promisee would not agree to commit, even if they happened to break the promise in the future, to rescue the other party from what was a bad bargain for the promisee to begin with. The reason is not that rescuing a contracting party from a bad bargain is morally unjustified, unfair, does not reflect mutual consideration or leads to inefficient outcomes, as lawyer economists would have it. The reason is simply that, other things being equal, reasonable people do not commit to take unlimited responsibility for events that are beyond their control. Because the nature and extent of a promisee's reliance investments, both the planned ones and those actually incurred, are typically out of the control of the promisor, there is a reason to assume that most contracting parties would not, absent special reasons, agree to undertake remedial (secondary) obligations exceeding the limits dictated by their primary obligations towards each other.

However, this typical presumption should not be understood as a necessary implication of reliance as promisee, but rather as a majoritarian default rule that contracting parties may alter. Such alteration can, of course, be either explicit in the contract terms or implied in fact, that is, deduced from an act, omission or representation of one of the parties or both. However, in principle, there is no reason to exclude the possibility of implying such alteration even absent an actual expression of will.[60] While a majoritarian default rule arguably matches the implied or presumed preferences of most reasonable parties, the preferences of the parties might, in certain situations, denote an alteration of a default rule.[61]

We believe one such situation is the scenario in which reliance damages are most commonly awarded, namely cases where, following a total breach of the contract, there is a significant objective difficulty in estimating the expectation interest of the aggrieved promisee. Such a scenario may be predicted *ex ante*, for example, where a foreseeable breach is likely to cause the promisee consequential losses. Such

[57] *See supra* text accompanying note 14.

[58] *See, e.g.*, Craswell, *Against Fuller*, *supra* note 2, at 130, 133 (A promise-based liability may entail, in different circumstances, remedies which approximate the promisee's expectation; give less, or give more than the expectation). In the same vein, *see* Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 Mich. L. Rev. 489, 517–20 (1989); cf. Jody S. Kraus, *The Correspondence of Contract and Promise*, 190 Colum. L. Rev. 1603, 1629 (2009) ("The content of remedial moral duties does not necessarily correspond to the content of the first-order moral responsibilities whose breach they remedy.").

[59] This truth is often obscured because the expectation interest was originally defined by Fuller and Perdue as a post-breach interest.

[60] We refer here to what has been described as "open-ended," pure interpretive, alteration of a default rule. Put differently, an alteration can be deduced from the parties' reasonable intention, including an implied-in-fact intention. *See* Gregory Klass, *Two Forms of Formalism in Contract Law*, 46 Cardozo L. Rev. 369, 379–81, 389 (2024).

[61] *Id.* at 384, 401.

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losses are typically more speculative and thus more difficult to ascertain and to assess with reasonable certainty.[62] Predicting ex ante that the unverifiable expectation measure may lead to a relatively low probability of suit in a case of breach or would not adequately compensate the promisee, nor effectively deter breaches or incentivize performance, reasonable parties may well agree to grant the promisee an option to obtain reliance damages that may exceed her expectation interest.

This may be seen, by analogy, as a special type of liquidated damage clause: the parties contemplate the possibility of facing an evidentiary obstacle in substantiating the losses caused by a breach and impliedly agree that the non-breaching party will not be required to prove these losses. Instead, the non-breaching party may invoke an uncapped promise to reimburse. Just as in the case of a liquidated damage clause, this uncapped reliance recovery can be either higher or lower than an award based on the (unverifiable) expectation interest. However, because the promise to reimburse is independent from the expectation interest, the aggrieved party can choose to enforce it instead of attempting to establish their expectation interest. As we shall argue below, such an implied agreement can also be understood as an *ex ante* allocation of risks aimed at providing stronger incentives to perform and deter breach.[63]

4 | PRELIMINARY EMPIRICAL VALIDATION

In the previous part we suggested that the *promise to reimburse* may underlie the entrenched practice of the courts to compensate aggrieved promisees for their reliance losses. In other words, awarding reliance damages as a standalone remedy may reflect an intuitive notion acknowledging the existence of a promise to reimburse as a conventional expectation of parties, a notion that motivates judges to enforce such a promise.

Underlying this conjecture is the belief that implying such a promise reflects a prevailing moral intuition or common sense. Indeed, it is well known that there is a close correlation between the commonsense morality of a given society and the law of that society.[64] This intimate correlation is revealed in every legal field, including contract law.[65]

This part portrays a preliminary empirical study we conducted to examine the extent to which reliance as promise is consistent with the prevalent moral intuitions or common sense of ordinary people.

4.1 | Background and goals of the study

It has been observed that prevailing moral intuitions are closely linked to psychological tendencies which, in turn, shape the law as well.[66] For example, it has been convincingly argued that the notions of *reference dependence* and *loss aversion*, which have a profound effect on human conduct generally,[67] significantly affect the law, including remedies for breach of contract.[68]

Specifically, the notions of reference dependence and loss aversion were proposed by Eyal Zamir as explanations for the marginality of disgorgement damages as a remedy for breach of contract. According to this argument, people generally perceive outcomes as gains or losses which are defined relative to a reference point. Usually, losses loom larger than gains; that is, people find losses more painful than unobtained gains. These notions can explain why contracting parties do not regard their interest in disgorging benefits from a contract breacher as important as securing compensation for losses they have actually suffered. Ordinarily, promisees do not perceive the breaching party's gains from the breach as something they have lost, but rather as unobtained gains. Therefore, promisees tend not to sue for the breacher's gains and courts are less likely to award them. In contrast, promisees view their *reliance expenses and expectation losses* as much more pressing issues, namely, as something they have affirmatively *lost*. Therefore, not protecting their reliance and expectation interests is considerably more painful for promisees. This explains the legal superiority of those latter interests over the disgorgement interest.[69]

Arguably, this kind of logic can support our claim that a basic intuition regards the interest of contracting parties in being insured against the loss of reliance costs as no less pressing for them than the interest in being insured against the loss of the expectancy to realize a profit from full performance. As Zamir states, from a psychological perspective, both expectation and reliance are conceivable points of reference for assessing a promisee's loss due to a breach.[70] If that is the case, if reliance losses are indeed a pressing issue for contracting parties *ex post*, then it is only natural to conclude that, *ex ante*, the parties may have this issue in mind. And predicting it, they share ex ante, often tacit, understandings regarding the preservation of their reliance interest, just as they do regarding the preservation of their expectation interest.

[62] *See, e.g.*, Treitel, Contract Law, *supra* note 11, at 1193, 1112.
[63] *See infra* Section 5.3, especially text accompanying notes 140–149.
[64] *See, e.g.*, H.L.A. Hart, The Concept of Law 204 (2d ed. 1994) ("The law of every modern state shows at a thousand points the influence of both the accepted social morality and wider moral ideals. These influences enter into law either abruptly and avowedly through legislation or silently and piecemeal through the judicial process"); Samuel E. Stumpf, *The Moral Element in Supreme Court Decisions*, 6 Vand. L. Rev. 41 (1952) (court decides cases on the basis of moral judgment); Eyal Zamir, Law, Psychology and Morality 194 (Oxford University Press, 2015) ("Indeed, one can hardly deny that legal norms are very often commensurate with. . . commonsense morality"); Robert A. Prentice & Jonathan J. Koehler, *A Normality Bias in Legal Decision Making*, 88 Cornell L. Rev. 583, 592 (2003) ("Common law is based on intuitive judgment or common sense"); Ori Katz, *Mapping the Diversity of Thought – An Attitude Theory of Contract Law*, 31 S. Cal. Interdisc. L.J. 49, 49–50 (2021) ("Legal policy and decision-making are affected by myriad factors, including . . . notably, prevailing normative attitudes.").
[65] The correlation between common moral conceptions and the rules and principles of contract law is discussed and illustrated in Eyal Zamir & Barak Medina, Law, Economics and Morality, 289–91, 301–03 (2010). For the correlation between the way parties understand their own contractual obligations and their moral intuitions, *see generally* Tess Wilkinson-Ryan, *Legal Promise and Psychological Contract*, 47 Wake Forest L. Rev. 843 (2012).
[66] Zamir, *Loss Aversion*, *supra* note 11, at 876.
[67] E.g., Richard H. Thaler, *Towards A Positive Theory of Consumer Choice*, 1 J. Econ. Behav. & Org. 39, 43–47 (1980) (discussing the "endowment effect," which makes people appreciate what they have more than what they do not); Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economists*, 93 Am. Econ. Rev. 1449, 1454–58 (2003) (discussing the effect of reference dependence and loss aversion on human perceptions).
[68] *See generally*, Zamir, *Loss Aversion*, *supra* note 11, at 852–60.
[69] *Id.*
[70] *Id.* at 856.

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Furthermore, the psychological urge to satisfy the reliance interest may, in fact, be even *more* pressing than that of the expectation interest. As far as reliance expenditures are concerned (as opposed to forgone opportunities), reliance damages represent an *out-of-pocket loss*, whereas expectation damages inevitably extend to the protection of expectancy for *future* profit. In this sense, describing expectation damages as *losses* (rather than as *unobtained gains*) is, though feasible, somewhat harder than describing reliance damages as such.[71]

Arguments and theories about contracting parties' hypothetical intentions, generally and regarding remedies, are, however, always exposed to criticism. A powerful critique is that the question of a hypothetical remedial agreement between parties is ultimately an empirical question. Attributing to the parties contractual obligations in the absence of any objective expression of will, as reliance as promise admittedly does, can lead to the imposition of non-promissory legal duties under disguise of contractual consent.[72] In response to such claims, it should be noted that majoritarian remedial rules are often used in contract law and are considered normatively consistent with individual autonomy and respect for the parties' will.[73] And yet, there is always the concern that an interpretive hypothetical agreement will be mistakenly deduced as a matter of empirical fact. Reliance as promise, as any other suggestion of a hypothetical agreement, thus faces a further challenge: establishing its empirical validity.

Taking this challenge seriously, we decided to embark on an empirical study: we approached ordinary people and asked them what they thought about how people perceive contractual relationships. Keeping in mind that this Article's main endeavor is theoretical rather than empirical, we decided nonetheless to engage in a modest preliminary study to test the prima facie validity of the premise underlying reliance as promise. Given the preliminary nature of the study and its admittedly limited scope, we chose as our method an anonymous self-report survey to be distributed among a representative sample of the general population.[74]

Note that the goal of the study, as explained above, was not to figure out what people perceive as the law governing contractual remedies.[75] As this Section has made clear, the purpose of the study was to try to expose the moral intuitions of ordinary people, and their own views as to what is just and fair *in their eyes*.

The following sections portray our methodology, present the findings, and discuss their possible significance, critique, and implications.

4.2 | Methodology and hypothesis

Before we describe the survey and discuss its findings, a note is in place regarding the content and structure of the study, as well as regarding the research hypothesis.

The idea behind the study was to design a dilemma that will force respondents participating in the survey either to acknowledge or to deny the existence of a legitimate moral claim for reimbursement of reliance costs, based on an implied promise to do so. If that promise is, in people's eyes, independent from the promise to ensure the contractual expectancy, as reliance as promise claims, we speculated that most people would recognize the legitimacy of an independent reliance claim. Also, we contemplated that those who would recognize such a reliance claim would tend to acknowledge its promissory or consensual nature.

Consequently, the next natural step was to construct a hypothetical in which the claim for reliance damages could easily and sharply be distinguished from the claim for expectation damages. The scenario that seemed to us most suitable for this purpose was that of an evidently losing contract, that is, a contract where (but for the breach) the aggrieved party would have suffered an economic loss (rather than making a gain).[76] If people recognized the injured party's moral right to (full and uncapped) reliance damages in a losing contract, this would arguably indicate that they perceive reliance damages as an independent interest of contracting parties. On the other hand, if most people rejected the injured party's right to obtain a recovery larger than expectation damages, this could indicate that most people recognize a certain inter-dependency between the claim for reliance damages and the claim for expectation damages.

While the results of such a questionnaire could be illuminating, they alone would not be able to identify the underlying perceptions of each respondent. To achieve that objective, each respondent was asked to answer another question that would further expose their perception by revealing *the reason* behind their decision (to accept or deny the reliance damage claim). Thus, within the group of *positive respondents* (*i.e.*, respondents that accepted the reliance claim), we could distinguish between respondents who see the uncapped reliance interest as promissory in its nature (as reliance as promise presumes) and those who see it as based on a non-consensual policy (a premise underlying the pure reliance approach). To achieve this, positive respondents were asked to clarify whether their choice was anchored in their understanding of this claim as internal to the contractual relationship or as based solely on some external principle or policy (such as deterrence, corrective justice, reprehension, etc.). If most positive respondents preferred the first option, this could indicate that they recognized the promissory basis of reliance and vice versa: if they believed the reason for awarding full reliance damages

[71] Interestingly, Zamir's relatively extended analysis of expectation damages in terms of loss (compared to a much shorter discussion about reliance) may implicitly support our claim that reliance damages are much more intuitively perceived as a pressing loss. *See id.* at 856–57.

[72] *See, e.g.*, Charles Fried, Contract as Promise 60 (1981) ("The further courts are from the boundary between interpretation and interpolation, the further they are from the moral basis of the promise principle and the more palpably are they imposing an agreement").

[73] Kraus, *supra* note 58, at 1627–34 (discussing remedial default rules and arguing, contra Charles Fried, that a majoritarian remedial default rule can be compatible with contracting parties' subjective intentions and autonomy). *See also infra* notes 115–120 and the accompanying text.

[74] *See infra* Section 4.3.

[75] *See, e.g.*, Tess Wilkinson-Ryan, *Fault in Contracts: A Psychological Approach*, *in* Fault in American Contract Law 289, 291–98 (Omri Ben-Shahar & Ariel Porat eds., 2010) (studying people's beliefs about the available contract remedies).

[76] Initially we considered formulating two additional hypotheticals to address the alternative scenarios of a profitable contract and of a contract the profitability of which was unknown or uncertain. However, realizing that under these scenarios, distinguishing reliance as promise from pure reliance and instrumental reliance would be practically impossible, we ultimately decided to focus on a single scenario in which the rival approaches to reliance can be distinguished most clearly.

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had nothing to do with the parties' understandings, this could amount to an implicit endorsement of the pure reliance approach, or another non-promissory approach (*e.g.*, an approach based on a punitive, educational, or economic rationale).

Similarly, a second step was needed to differentiate two possible approaches within the *negative group* (*i.e.*, respondents who denied the uncapped reliance claim). We speculated that within this group of respondents, there could be a theoretically significant split between those flatly denying the existence of any independent reliance claim, and those endorsing a more attenuated position, which recognizes an independent promissory interest in reimbursement, but subjects its scope to the explicit allocation of risk between the parties, as reflected in the contract price.[77]

Consequently, we decided to construct the questionnaire in a way that will differentiate not two but four competing approaches to reliance claims. Within the positive group, the questionnaire distinguished between an internal (promissory) and an external (pure) approach; within the negative group, it distinguished between an approach rejecting the reliance interest altogether and a view that acknowledges an independent reliance interest capped by the expectation interest. Most of our efforts, at the planning phase of the research, were thus directed at constructing a simple survey that would be capable of capturing these four competing approaches. If we succeeded, we could then encapsulate in one simple hypothetical the entire contractual reliance debate, as this Article understands it.

As regards the research hypothesis, we admit to having been somewhat clueless as to which results are most likely to come up. Nonetheless, we hoped, and to a certain degree of confidence believed, that a considerable part of the respondents would acknowledge, in one form or another, an unspoken and independent contractual obligation to reimburse for reliance expenses.

Finally, as mentioned, the main purpose of the study was to try to reveal the *moral intuitions* of ordinary people, rather than their beliefs about the law's position regarding the remedies available for breach of contract. Therefore, we made it explicitly clear to respondents that they are requested to ignore what they may know about contract law, and to focus instead *solely* on what they thought to be a just and fair outcome in their own moral view. Nonetheless, one could hardly deny the possible influence of what people may perceive as the actual legal norm on their own independent beliefs or preferences,[78] and vice versa.[79]

[77]We defended that approach; *see supra* Section 3.4.

[78]*See generally*, Avital Moshinsky & Maya Bar-Hillel, *Loss Aversion and the Status Quo Bias*, 28 Soc. Cognition 191 (2010) (people's preferences regarding policy issues are influenced by what they perceive as the *status quo* policy); Tess Wilkinson-Ryan, *Justifying Bad Deals*, 169 U. Pa. L. Rev. 193 (2020) (individuals are motivated to hold beliefs that the legal *status quo* is good and fair); Ben Depoorter & Stephan Tontrup, *How Law Frames Moral Intuitions: The Expressive Effect of Specific Performance*, 54 Ariz. L. Rev. 673 (2012) (presenting empirical findings about the influence of legal frames on moral intuitions, with regard to the remedy of specific performance).

[79]*See, e.g.*, Tess Wilkinson-Ryan, *supra* note 65, at 854 (noting the correlation between people's intuitive judgment as to the appropriate remedy for breach and their predictions regarding the legal outcome).

4.3 | The questionnaire

We approached 1000 respondents (adults over the age of 18) via an online platform.[80] Each potential respondent was asked to read a few instructions and to indicate their consent to participate in the study. Having provided the requisite consent, all participants were then presented with a single hypothetical, which read as follows:

> *A client hired the services of an apartment realtor in [Name of local city]. In the brokerage contract, the client undertook to pay a brokerage fee of 1% of the price of the apartment, if the client purchases an apartment that the realtor finds for her. The realtor invested a lot of effort over 10 months, including expenses for fuel, parking, documents and information gathering in the total amount of 13,000 [local coin], and finally found an apartment that suited the client. The client purchased the apartment at a price of 1 Million [local coin], but breached the contract and refuses, without any justification, to pay the brokerage fee of 10,000 (1%) [local coin]. The realtor is suing the client in court for 13,000 [local coin] as compensation for the expenses he incurred to fulfill their part of the contract.*

Having reviewed the hypothetical, all 1000 participants were asked to answer the following YES/NO question (Question No. 1):

> *In your opinion, in these circumstances, is the realtor's demand to receive payment for all her expenses (in the amount of 13,000 [local coin]) justified? Please reply according to your sense of justice, and regardless of what you know about what the law states.*

Having responded to Question No. 1, each respondent was then asked to answer a second and final question (Question No. 2). Question No. 2 was not a YES/NO question, and was not identical for all participants. It had two distinct versions: the first was presented to positive respondents, namely participants that chose "YES" as the answer to Question No. 1. The second version was presented to negative respondents, who chose "NO" as the answer to Question No. 1.

The version which was presented to positive respondents (Question No. 2(a)) read as follows:

[80]The study was conducted on a representative sample by the Geocartography Knowledge Group Ltd., a leading research institute in Israel, specializing in online surveys. The sample consists of internet users aged 18 and above, and it is representative in terms of gender, age, religious affiliation, and geographic location. We are aware that conclusions drawn from a representative sample in Israel cannot be directly generalized to a representative sample in the United States.

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In your opinion, which of the following answers is more correct:

a. *The realtor's demand is justified because the agreement was breached, and therefore, according to the understandings of the parties, in such a case, the client must pay the realtor the expenses.*
b. *The realtor's demand is justified because the realtor is entitled to reimbursement for all expenses incurred, regardless of the understandings that existed between the parties at the time they made the contract.*

Option A in Question No. 2(a) presents, roughly, the position we present herein, *reliance as promise*. Option B in Question No. 2(a) instead presents a pure reliance position.

The version which was presented to negative respondents (Question No. 2(b)) read as follows:

In your opinion, which of the following answers is more correct:

a. *The realtor's demand is unjustified because according to the understandings of the parties, the realtor is entitled to the brokerage fees promised to her (10,000) and is not entitled to reimbursement for her expenses.*
b. *The realtor's demand is unjustified because according to the understandings of the parties, the realtor is entitled to recover expenses if the contract is breached, but only up to the amount of the brokerage fees.*

Option A in Question No. 2(b) presents an "expectation interest only" position (the instrumental position). Option B in Question No. 2 (b) instead presents the option of reliance recovery, but only up to the amount of expectation interest. Option B of Question No. 2(b) is compatible with *reliance as promise*.

Hence, each participant was requested to answer two questions in total, namely Question No. 1, and either Question No. 2(a) or Question No. 2(b).

4.4 | The findings

Our findings are presented in the following three tables. Table 1 includes the data pertaining to Question No. 1. Table 2 includes the data pertaining to Question No. 2(a). Table 3 includes the data pertaining to Question No. 2(b).

TABLE 1 All Respondents.

Answer	Number	Percentage
Yes	704	70.4%
No	296	29.6%

Note: The question: *Is the realtor's demand to receive payment for all her expenses justified?* [Correction added on 24 April 2026, after first online publication: The note for Table 1 has been added in this version.]

TABLE 2 Positive respondents.

Answer	Number	Percentage
Because of the understandings	566	80.4%
Regardless of understandings	138	19.6%

Note: The question: *Is the realtor's demand to receive payment for all her expenses **justified** because of the parties' understandings or regardless of any such understandings at the time they made the contract?*

TABLE 3 Negative respondents.

Answer	Number	Percentage
Reliance claim denied	237	80.1%
Reliance claim limited	59	19.9%

Note: The question: *Is the realtor's demand to receive payment for all her expenses **unjustified** because the parties' understandings are inconsistent with such a claim, or because the parties' understandings acknowledge such a claim but limit its extent to the contractual price?*

The data presented in Tables 1–3 can be briefly summarized as follows. Table 1 shows that out of the entire sample, there was a strong majority of what we called *positive respondents* compared with *negative respondents*, in a ratio of 3:7. Slightly more than 70% of all respondents recognized the legitimacy of the aggrieved realtor uncapped reimbursement claim, whereas slightly less than 30% denied the legitimacy of that claim.

Table 2 shows that 566 out of 704 (80%) of all positive respondents expressed the view that the basis for the claim was the *parties' understandings*. Only 138 (20%) of all positive respondents expressed the view that the basis for the claim was *not* to be found in the parties' understandings.

Table 3 shows that 237 of 296 (80%) of all negative respondents denied that the parties' understandings gave rise to any legitimate reimbursement claim of the aggrieved realtor, and expressed the view that the latter was only entitled to the contract price. The rest (59 respondents (20%)) of all negative respondents recognized that the parties' understandings gave rise to a legitimate reimbursement claim, but expressed the view that reimbursement could not exceed the contract price.

4.5 | Analysis and initial insights

For us, the findings of the study were revealing. The first outstanding fact is that, as Table 1 shows, an absolute majority (70%) of a representative sample of the adult population supported a claim for full and uncapped reliance damages in a losing contract scenario. This record is arresting. If it is indeed representative of the common moral perceptions of the public, it can cast doubt on the descriptive force of the instrumental approach, that is, its ability to explain the true motivation behind the practice of claiming, and awarding, reliance damages. At the same time, it may reinvigorate the pure approach, which modern contract theory has almost unanimously discarded as normatively and descriptively weak.

The findings appearing in Table 1 prove that, contrary to the presuppositions of mainstream contract scholarship, most ordinary people reject the instrumental approach to reliance. There is no possible way

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of reconciling the clear victory of the positive group over the negative group with the prevalent approach that views the practice of awarding reliance damages as merely a means to restoring to the injured party her expectation interest. Because in the hypothetical the expectation interest is easily identifiable (10,000–13,000 = −3000), allowing a full reliance recovery is a clear acknowledgement that the realtor's reliance interest is worthy of protection regardless of whether or not that protection surpasses that dictated by the expectation interest.

This finding may explain why, notwithstanding the failure of pure reliance as a theoretical approach, the reliance discourse continues to exert influence on contract doctrine and literature. The answer may be that Fuller and Perdue rightly emphasized the moral significance of the reliance claims. However, as we shall now proceed to explain, they might have been mistaken in failing to identify the true source of the moral claim for reimbursement in the face of breach.

Arguably, the findings of Table 2 are no less striking than those of Table 1. They show that within the group of positive respondents, an absolute majority (of 80%) understood the moral obligation to reimburse as originating in the contracting parties' understandings in the time they concluded the contract, rather than in any non-consensual or extra-contractual policy or principle. In terms of the rival reliance accounts, this seems as a knock-out to pure reliance approach, which anchors the reliance interest in a tort-like idea of protecting against wrongfully caused injuries, and a clear victory for reliance as promise, which regards that interest as promissory.

Interestingly, another inference can be made, although with some caution. If, as Table 2 demonstrates, contracting parties are sometimes willing to deviate from the contractual risk allocation they explicitly endorsed, this opens up the possibility that they will be willing to allow such deviation in other cases. In particular, if parties are willing to recognize an uncapped reliance claim when the expectation interest is *easily verifiable*, this might indicate that they would be even more willing to allow such a deviation where it is not as easily proved or quantified. If this is a valid inference, Table 2 can render support to our claim that in certain cases, especially those in which an uncertainty as to the expectation damages is predicted *ex ante*, it makes sense to attribute to contracting parties a common intention to allow an unlimited reliance recovery.[81]

Finally, the data emanating from Table 3 is also revealing. It shows that among negative respondents, a clear majority thinks that even in face of a total breach, aggrieved parties are not entitled to the protection of their reliance interest but only to the protection of their expectation interest. One will recall that this position is consistent with the instrumental account, which is the prevalent approach to reliance damages today. Table 3 further shows that one in five negative respondents, while similarly refusing to allow an uncapped reliance on the parties' understanding, nonetheless acknowledged the moral validity of a promissory claim for (capped) reliance damages. Under this minority approach, an independent promise to reimburse can coexist with the more explicit promises embedded in a contractual relationship. However, the promise to reimburse will be enforced only insofar as it does not contradict the contractual risk allocation, as reflected in the explicit terms of the contract. These two understandings are in complete harmony with the presumptions of reliance as promise in cases when the expectation damages can be readily ascertained.[82]

Let us conclude. The (admittedly limited) empirical study we conducted sheds new light on the reliance debate, in two main respects. First, contrary to what the instrumental approach to reliance tells us, and contrary to what contract doctrine dictates, the common moral perception of real people seems to be much less inclined to perceive the protection of reliance as a mere approximation of the expectation interest. As the data demonstrates, 80% of all *negative respondents* (which were only 29.6% of the total respondents) (nominally 237 respondents) denied the existence of an independent reliance interest. This number amounts to 24% of the entire sample, that is, a little less than a quarter of people surveyed. The remaining 76% (of all participants) recognized an *independent moral claim* for the, limited or unlimited, protection of the reliance interest, whether by answering positively or choosing the Option B in the negative response subsequent Question.

Second, and most importantly in the context of this Article, the study suggests that the idea of reliance as promise is not only plausible, but is consistent with the way ordinary people understand the unspoken remedial intentions of contracting parties ex ante. In line with the promissory account of reliance, an absolute majority of all *positive respondents* (563 out of 704) acknowledged an independent *promissory* right to claim full (uncapped) reliance damages in a losing contract. In addition, 59 negative respondents confirmed the existence of an unspoken *consensual* obligation to cover expenses up to a limit dictated by the contract price, although they disagreed with the award amount proposed in Question No. 1's hypothetical. All in all, then, 62% of the participants (622 out of 1000) indicated their willingness to recognize an *implied promise to reimburse*.[83] While the findings of this empirical study are obviously open to discussion and interpretation, we believe they are sufficient to establish a prima facie case for a common moral intuition consistent with reliance as promise.

4.6 | Critique—And response

A possible critique of our analysis can argue that our findings may suffer from a sympathy bias.[84] Specifically, one could argue that the facts of the hypothetical we presented to respondents influenced them by triggering their sympathy towards the aggrieved realtor or their

[81] *See supra* Section 3.4.

[82] *Id.*

[83] One should recall that under the hypothetical presented to the participants, the issue of performance expenditures was not discussed nor even mentioned between the realtor and the client.

[84] *See generally*, Ori Katz, *Reducing Sympathy Bias: The Impact of Statutory Interpretation Methods*, 55 J. Legal Stud. (forthcoming 2026); Andrew J. Wistrich, Jeffrey J. Rachlinski & Chris Guthrie, *Heart* Versus *Head: Do Judges Follow the Law or Follow Their Feelings?* 93 Tex. L. Rev. 855 (2015) (experiments reveal the influence of sympathy on judges' decisions); My Bergius et al., *Are Judges Influenced by Legally Irrelevant Circumstances?*, 19 L. Probab. & Risk 157 (2020) (an experimental study shows that in their legal decision-making judges are affected by sympathy or antagonism towards litigants). For the influence of emotional responses on people's judgments and decisions *see generally* Raymond J. Dolan, *Emotion, Cognition, and Behavior*, 298 Science 1191, 1194 (2002) ("[E]motion-related processes can advantageously bias judgment and reason"); Daniel Kahneman, Thinking, Fast and Slow, 139 (2011); Ziva Kunda, *The Case for Motivated Reasoning*, 108 Psychol. Bull. 480, 493–95 (1990).

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antagonism toward the breaching client. If so, the argument runs, rather than reflecting people's reasoned judgment, the findings might reflect people's emotional reaction to a seemingly inexcusable breach by the client. This concern, one might add, is reinforced by people's known tendency to support the imposition of a punitive sanction on willful, deliberate contract breakers.[85]

The concern is hence that those respondents who recognized the realtor's moral right to be reimbursed for his reliance losses did so not so much because they truly spotted the realtor's *reliance interest*, but merely, or mainly, to express their sympathy with the realtor and their resentment toward the client (by making him pay damages over and above the expectation measure as presented in the hypothetical).

While we recognize that totally eliminating a sympathy bias in breach scenarios is hardly ever possible, the structuring of the questionnaire strived to reduce this bias in several ways.

First, the harm to the realtor in this case was a relatively minor and easily calculable pecuniary loss.[86] The suffering of such a loss, per se, did not seem to us to trigger a strong resentment toward the party in breach, compared with that arising from the causation of serious financial loss, emotional harm, or subjective loss that could hardly be compensated by an (objectively measured) expectation award. Such concerns were neutralized, or at least reduced, under the scenario presented to respondents. The fact that the loss in the presented case was easily calculable also minimized the relevance of evidentiary concerns regarding the proof and quantification of the loss by the realtor, and hence reduced the possible urge of some respondents to take such factors into account while determining the level of compensation.

Secondly, while the gap between the value of the realtor's lost expectancy (10,000 NIS) and the value of his lost investment (13,000 NIS) is evident, it is a relatively modest (equaling approximately 784 USD). This, coupled with the fact that the reliance award was limited to the realtor's out-of-pocket losses, arguably minimized its potentially punitive effect.

Third, punitive preferences are most naturally expected from people facing especially spiteful or blameworthy conduct to which they feel an urge to respond. The hypothetical did not include any facts, other than those required to establish an obvious total breach, that could have intensified the moral resentment against the client. For example, no clue was given to respondents as to the client's motive behind her decision to renege on the contract (for instance, whether the breach was intended to avoid loss or to make a gain).[87]

Notably, every breach of a contractual promise involves some kind of moral wrong and as such inevitably triggers some antagonism towards the contract breaker, and some sympathy towards the aggrieved party, at least prima facie. Reducing this initial bias may be achieved by portraying the breach as strongly justifiable or excusable under the circumstances. However, introducing such exculpatory circumstances into the questionnaire (so to reduce the level of sympathy toward the realtor) would have run the risk of triggering over-sympathy towards the client. In other words, it might have encouraged respondents to excuse the client from their obligation to pay not only reliance damages but even expectation damages. A less blameworthy breach scenario would therefore run the risk of distorting respondents' incentives to pick the correct answer by creating over-sympathy for the client in breach.

Fourth, the risk that positive respondents will be motivated by punitive intuitions was significantly reduced by allowing respondents to recognize the realtor's right to the protection of her (full) reliance interest for reasons wholly unrelated to the parties' understandings.[88] By offering respondents this option, the questionnaire encouraged respondents to consider *every other possible reason* that could justify the reliance award, including punitive reasons or general sympathy towards the aggrieved realtor. Nonetheless, more than half of the respondents not only believed that reliance damages are appropriate in the case presented, but also indicated that these damages are justified because they reflect the *understanding of the parties* at the time of contracting.

Lastly, real estate brokerage is known to be among the most notorious professions. Public surveys, governmental reports, and legislative reforms to regulate real estate brokerage establish the validity of this widespread perception. This seems to hold true generally,[89] but is especially acute in Israel, the State in which the empirical study was conducted.[90] Given the miserable public image of the realtor's

[85] *See, e.g.*, Tess Wilkinson-Ryan & Jonathan Baron, *Moral Judgments and Moral Heuristics in Breach of Contract*, 6 J. Empirical Legal Stud. 405, 414–19 (2009) (experiments show that people support the imposition of supra-compensatory punitive damages against willful contract breakers); Wilkinson-Ryan, *supra* note 65, at 852 (claiming that people tend to assume punitive damages is a recognized legal remedy for willful breach); Wilkinson-Ryan, *supra* note 77 (same). For normative justification of imposing punitive damages upon deliberate breach *See, e.g.*, Oren Bar-Gill & Omri Ben-Shahar, *An Information Theory of Willful Breach*, 107 Mich. L. Rev. 1479, 1483–93 (2009) (punitive damages are economically justifiable in cases of willful breach because willful breach reveals information about other undetected breaches of the promisor).

[86] 10,000 NIS equals approximately 2600 USD.

[87] For the correlation between such variables and people's tendency to support punitive damage, *see* Wilkinson-Ryan & Baron, *supra* note 85, 414–19.

[88] *See* Option B in Question No. 2(a) (The realtor's demand is justified. . . *regardless of the understandings that existed between the parties*. . .).

[89] Lew Sichelman, *Self-righteous Or Poorly Trained, Too Many Agents Spoil The Pot*, Nat'l Mortg. Prof. (Mar 27, 2024), https://nationalmortgageprofessional.com/news/self-righteous-or-poorly-trained-too-many-agents-spoil-pot (discussing complaints against Florida real estate agents, their frequent incompetence, and their poor public image); Anthony Daniel, *Sirius Warning: 10 Reasons Why Everyone Hates Real Estate Agents*, Linkedin (May 16, 2017), https://www.linkedin.com/pulse/sirius-warning-10-reasons-why-everyone-hate-real-estate-daniel; For a similar English Perspective *see*, e.g.: Marc Da Silva, *Estate Agents are Among The Least-Trusted Professionals*, Prop. Indus. Eye (Dec. 15, 2023), https://propertyindustryeye.com/estate-agents-are-among-the-least-trusted-professionals-2/ (trust in estate agents remains low, positioning the profession fifth from the bottom among all professions).

[90] Ofer Petersburg, *Don't Trust Realtors? New Ethics Regulations Will Restore Confidence*, The Jerusalem Post (June 24, 2024), https://www.jpost.com/business-and-innovation/real-estate/article-807021 (describing the widespread distrust towards realtors, and mentioning a survey conducted by the Israeli Ministry of Justice establishing this state of affairs); Dani Bar On, *Say, Mr. Realtor, Is It Really That Difficult to Tell The Truth About The Floor Area?*, Ha'Aretz (July 4, 2019), https://www-haaretz-co-il.eu1.proxy.openathens.net/magazine/2019-07-04/ty-article/.premium/0000017f-df11-d3ff-a7ff-ffb1ca640001 (realtors hold a safe position within the least respected professions); Avichai Tadesa, *Will Real Estate Agents Become Righteous?*, Bizportal (Mar. 9, 2025), https://www.bizportal.co.il/realestates/news/article/20014351 (delineating a series of transgressions committed by real estate agents); Hila Zion, *"Dozens of Complaints a Year": The Knesset Debate on Regulating the Real Estate broker sector*, Ynet (June 4, 2024), https://www.ynet.co.il/economy/article/hkrae8340 (citing a Ministry of Justice official stating that research conducted for 2 years reveals a level of dissatisfaction that cannot be tolerated); Hila Tsion, *Survey: 70% of Apartment Buyers Do Not Want A Realtor*, Ynet (Oct. 19, 2015), https://www.ynet.co.il/article/4713328 (people think that a realtor seeks to make profit at their expense); Regulation of Professions Division, Ministry of Justice, *The Ministry of Justice's Real Estate Brokerage Reform Has Been Launched* (Mar. 9, 2025), https://www.gov.il/he/pages/mediators-reform (announcing a law reform providing new ethic regulations for realtors, following empirical research demonstrating widespread public dissatisfaction with the profession. The full governmental report is available at: https://fs.knesset.gov.il/25/SecondaryLaw/25_scl_bg_4436470.pdf.).

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profession, the concern of over-sympathy toward the realtor seems implausible, or at least greatly exaggerated. Arguably, if respondents sided with the realtor against the interests of the client, it was not because of their basic sympathy towards the former, but despite their initial antagonism towards real estate agents.

All in all, while the findings of our study do not purport to be conclusive, they are arguably sufficient to establish the prima facie plausibility of reliance as promise as an explanatory account of the practice of awarding reliance damages. Clearly, further research is required to establish more conclusively people's intuitions and attitudes towards reliance damages, taking into account variables such as the nature of the loss and its extent, the motivation behind the breach, its willfulness and blameworthiness, and other possibly relevant considerations.

4.7 | Explanatory and normative implications

The main contribution of the empirical study is explanatory. As we explained above, the goal of the study was to learn about the moral intuitions ordinary people share as regards reliance as promise. This was done to see whether these intuitions can explain the extant practice of courts, when they award reliance damages as a freestanding remedy. On this explanatory level, the empirical findings suggest that the commonsense morality or intuitive judgment of most people clearly supports the notion of an implied promise to reimburse as a conventional expectation of contracting parties. Hence, such intuitive judgment, coupled with the established correspondence between prevailing moral intuitions and the law,[91] arguably provides a possible *explanation* for the judicial practice of awarding reliance damages as a standalone remedy. This judicial practice reflects the attitude of legal decision-makers whose moral intuitions conform to commonsense morality.

Arguably, however, in addition to their primary explanatory significance, the empirical findings of this study may also carry several normative implications. First, the prevailing intuitions regarding the understandings of most contracting parties as to their respective obligations and expectations play a central role in major *normative* theories of contract law. Most of these theories (*e.g.*, the will theory, corrective justice, and economic efficiency) attribute great value, either intrinsic or instrumental, to the actual or presumed will of contracting parties. Therefore, these normative theories must take seriously empirical findings that illuminate the intentions of such parties.

The findings of the empirical study indeed provide a glimpse into the common understandings of ordinary people. Hence, they must be taken into account in any normative debate on reliance damages, at least under the normative theories that take the intentions, understandings, and preferences of contracting parties seriously.

Take, for instance, the case of the will theory.[92] If the primary normative role of contract law is to give effect to the will of contracting parties, then exposing the typical expectations of average people from contracting provides a normative standard that policymakers such as courts should seriously consider when they interpret contracts and award remedies for their breach. The same is true for theories of corrective justice.[93] Under these theories, contracting parties' mutual expectations are often regarded as the normative baseline to which they should be restored following breach.[94] Lastly, an economic theory that aims at enhancing well-being by fulfilling one's preferences[95] should arguably also give due weight to people's *ex ante* actual preferences,[96] as they are revealed by empirical research.

To be sure, this argument should not be understood as directly deriving *ought* from *is*. Rather, the claim is that contract theories which by and large treat the will of the parties as an important factor in the design of contract law serve as a plausible connecting link between empirical findings that reveal common wills and their potential normative force.

Second, empirical findings that show what people actually think about concrete questions may shape policy and decision making. Specifically, legal decision-makers may become more attentive and willing to expand the protection granted to the reliance interest once they realize that this would be in line with a widespread intuition of ordinary people regarding contracting parties' expectations. On the basis of such an insight, the court may consider broadening the scope of the right to claim reliance damages. For example, some courts have strictly conditioned the right to reliance damages on the plaintiff establishing an evidentiary difficulty to prove her expectation damages with sufficient certainty.[97] An example of this conservative approach can be found in the English case of *Parker v. SJ Berwin*.[98] In that case, the court ruled that an injured party cannot claim reliance damages when better means of assessing the speculative expectation damages were available. Under the court's approach, whether to claim reliance damages is not "a matter of choice" but depends on "a practical impossibility" to prove the plaintiff's loss of profit.[99]

The empirical findings may call for a less rigid approach. Under this more liberal approach, reliance damages are not merely an instrument to assess expectation damages, which is relevant only when a practical impossibility arises. Rather, a reliance award may be more intuitively perceived by judges as representing an *independent right* of promisees, to which they are entitled, regardless of their capacity to prove their expectation interest by other means. Such a new perception can induce a more sympathetic attitude toward the reliance damage remedy.

Third, judges who seek to protect the reliance interest independently in a certain case may now be equipped with improved reasoning to support such a move. The fact that a reliance award can be seen as emanating from the understanding of the contracting parties themselves can provide courts with a more accurate and persuasive

[91] *See supra* note 64 and the accompanying text.

[92] *See further infra* Section 5.1. *See* also *infra* notes 121–122 and the accompanying text.

[93] For discussion *see infra* Section 5.2.

[94] *See Supra* note 26 and the accompanying text.

[95] *See infra* note 134. The theory of economic efficiency is discussed more generally *infra* Section 5.3.

[96] *See infra* notes 140–141 and the accompanying text.

[97] *See supra* note 38 and *infra* note 161 and the accompanying text.

[98] *Parker v. SJ Berwin & Co.*, [2008] EWHC 3017 (QB).

[99] *Id.* at para 73.

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reasoning to award reliance damages, one that overcomes the failures of extant justifications for doing so.[100] Clearly, elements of accuracy and persuasiveness are of great importance in judicial reason-giving generally.[101]

Finally, legal policymakers facing pragmatic and doctrinal issues arising in the context of reliance damage claims may find empirical evidence relevant in further shaping and reforming the law.[102] Specifically, once questions about the scope of the right to reliance damages begin to be analyzed from the perspective of reliance as promise, these questions will be *reframed* as *interpretive questions*. As such, those questions should be resolved according to the contracting parties' presumed common will in the case at hand, rather than on the basis of any predetermined normative conception regarding the scope of the reliance interest. Such reframing may steer judges' decisions in new directions, encouraging them to advance different legal policies.[103]

5 | NORMATIVE ANALYSIS

In Part 3 we argued that when the expectation damages are readily measurable, an award of reliance damages enforcing the promise to reimburse should not lead to an award exceeding the expectation measure. However, we also argued that when the expectation measure is unverifiable, and the parties may realize that *ex ante*, the promise to reimburse can and should be interpreted so as to allow a (possible) deviation from the (unverifiable) expectation measure.[104] In other words, in such scenarios, reliance damages may be awarded with no reference to or dependence on the expectation interest. In these cases, contracting parties are assumed to have agreed *ex ante* to relax the ordinary limitation on the scope of the duty to reimburse and to grant the promisee an option for reliance recovery regardless of whether or not such recovery exceeds (or falls short of) the (unknown) true expectation recovery.

This Part examines this interpretation of reliance recovery, as awarded regardless of the value of expectancy, in light of major theories of contract law: the will theory, corrective justice, and economic efficiency.

To be sure, the question under discussion is not whether to replace expectation damages as the default contract remedy. This Article does not challenge the basic view that the standard goal of contract remedies is to protect the expectation interest.[105] Indeed, nothing in the conception we proposed in Part 3 suggests that reliance damages serve, or should serve, as a general substitute for expectation damages.[106] Rather, the only question in need of clarification is if the prevailing justifications for enforcing contractual promises are compatible with allowing an injured party (where the parties reasonably anticipated *ex ante* that the expectation interest would be hard to value) to claim reliance damages as a matter of right, without any reference to, or dependence on, the true value of expectancy. As we shall argue, whether reliance as promise supports a reliance award smaller or larger than expectation damages, it can be justified on its own merits by core theories of contract law.

5.1 | Will theory

The will theory of contract, in its classical shape, asserts that the primary role of contract law is to give effect to the parties' common will.[107] An influential modern version of the theory was offered in Charles Fried's *Contract as Promise*.[108] Fried's basic idea was that the moral basis of contract law is grounded in the "promise principle:" "that principle by which persons may impose on themselves obligations where none existed before."[109] According to Fried, contracts are binding because promises hold intrinsic moral value: "[S]ince a contract is first of all a promise," Fried states, "the contract must be kept because a promise must be kept."[110] By forcing a promisor to keep a promise she freely made, we respect her capacity as a free and rational moral agent and encourage the trust promises invoke.[111]

As regards remedies, Fried supports the expectation measure of damages, because that measure ensures that even in the face of breach, aggrieved promisees get the value of what they were promised.[112]

Reliance as promise falls into line with the will theory. Clearly, the whole point of this account is to justify the duty to reimburse as an implied contractual promise. It makes the promisor render a performance of that promise just because he has promised that very thing. Note that this is true whether reliance damages are claimed as a sole remedy or in addition to the profit element (when the latter can be measured).

However, if the will theory entails expectation damages as the standard remedy, reliance as promise may seem at odds with it. As

[100] *See* discussion in *supra* Sections 2.2 and 2.3.

[101] *See generally* with regard to the accuracy and quality of decisions, Mathilda Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 Wash & Lee L. Rev. 483, 511–13 (2015); Richard A. Posner, *Judges' Writing Styles (and Do They Matter?)*, 62 U. Chi. L. Rev. 1421, 1447–48 (1995); Peter Friedman, *What is a Judicial Author?*, 62 Mercer L. Rev. 519, 529 (2011); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371, 1375 (1995).

[102] We address such doctrinal issues; *see infra* notes 161–165 and the accompanying text.

[103] We discuss this further *infra* Part 6.

[104] At least where the evidentiary difficulty could have been reasonably foreseeable at the time of contracting. *See supra* text accompanying note 60.

[105] Thus, it is beside our point to address the familiar debates about the compatibility of expectation damages with major theories of contract law. Our baseline for the discussion is that, notwithstanding critique (to be discussed *infra*), expectation is the general measure of contract damages.

[106] When expectation damages are readily measurable, the promise to reimburse can be enforced, as an independent entitlement, either *along with – or separate from –* the profit element of the contract (i.e., the net expectancy). The recognition of this promise does not, then, entail a denial of the injured party's right to claim expectation damages (which in the case of a profitable contract covers the reliance element). The point is only that the injured party is *entitled* to pursue this course of action if he so wishes. If, however, expectation damages are *unverifiable*, reliance as promise allows the injured party to enforce the promise to reimburse *instead of* enforcing the (different) promise to ensure the profit element (by claiming ordinary expectation damages). In such cases, as mentioned, reliance damages may exceed the expectation measure.

[107] For classical contract law, *see* Patrick S. Atiyah, The Rise and Fall of Freedom of Contract 219–568 (1979).

[108] Charles Fried, Contract as Promise: A Theory of Contractual Obligation (2d ed. 2015) [hereinafter Fried, Contract as Promise]. For a critical overview of the first edition of Fried's book *see generally* Anthony T. Kronman, *A New Champion for the Will Theory*, 91 Yale L.J. 404 (1981). A different contemporary version of the will theory was proposed by Randy E. Barnett, *A Consent Theory of Contract*, 86 Colum. L. Rev. 269 (1986).

[109] Fried, Contract as Promise, *supra* note 108, at 1.

[110] *Id.* at 17.

[111] *Id.* at 11–17.

[112] *Id.* at 17–21.

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mentioned, reliance as promise justifies the injured party's right, even in certain limited cases, to disregard the expectation measure, allowing them recovery of reliance damages regardless of the true value of expectancy.

Reliance as promise offers two answers to this challenge. *First*, when reliance as promise justifies reliance damages, it does so with a direct linkage to the parties' consent as embodied in their contractual relations. Clearly, respect for individual freedom and autonomy also entails respecting the parties' *remedial choices* in a case of breach. If a promissory obligation is grounded in the autonomous choice of the parties, then that exact autonomous choice governs the remedial obligations in a case of breach.[113]

A counter-argument might be made that the consent attributed to contracting parties by reliance as promise is not *actual* consent, but merely *hypothetical*, and therefore fictitious. While we acknowledge this feature of reliance as promise,[114] we do not see how it undermines its compatibility with the will theory. First, is it not uncommon for contract law to attribute implied intentions and obligations to contracting parties, including remedial ones as a majoritarian default rule[115] If such default rules are understood as aiming to give effect to the parties' implied, presumed, or hypothetical intentions, they are readily justified by the will theory. However, this perspective is not without its critics.[116] Fried himself rejected the idea that default rules can be truly seen as based on the parties' will.[117] In fact, according to Fried, interpreting a contract based on the understandings of *reasonable* persons, rather than on the parties' actual subjective intentions, may impose on contracting parties external, non-promissory standards of justice.[118] Nonetheless, one may question Fried's firm stance on the detachment between reasonable intentions and the parties' actual will. Arguably, the mere absence of an explicit expression of intent on a particular matter does not rule out the possibility that the parties shared a genuine understanding on the issue in question.[119] Since every contract is made under certain shared assumptions and understandings, attributing hypothetical intentions to the parties may well represent an authentic effort to reconstruct their actual common will.[120]

Secondly, the question whether a certain second-order remedial obligation was truly in the contemplation of the parties upon entering the contract is ultimately an empirical one.[121] While reliance as promise is first and foremost a hypothetical-interpretive construct, this Article suggests that, empirically, reliance as promise closely follows the common understandings of most persons and therefore most contracting parties.[122]

This brings us to the second answer to the abovementioned challenge. The notion that the will theory conclusively entails a protection of the expectation measure is not without its critics. According to a well-known critique, the expectation measure is not adequately attuned to the moral obligation to keep promises. Under this view, stronger remedies such as specific performance, punitive damages, or disgorgement damages better express the moral wrongness inherent in breaking promises and the disapproval for its breach, and are thus more compatible with the will theory.[123] Reliance as promise seems to be attuned to such considerations. By allowing a reliance relief even if it exceeds the (unverifiable) expectation measure, it reinforces the notion that promises should be kept and better deter breaches. And as mentioned, it achieves that goal with a direct linkage to the parties' consent, in contrast to other remedies that might achieve the same result (such as punitive damages).

5.2 | Corrective justice

Corrective Justice is today a leading theory of private law,[124] but the concept dates back to the writings of Aristotle.[125] Aristotle suggested a sharp conceptual distinction between two forms of justice: corrective justice, the justice of restoring a pre-existing equilibrium disturbed by a wrongful interaction between two people, and distributive justice, the justice pertaining to the allocation of resources among a group of people.[126] A claim in corrective justice is thus a claim to reverse the outcomes of a wrongful interference. In the law, this is done by restoring a pre-existing moral (and often economic) equilibrium between a perpetrator and its victim. A claim in

[113]Kraus, *supra* note 58, at 1629. *See also* Charles Fried, *The Convergence of Contract and Promise*, 120 Harv. L. Rev. F. 1, 7 (2007) (contracting parties are entitled to elect an alternative remedy rule, especially where the value of performance would be hard to estimate).

[114]*See supra* Section 3.2.

[115]Gregory Klass, *Promise* Etc., 45 Suffolk U. L. Rev. 695, 709–17 (2012) [hereinafter Klass, *Promise*] (Discussing expectation damages as a majoritarian rule grounded in the default interpretation of the parties' remedial intent). *See also* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L.J. 87, 93 (1989) [hereinafter Ayres & Gertner, *Filling Gaps*]; Richard Craswell, *Promises and Prices*, 45 Suffolk. U. L. Rev. 735, 759 (2012).

[116]*See, e.g.*, Eyal Zamir, *Default Rules: Theoretical Foundations*, *in* Research Handbook on the Philosophy of Contract Law 344, 346–47 (Mindy Chen-Wishart & Prince Saprai eds., 2025) [hereinafter: Zamir, *Default Rules*]; Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 Va. L. Rev. 821, 874–75 (1992) [hereinafter: Barnett, *Sound of Silence*].

[117]*See* Fried, *supra* note 108, at 60–61, 69–73; Charles Fried, *Contract as Promise Thirty Years On*, 45 Suffolk U. L. Rev. 961, 971 (2012).

[118]Fried, *supra* note 108, at 61.

[119]*See, e.g.*, Barnett, *Sound of Silence*, *supra* note 116, at 879 ("[C]ontracting parties are often silent . . . about what they in fact believe"); *see also* Klass, *supra* note 60, at 389 (discussing implied-in-fact mutual intentions regarding contract formation); Wilkinson-Ryan, *supra* note 65 at 844 ("Many scholars have recognized that the content of parties' understandings of their mutual obligations is not fully encapsulated by the contract terms. . .").

[120]Zamir, *Default Rules*, *supra* note 116, at 347; Barnett, *Sound of Silence*, *supra* note 116, at 880 ("the parties' *subjective consent* is most likely to be satisfied by a default rule that interprets manifested consent to reflect the commonsense or conventional expectations that likely are part of the tacit assumptions of particular parties") (emphasis added).

[121]*See, e.g.*, Robert E. Scott & Jody Kraus, Contract Law and Theory 107 (5th ed. 2013); Gregory Klass, *Efficient Breach*, *in* The Philosophical Foundation of Contract Law 362, 375 (Gregory Klass, George Letsas & Prince Saprai eds., 2014).

[122]*See supra* Part 4.

[123]*See, e.g.*, Zamir, *Restoration*, *supra* note 9, at 105 (the will theory supports stronger remedies that more clearly express the inherent moral virtue of keeping one's promise); Friedmann, *Performance Interest*, *supra* note 9, at 637–38 (claiming that the will theory supports the remedy of specific performance); Stephen A. Smith, Contract Theory 418 (2004) (the will theory can justify punitive damages for breach of contract); Seana V. Shiffrin, *The Divergence of Contract and Promise*, 120 Harv. L. Rev. 708, 723 (2007) (punitive damages and specific performance better convey the moral virtue of promise keeping); For responses to this line of criticism of expectation damages *see* Klass, *Promise*, *supra* note 115, at 709–17.

[124]The most prominent contemporary corrective justice theorist is Weinrib: Ernest J. Weinrib, The Idea of Private Law (1995) [hereafter: Weinrib, Private Law]; Ernest Weinrib, Corrective Justice (2012); Ernest Weinrib, Reciprocal Freedom: Private Law and Public Right (2022). Another influential corrective justice theorist is Coleman; *see generally* Jules Coleman, *The Mixed Conception of Corrective Justice*, 77 Iowa L. Rev. 427 (1992); Jules Coleman, *Tort Law and the Demands of Corrective Justice*, 67 Ind. L.J. 349 (1992); Jules Coleman, *The Practice of Corrective Justice*, 37 Ariz. L. Rev. 15 (1995).

[125]"[Aristotle's] treatment of corrective justice reveals both what unites the private law relationship, and what sets private law apart from other kinds of ordering. In the history of legal philosophy, private law is Aristotle's discovery." Weinrib, Private Law, at 56.

[126]Aristotle, Nicomachean Ethics bk. V, ch. 2 (W.D. Ross trans., Internet Classics Archive 2009), http://classics.mit.edu/Aristotle/nicomachaen.5.v.html.

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distributive justice, on the other hand, is a demand to enforce a predetermined allocation criterion that has been apparently disregarded.[127]

As mentioned in Part 2, underlying the pure reliance approach is the claim that protecting the reliance interest following breach is consistent with corrective justice.[128] As we showed, however, this premise is hardly convincing and is rightly exposed to severe criticism. Because in the context of a breached contract the wrong is the breach rather than the formation of the contract, what needs to be removed or rectified is the harmful outcomes of breach, rather than those of forming a contract and relying on it, acts that are entirely lawful.[129] The fact that reliance damages remove the harmful outcomes of contracting, rather than those of breaching the contract, makes them conceptually incompatible with the idea of corrective justice.[130]

This insight immediately raises the challenge of justifying the enforcement of the promise to reimburse in terms of corrective justice: if reliance as promise supports the protection of the reliance interest, does this not entail the conclusion that imposing the duty to reimburse on a breaching party is equally inconsistent with corrective justice?

The obvious answer is "No," and for a simple reason. Under reliance as promise, the award of reliance damages originates not in any extra-contractual norm governing the parties' relationship following breach. Neither is it based on the (arguably flawed) logic behind the pure reliance approach. Rather, the duty to reimburse, as we portray it, originates in an internal contractual norm which governs the parties' remedial expectations from each other. If these expectations were truly limited to assuring the contractual expectancy alone, as the instrumental approach insists, protecting reliance per se could never be justified on the basis of corrective justice. If, however, the duty to reimburse following a breach is understood as an *independent contractual obligation*, then enforcing it becomes clearly in line with corrective justice: under reliance as promise, reliance damages force the breaching party to pay an agreed compensation for a breach that leads to the total failure of the contract.

In this sense, as we mentioned earlier, reliance damages can be likened to an implied liquidated damage clause.[131] By enforcing this hypothetical clause, which the parties themselves have willingly (though impliedly) endorsed, the court restores the normative equilibrium that the breach disturbed, according to the implied instructions of the contracting parties. In a sense, this is akin to enforcing, *in specie*, a contractual obligation through an order for specific performance.[132] Put differently, in allowing a possible deviation from the expectation measure in the case they foresee as fit for such deviation, the parties merely define the content of their remedial expectations from each other.[133] To conclude, while an *independent* award of reliance damages is hard to reconcile with corrective justice under the pure and instrumental account of reliance, under reliance as promise, they become wholly aligned with this fundamental moral principle.

5.3 | Economic efficiency

This Section explores the economic efficiency of reliance as promise. Its main focus is on the question of whether efficiency considerations can justify an award of reliance damages even if, as reliance as promise suggests, such an award might exceed the expectation measure.

Economic efficiency focuses on the consequences which follow a legal norm. More specifically, it maintains that the determining factor in assessing the quality of outcomes is the influence on social welfare.[134] Normative economic analysis of law mainly focuses on the optimal design of legal norms.[135] For economists, the most effective way to predict the potential outcomes of a legal norm is by understanding the incentives it creates. Remedies for breach of contract are thus primarily evaluated according to the incentives they create for the contracting parties.[136]

At the outset it is worth mentioning that our brief analysis only scratches the surface of a more complex analysis of contract remedies. It does not venture to take account of all relevant incentives and considerations pertinent to determining the optimal contract remedy. Not surprisingly, since economic analysis has identified more and more crucial variables and incentives created by a legal norm, some have expressed a skepticism regarding the ability of economic analysis to produce definitive conclusions about any preferred remedy.[137]

To begin, let us recall that under reliance as promise, a reliance recovery should not, in most cases, exceed the expectation measure. When the contractual expectancy is readily measurable, a reliance recovery (or an enforcement of the promise to reimburse) is a vital step in the fulfillment of the expectation measure and should not exceed that amount.[138] As emphasized earlier, the question under consideration is not whether to

[127]The interrelation between distributive and corrective justice is a most debated issue. *See generally*, Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 Iowa L. Rev. 515 (1992); Hanoch Dagan, *The Distributive Foundation of Corrective Justice*, 98 Mich. L. Rev. 138 (1999); Itzhak Englard, The Philosophy of Tort Law 11–20 (1992). The intellectual history of these two concepts is explored in Izhak Englard, Corrective and Distributive Justice: From Aristotle to Modern Times (2009).

[128]*See supra* text accompanying note 22.

[129]"The mere doing and suffering of something that adversely affects the sufferer are not in themselves significant. What is done and suffered must be an injustice . . ." Ernest J. Weinrib, *Tort Law: Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, 2 Theoretical Inq. L. 107, 123 (2001).

[130]*See supra* text accompanying notes 25–30. *See also* Stephen A. Smith, *The Reliance Interest in Contract Damages and the Morality of Promising*, 1 Issues Leg. Scholarship 1, 3 (2001) ("If the harm caused by breaking a contract is the harm of breaking a promise, then the compensation for that harm should compensate for *that* harm.").

[131]*See supra* text accompanying note 63.

[132]For an acknowledgement that orders for specific relief to prevent unjust harm are consistent with corrective justice, *see* Weinrib, Private Law, *supra* note 122 at 144, n. 41.

[133]Enforcing such expectations can thus be seen as "expectation damages of sorts," just as liquidated damages can be seen as a form of expectation damages.

[134]The welfare of any particular individual is measured by the satisfaction of individual preferences, rather than by other criteria of human welfare, such as hedonistic theory or objective list theory. *See* Eyal Zamir & Barak Medina, *Deontological Morality and Economic Analysis of Law*, *in* The Oxford Handbook of Ethics and Economics 521, 523–24 (Mark D. White ed., 2019).

[135]For a brief overview of normative economic analysis of law, *see* Eyal Zamir & Doron Teichman, Behavioral Law and Economics 7–18 (2018).

[136]*See, e.g.*, Lewis A. Kornhauser, *An Introduction to the Economic Analysis of Contract Remedies*, 57 U. Colo. L. Rev. 683, 692–725 (1986); Zamir, *Restoration*, *supra* note 9, at 106–07; Craswell, *Remedies*, *supra* note 34; Craswell, *Against Fuller*, *supra* note 2, at 107.

[137]*See* Klass, *Efficient Breach*, *supra* note 121, at 376–77 ("No single remedial rule is likely to provide optimal incentives across these many decisions"); Zamir, *Restoration*, *supra* note 9, at 117 ("Not surprisingly, one could find efficiency arguments supporting almost any conceivable remedy rule."); Craswell, *Against Fuller*, *supra* note 2, at 107–11. ("[T]he measure of damages that is truly optimal – optimal, that is, when *all* of the relevant factors have been considered – *could lie anywhere on the real number line*.") (emphasis added); Richard Craswell, *Instrumental Theories of Compensation: A Survey*, 40 San Diego L. Rev. 1135,1137–1138, 1171 (2003); A. Mitchell Polinsky, An Introduction to Law and Economics 69 (3d ed. 2003).

[138]*See supra* Section 3.4.

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replace expectation damages as a general rule,[139] but whether allowing the parties, *in a limited category of cases*, to adopt a remedy which might give the injured party more than their expectation interest, is consistent with efficiency considerations. We believe the answer to be positive when taking the following several considerations into account.

5.3.1 | Ex ante risk allocations and parties' preferences

Being aware *ex ante* that the expectation interest might be difficult to establish (so there is a relatively low ex ante probability of suit or of a sufficient compensation), rational parties may well be interpreted as agreeing to grant each other the right to claim full reliance damages in case of a breach. Parties may choose to do so either to guarantee any (unprovable) expectation losses if breach occurs, to deter inefficient breaches, or to provide stronger incentives to perform.[140] In this sense, reliance as promise may be described from the standpoint of *ex ante* risk allocations.[141] It reflects the parties' ability to choose what they perceive as a superior remedy when realizing that expectation damages would not be optimal. If, as the empirical findings presented in Part 4 suggest, reliance as promise aligns with most people's understanding of contractual relationship, then it is likely to be a majoritarian default rule which reflects an optimal remedial rule preferred by the parties in uncertainty instances.[142] Furthermore, if reliance as promise reflects the preferences of most contracting parties, it reduces the overall transaction costs involved in negotiating and regulating the prospect of awarding reliance damages as a remedy for breach of contract in certain cases.

5.3.2 | Incentives for performance

To take the most obvious, a reliance award which exceeds expectation may over-deter breach and incentivize inefficient performance. This effect is widely known as the efficient breach theory.[143] Under that theory, expectation damages represent the optimal level of damages and incentivize performance only when such performance is efficient.[144] In its simplest version, the theory asserts that when the expected gains from a breach are greater than its costs, the promisor is permitted, or even encouraged, to breach, so long as he ensures that the injured party will be placed in the position they would have been in had the contract been fully performed. A perfect protection of the expectation interest of the injured party ensures, then, that the injured party is not worse off (thus indifferent between performance and breach), and that the breaching party would internalize the costs of breach, hence would breach only when the gains from the breach are greater than its total costs. Expectation damages, therefore, provide the optimal remedial regime by giving an incentive to perform only when performance maximizes social welfare. If so, then when reliance as promise allows an award greater than expectation damages, it is likely to prompt the promisor to perform when breach would be more efficient. Also, a compensation greater than the expectation measure exposes the promisor to higher costs, therefore encouraging her *ex ante* to demand a higher contractual price.[145] Arguably, such a premium is inconsistent with most parties' preferences.[146]

To this challenge, reliance as promise offers a twofold answer. *First*, the efficient breach theory unrealistically assumes perfect compensation and largely ignores the phenomena of under-compensation and under-enforcement which inevitably result in under-deterrence of prospective breachers.[147] Hence, in reality, the injured party is almost never indifferent between performance and breach. Expectation damages thus create suboptimal incentives for performance and ultimately encourage inefficient breaches.[148] This conclusion applies even more so in the paradigmatic cases of awarding reliance damages, namely, in conditions where the promisee is unlikely to be able to prove his expectation damages and thus achieve less than full internalization of the harm by the breaching party.

In light of these real-world challenges, the advantage of reliance as promise becomes clear. The prospect of receiving an award exceeding the expectation measure (in cases where the parties contemplate a difficulty in establishing that amount) makes reliance damages a superior remedy in overcoming problems of under-

[139] It is beside our point to address the widely known debates about the efficiency of expectation damages. Suffice it to assume, as a baseline for the discussion, that the expectation measure is the general rule of contract remedies. As such, it enjoys the support of common, though widely debated arguments from an economic standpoint. *See* text accompanying note 143–146.

[140] *See supra* Section 3.4.

[141] *See generally* Klass, *Efficient Breach*, *supra* note 121, at 376 (stating that the main reasons for parties to enter into contracts are to give incentives to perform or to shift risk among them).

[142] To be sure, since reliance as promise is primarily based on interpreting the contract relying on the parties' implied intentions, it is admittedly at odds with the conservative law-and-economics branch ("neo-formalism"), which strongly prefers literal interpretation of contracts. *See*, *e.g.*, Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 Nw. U. L. Rev. 847 (2000). Clearly, it is possible to endorse an economic viewpoint without adopting such a restrictive approach. For support *See*, *e.g.*, Zamir, *Default Rules*, *supra* note 116, at 349.

[143] *See, e.g.*, Robert Birmingham, *Breach of Contract, Damages Measures and Economic Efficiency*, 24 Rutgers. L. Rev. 273, 288–89 (1970); John H. Barton, *The Economic Basis of Damages for Breach of Contract*, 1 J. Leg. Stud. 277 (1972); Richard A. Posner, Economic Analysis of the Law 55–61 (1972). For powerful criticisms of the efficient breach theory, in terms of both morality and efficiency, *see generally* Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. Legal. Stud. 1 (1989) [hereinafter Friedmann, *Fallacy*]; Ian R. Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 Va. L. Rev. 947 (1982); Klass, *Efficient Breach*, *supra* note 121. For critique of the theory's premise that expectation damages are superior to specific performance, *see generally*, Alan Schwartz, *The Case for Specific Performance*, 89 Yale L.J. 271 (1979) [hereinafter Schwartz, *Specific Performance*]; Thomas S. Ulen, *The Efficiency of Specific Performance: Towards a Unified Theory of Contract Remedies*, 83 Mich. L. Rev. 341 (1984) [hereinafter Ulen, *Specific Performance*]; Anthony T. Kronman, *Specific Performance*, 45 U. Chi L. Rev. 351 (1978); Melvin A. Eisenberg, *Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law*, 93 Cal. L. Rev. 975 (2005).

[144] Thus, expectation damages correspond with the basic premise as articulated by Posner: "contract remedies should. . . give the party to a contract an incentive to fulfill his promise unless the result would be an inefficient use of resources.". *See* Posner, *supra* note 143, at 56.

[145] *See*, *e.g.*, Zamir, *Restoration*, *supra* note 9, at 126.

[146] For this argument *See*, *e.g.*, Alan Schwartz, *The Myth that Promises Prefer Supercompensatory Remedies: An Analysis of Contracting for Damage Measures*, 100 Yale. L.J. 369 (1990).

[147] In the real world, remedies for breach of contract are systematically under-compensatory. This is due various factors such as litigation and settlement costs, difficulties in establishing the expectation losses, and doctrinal limitations on recovery, such as foreseeability and mitigation of damages. *See*, *e.g.*, Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 Yale L.J. 1261, 1288–91 (1980); Klass, *Efficient Breach*, *supra* note 121, at 369; Craswell, *Against Fuller*, *supra* note 2, at 110; Craswell, *Remedies*, *supra* note 34, at 637; William S. Dodge *The Case for Punitive Damages in Contracts*, 48 Duke. L.J. 629, 664 (1999); Stewart Macaulay, *The Reliance Interest and the World Outside the Law Schools' Doors*, 1991 Wis. L. Rev. 247, 249–53. Also, difficulties in establishing the expectation measure may considerably increase the under-compensation problem, thereby resulting in underenforcement. Zamir, *Restoration*, *supra* note 9, at 123.

[148] Daniel A. Farber, *Reassessing the Economic Efficiency of Compensatory Damages for Breach of Contract*, 66 Va. L. Rev. 1443, 1444–45 (1980).

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compensation and under-deterrence.[149] By imposing higher compensation, reliance as promise improves deterrence from breach and corrects the distortion caused by the imperfections in the practical execution of expectation damages.

Secondly, the presumption that an award greater than expectation damages prevents reaching an efficient outcome is too hasty. As was widely recognized, expectation damages are not the only way to allow or incentivize efficient outcomes. Other remedies, even remedies that exceed the expectation measure, may be equally efficient.[150] Specifically, the theory of efficient breach neglects the ability of the parties to renegotiate (prior to performance) the promisor's discharge from the contract, thus reaching an efficient release from the contract.[151] So long as the breaching party can credibly threaten inefficient performance of what may end up as a *losing deal* for the promisee, the latter is expected to prefer the promisor's discharge of the contract at an exit price that will benefit both of the parties relative to the alternative of performance. Such negotiations may indeed be costly,[152] but these costs are likely to be lower than the costs of a legal dispute over damages.[153] Hence, a remedy that deters breach (such as reliance damages that exceed expectation) is likely to reduce overall costs compared with a rule that incentivizes breach and provokes a legal dispute over damages.[154]

5.3.3 | Other incentives

Furthermore, the availability of an excessive reliance recovery may influence direct incentives at the negotiation and performance stages. For example, it may incentivize the promisor to think carefully before signing a contract. It also encourages her, at the performance stage, to take proper precautions to avoid breach. On the promisee's side, it removes her incentive for excessive self-protection and under reliance because she knows she can recover for her full reliance expenses. Such incentives may indeed be most needed in the cases envisioned under reliance as promise, in which the expectation measure is unverifiable.

5.3.4 | Litigation costs

Lastly, a strong promissory *entitlement* of full reliance damages is likely to reduce litigation costs when reliance damages are claimed. Often the proof of expectation losses is more difficult, and hence more costly, than the proof of reliance damages, which rests on relatively verifiable and accessible data.[155] When reliance damages are claimed under the prevailing *instrumental account* (in cases of difficulty to establish the expectation measure), the promisor may still attempt to meet their burden of proof, showing that the contract would have been unprofitable to the promisee (thus to reduce the latter's reliance damages by their now-proved expectation interest).[156] When the promisor pursues such a claim, he engages the promisee in protracted, costly litigation over hypothetical issues regarding their expectancy. By facilitating the enforcement of the promise to reimburse as an independent right, rather than using reliance damages instrumentally to protect the expectation interest, reliance as promise is likely to reduce litigation costs. Under reliance as promise, the enforcement of the promise to reimburse is not subjected to the promisee's expectancy. Rather, she is entitled to such enforcement as a matter of a right.

5.3.5 | Counter-Arguments and Responses

In response to these arguments, one may consider some counter-arguments. *First*, there is always the concern that the promisees will over-invest in the contract and will over-rely on its performance.[157] To this argument, reliance as promise offers a simple answer: The promise to reimburse, even when it endorses an unlimited reliance recovery, is not an open license for the promisee to act recklessly. Rather, that recovery, as any damage recovery, is subject to the general standards of reasonableness, foreseeability, and mitigation that limit its scope.[158] Thus, even when reliance as promise allows an uncapped reliance award, this award is still limited by well-known rules, which overall serve efficiency goals.[159] These limitations ultimately prompt the promisee to be selective in engaging reliance costs.

Secondly, a reliance recovery that may exceed expectation might lead to over-deterrence and may induce excessive precautions in the performance stage. On the other hand, reliance as promise's advantage is that it enhances deterrence only *in proportion* to the probability of the breaching party to avoid liability. Reliance as promise supports a recovery that exceeds the expectation measure in a limited scope of cases, in which expectation damages are systematically unverifiable, that is, when the likelihood of the promisor seeking to avoid liability is most increased.

[149] For arguments of this sort, supporting remedies which exceed expectation damages (such as specific performance, punitive damages or restoration remedies), *See, e.g.*, Schwartz, *Specific Performance*, *supra* note 143 (specific performance); Ulen, *supra* note 143 (same); Zamir, *Restoration*, *supra* note 9, at 119 (restoration remedies); Dodge, *supra* note 147 (punitive damages); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869 (1998) (same).

[150] For arguments of this sort, *See, e.g.*, Klass, *Efficient Breach*, *supra* note 121, at 372–73; Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 Yale. L.J. 829, 834–839 (2003) [hereinafter Posner, *Success or Failure*].

[151] As famously argued by Coase, if legal entitlements can be exchanged between parties at a low cost, then the initial assignment of those entitlements does not influence their final allocation, which will always result in an efficient outcome. *See* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1(1960). For such a claim in the context of specific performance *See, e.g.*, Daniel Markovits & Alan Schwartz, *The Myth of Efficient Breach: New Defenses of the Expectation Interest*, 97 Va. L. Rev. 1939, 1944–45 (2011).

[152] Especially due to the bilateral monopoly of the parties for such negotiation. For further discussion of costs associated with such bargain, Robert Cooter, *The Cost of Coase*, 11 J. Legal Stud. 1, 16–20 (1982); Ulen, *Specific Performance*, *supra* note 143, at 381–82.

[153] Dodge, *supra* note 147, at 634; Zamir, *Loss Aversion*, *supra* note 11, at 857 (same analysis regarding disgorgement remedy).

[154] *See, e.g.*, Friedmann, *Fallacy*, *supra* note 143, at 7.

[155] *See, e.g.*, Friedmann, *Performance Interest*, *supra* note 9, at 635–36.

[156] *See supra* text accompanying note 39.

[157] For an example and further discussion of this effect (discussed with regard to the expectation measure as the general rule), *see* Steven Shavell, *Damage Measures for Breach of Contract*, 11 Bell J. Econ. 466, 478 (1980); Posner, *Success or Failure*, *supra* note 150, at 835–36.

[158] *See, e.g.*, *Hadley v. Baxendale*, 156 Eng. Rep. 145 (Ex. 1854).

[159] For the efficiency goals promoted by the rule of foreseeability *See, e.g.*, Ayres & Gertner, *Filling Gaps*, *supra* note 115, at 101–104; Posner, *Success or Failure*, *supra* note 150, at 836–37; Lucian Arye Bebchuk & Steven Shavell, *Information and the Scope of Liability for Breach of Contract: The Rule of* Hadley v. Baxendale, 7 J.L. Econ. & Org. 284(1991); Zamir, *Default Rules*, *supra* note 116, at 351.

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The above discussion does not exhaust all possible considerations. But at the end of the day, reliance as promise seems to enhance efficiency in several respects and withstand possible objections from an economic perspective.

6 | CONCLUSION

This Article offered a heretofore overlooked perspective on the reliance interest. Under the concept it proposed, underlying the entrenched judicial practice of awarding reliance damages is a subtle recognition of a tacit promise to reimburse. As we explained, such an implied promise exists in every contract independently from, and in addition to, the promise to ensure the expected profit from performing the contract. Whereas an award of expectation damages enforces the latter promise, an order to pay reliance damages enforces the former. Instead of grappling to rationalize reliance damages in terms of approximating expectancy (as reliance instrumentalists do) or to see them as non-promissory (as pure reliance did), reliance as promise takes reliance damages for what they truly are: a remedy by which courts seek to enforce an independent remedial obligation. This concept does not only offer a more coherent explanation for the practice of awarding reliance damages as a sole remedy. As this Article has shown, reliance as promise is prima facie consistent with commonsense moral intuitions, that is, with how most ordinary people perceive the unspoken moral obligations of contracting parties.

One may wonder if endorsing reliance as promise can have any concrete ramifications. While this question deserves separate scrutiny and more attention than it can be given here, it is quite clear to us that it warrants a positive answer. First, there is reason to believe that endorsing reliance as promise would put an end to enduring *normative* debates over the legitimacy of the reliance interest generally, and of reliance damages specifically. The reliance interest and reliance damages are legitimate insofar, and only insofar, as they can be reconciled with the common intentions of contracting parties.

Secondly, reliance as promise can serve as a useful methodical tool for teaching contract law and contract remedies. For example, it can make sense of the seemingly irreconcilable rhetoric of the Restatement of Contracts, which portrays reliance as an independent interest and yet subjects reliance recoveries to a ceiling dictated by expectation interest.[160] Realizing that this complexity flows naturally from the promise-based view of reliance can arguably assist contract professors in reconciling this apparent tension and in explaining the logic of contractual reliance doctrine.

Finally, embracing reliance as promise can assist in resolving, or at least in better understanding, specific doctrinal controversies. To begin, two doctrinal implications seem almost self-evident. The first concerns the election debate, that is, the question whether an injured party can always freely choose to claim reliance damages or is instead limited by a precondition (namely that the expectation damages are difficult to determine).[161] Under reliance as promise, this question, which has baffled courts and commentators, is easily resolved: Because they represent an independent element of recovery, stemming from an independent promise, reliance damages can be claimed regardless of whether or not the injured party can claim expectation damages.

The second doctrinal implication, as a direct corollary, is the burden of proof, which is usually transferred to the breaching party.[162] Reliance as promise carries implications here, in that recognizing the independence of the reliance claim allows reliance as promise to disconnect it from the doctrinal grip of the expectation damages claim. It is therefore incoherent, as well as inconsistent with the parties' *ex ante* risk allocation, to allow the breaching party to reinstate the dependency between the two claims by proving the injured party's expectancy.[163]

Furthermore, embracing reliance as promise can shed light on the way forward towards the resolution of other doctrinal questions which today remain unsolved. For example, under extant law, it is far from clear if, and when, an injured party can be reimbursed, within a reliance damage claim, for lost opportunity costs, in addition to their performance expenditures.[164] Similarly, different views have been expressed as regards the right to reimbursement for precontractual expenditure.[165] We need not delve into these controversies. Under reliance as promise, these issues and others should be approached in the same way, that is, by reconstructing the parties' tacit understandings in the case at hand with respect to each of these problems. Put differently, if, as this article argues, reliance damages reflect an implicit *contractual obligation*, the scope and content of that obligation become *questions of interpretation*, to be resolved on a case-specific basis.

Rather than offering a conclusive solution, reliance as promise contributes to the debate, then, by suggesting how to shape the way in which these doctrinal challenges should be approached in the first place. These are all interpretive questions that, as such, must be formulated, considered, and ultimately resolved based on the promissory view of contractual reliance.

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[160] *See supra* text accompanying note 14.

[161] For this controversy *See, e.g.*, Zamir, *Three Views*, *supra* note 11, at 2083–84. The same debate has baffled English law. For discussion *see*, e., Treitel, Contract Law, *supra* note 11, at 1133, 1135.

[162] *See supra* text accompanying note 41.

[163] True, this would run contrary to the conventional rhetoric of the courts. However, as we explained, this rhetoric is far removed from reality. *Supra* text accompanying notes 39–42.

[164] *See* e.g., sources cited *supra* note 3. *See also* Zamir, *Restoration*, *supra* note 9, at 94 (noting that "the status of the entitlement to reliance damages based on lost opportunities from alternative contract is uncertain"); *see*, similarly, Kelly, *supra* note 7, at 1766.

[165] For discussion *See, e.g.*, Crespi, *supra* note 25; Eisenberg, *supra* note 11, at 1057–58.

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