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Contract Compensation in Nonmarket Transactions

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ARTICLES

CONTRACT COMPENSATION IN NONMARKET TRANSACTIONS†

Joseph P. Tomain*

Professor Tomain assails the myths holding that contract law is either complete and unitary or hopelessly indeterminate. He contends that a distinction must be made between market situations, which require a more formal analysis, and nonmarket transactions to which a more particularized analysis should be applied. Making the market/nonmarket distinction permits flexibility of methodology and considerations of economics, politics, and morals as appropriate, without forcing the conclusion that contracts analysis is totally without structure. Professor Tomain advocates application of reflective doctrinal analysis which tests the sufficiency of a rule of law and reforms the rule if it is not supported by sound policies. The analysis should relate form to content by recognizing that contract rules are dictated by contract types. He demonstrates that consistent workable decisional rules can be developed, even for nonmarket transactions, by keying in on the subject matter of the contract. Professor Tomain fully illustrates how the market/nonmarket distinction and reflective doctrinal analysis are employed to examine and, when necessary, reform rules of contract law by analyzing the issue whether a promisee should be afforded relief for nonpecuniary harm resulting from a promisor's breach in a nonmarket transaction.

TABLE OF CONTENTS

I. Introduction ............................................ 868
II. Myth, Meaning, and Method in Contracts Law .... 871
   A. The Interdisciplinary Form of Modern Discourse ... 871
   B. Myth .............................................. 874
   C. Meaning ........................................... 880
   D. Method ............................................ 882
   E. The Meaning of the Method ......................... 884
III. Contractual Liability for Nonpecuniary Damages .... 888
   A. A Class of Cases .................................. 888
   B. The Pathology of the Rule Against Recovery .... 893

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I. INTRODUCTION

Myth is not defined by the object of its message, but by the way in which it utters this message: there are formal limits to myth, there are no 'substantial' ones. Everything, then, can be a myth? Yes, I believe this, for the universe is infinitely fertile in suggestions.

Roland Barthes, Mythologies

Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.

Robert M. Cover,
The Supreme Court 1982 Term—Foreward: Nomos and Narrative

This Article is about myth, meaning, and method in the law of contracts. The discussion of these interrelated phenomena is a practical exercise in legal analysis treating contracts law as more alive than dead and more meaningful than meaningless. The discussion also serves as an antidote to the excesses of current jurisprudence which assaults contracts from the ideological left and right and sometimes claims contracts for the center.

The primary assertion of modern contracts jurisprudence is that contract law is in intellectual or theoretical disarray. As evidence for their claim about fragmentation, proponents point to conflicts among


I have adopted a particular word usage in the Introduction and Section II. I refer to contract(s) in the singular and plural. In the remainder of the Article the reference is to “contracts.” See infra note 24 and accompanying text, for an explanation of this linguistic device.
competing theories which base contract law on economics,\textsuperscript{4} politics,\textsuperscript{5} or morals.\textsuperscript{6} It should be obvious, although we quickly lose sight of this, that interdisciplinary categorical statements about the whole of contracts law are partisan; there is no one way to analyze contracts law, and the norms contained in the categories can and do conflict. A breach may be efficient while unfair and may be politically acceptable at the same time, for example. A conflict between efficiency and equity together with the seemingly contradictory statement that the conflict is acceptable politically does not necessarily lead to the conclusion that contracts law is hopelessly uncertain or meaningless. I argue, instead, that through doctrinal analysis sense can be made from contracts law, that conflicts among competing categories can be usefully mediated, and that modern discourse, even with its apparent contradictions, has enhanced rather than disturbed the soundness of contracts law.

Despite claims of disarray, modern discourse has made two important contributions to understanding and doing contracts. The first contribution is formal. The modern mode influences how we think and talk about contracts. The second contribution is substantive. Ec-


omics, politics, and moral philosophy provide substantive bases for policy analysis and supply normative justifications for contracts rules.

We can assume the truth of Barthes' statement that everything can be myth without believing all myth is meaningless. As applied to law, we can recognize the artificiality of legal constructs without believing contracts law or contracts methods are either indeterminate nonsense or motivated by a single moral, economic, or political criterion. Myth is grounded in reality. Uncovering the layers of meaning contained in the myth and then reconstructing its story leads to an understanding of the meaning of the myth, the possibilities of law, and, after Cover, the world in which we live. We uncover the meaning of the myth through method. The method used here, called reflective doctrinal analysis, has been given its shape by modern discourse.

Part II briefly defines the concepts of myth, meaning, and method. These are neither exhaustive nor controversial descriptions. They are necessary, however, to show how doctrinal analysis has developed and to place the remaining discussion into a broader, more understandable context. Part II also presents the theoretical background for the discussion of a specific contracts rule. The rule, as stated in section 353 of the Restatement (Second) of Contracts, is a presumption against awarding contract damages for nonpecuniary injuries suffered as a result of a breach of contract. Part III employs the described method and first analyzes the liability basis of the rule. Part III then describes the pathology of the rule, indicates how and why the rule has broken down, and states that the rule is not defensible and should be replaced by eliminating the presumption against a right to such awards. Part IV examines the remedial basis of an alternative rule and argues that a damages remedy can be fashioned consonant with the rationale behind granting a right for nonpecuniary harms. Consistent with the description of the contributions of modern discourse, the analysis in Part III is supported by policy arguments drawn from economics, politics, and morals. The substantive conceptual vehicle in which the analysis travels is a distinction between market and nonmarket transactions.7 There are a variety of contractual

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7. The market/nonmarket distinction runs through much, if not all, contracts talk. See, e.g., Unger, supra note 5, at 618-25. In that article, Unger refers to the market/nonmarket distinction throughout his discussion of contracts law, but nowhere more eloquently than in the following passage:

The idea that there is an area of experience outside the serious world of work, in which communal relations flourish, can be made to justify the devolution of practical life to the harshest self-interest. The premises to this devolution recall the contrast between Venice
situations and relationships which cannot be justified or defended with market-based rationales. While economics can be used to justify market transactions, nonmarket transactions are better supported by moral norms. Both sets of norms coexist in a political climate committed to mediating conflicts between the two sets of values. Finally, the conclusion suggests broader applications for the market/nonmarket distinction.

II. Myth, Meaning, and Method in Modern Contracts Law

A. The Interdisciplinary Form of Modern Discourse

Before the concepts of myth, meaning, and method are amplified, the structure of modern discourse must be recognized because it is this structure which gives the appearance of disarray and, once understood, helps to unravel the jumbled strands of contractual analyses. The form of modern discourse is: "Contract law is based on . . . ." In the blank fill in economics, politics, or moral philosophy. Indeed, we can say that the battle for the normative soul of contracts is fought on these three fronts with incidental skirmishes every now and then.  

and Belmont in The Merchant of Venice. In Venice people make contracts; in Belmont they exchange weddings rings. In Venice they are held together by combinations of interest; in Belmont by mutual affection. The wealth and power of Venice depend upon the willingness of its courts to hold men to their contracts. The charm of Belmont is to provide its inhabitants with a community in which contracts remain for the most part superfluos. Venice is tolerable because its citizens can flee occasionally to Belmont and appeal from Venetian justice to Belmontine mercy. But the very existence of Belmont presupposes the prosperity of Venice, from which the denizens of Belmont gain their means of livelihood. This is the form of life classical contract theory claims to describe and seeks to define—an existence separated into a sphere of trade supervised by the state and an area of private family and friendship largely though not wholly beyond the reach of contract. Each half of this life both denies the other and depends upon it. Each is at once the other's partner and its enemy.

Id. at 622-23. See also Fuller & Perdue, The Reliance Interest in Contract Damages (pts. 1 & 2), 46 YALE L.J. 52, 373 (1936-1937). The seminal contribution of this pair of articles is the alignment of the expectancy interest with market analysis and the reliance interest with nonmarket analysis.

8. Although contracts discourse is not limited to economics, politics, and morals, these are the dominant modes of analysis used by most mainstream scholars. My authoritative support for this assertion lies in the contracts casebooks by the law publishing houses of West, Foundation Press, Michie Bobbs-Merrill, and Little, Brown & Co. Contracts can be examined within other disciplines, e.g., historically, see M. Horowitz, supra note 5; L. Friedman, A History of American Law 228-247 (1973); L. Friedman, Contract Law in America (1965); and P. Atiyah, supra note 6; anthropologically, Gabel, Intention and Structure, supra note 5; and, sociologically, see I. MacNeil, The New Social Contract: An Inquiry into Modern Contractual Relations (1980). The forced alignment of contracts law with other disciplines is as artificial as separating law into contracts and torts or contracts into "real" contracts and quasi-contracts. Categories are distin-
This form of contracts talk is interdisciplinary. Interdisciplinary discourse has the following formal attributes which are more specifically discussed in the remaining sections of this Part: generality, a principal substantive criterion, a principal analytic methodology, an analytic method normatively linked to a substantive criterion, and an ideological agenda tilted in favor of the nonlegal discipline. The interdisciplinary view is neither a completely inside nor outside look at contracts. That is to say, the primary goal of interdisciplinary distinguished for several reasons, one of which is to make discourse intelligible as opposed to affirming the desirability and separability of categories. Categorization is a means to the end of intelligible and practical discourse not an objectively verifiable truth. See infra note 63 and accompanying text.


10. See infra notes 27-41 and accompanying text. But see S. HAMPSHIRE, MORALITY AND CONFLICT 1 (1983); V. HELD, RIGHTS AND GOODS 3-5 (1984). Both authors argue that single criterion analysis of normative values is too restrictive and ultimately misleading.

11. Much of this Article is about what I mean by "normatively linked." I use the concept in two senses. First, the external discipline that one chooses as a basis of analysis carries with it normative content. To speak about "Law and Sociology" necessarily means speaking about law from a sociological (and reductionist) orientation. Second, form and content (method and substance) are linked in ways that are reflexive and reinforcing. See infra Part II, Subsection D. See generally D. HOFSTADTER, GOEDEL, ESCHER AND BACH 431-37 & ch. XVI (1980); R. NOZICK, PHILOSOPHICAL EXPLANATIONS 71-78 (1981). This normative link between substance and method as a necessary limiting device is useful for understanding and knowledge. See, e.g., N. CHOMSKY, LANGUAGE AND RESPONSIBILITY 64 (1977). The statement "Contracts law is x" means the proponent has committed herself or himself to making assertions about contracts constrained by x. I want to distinguish this Article from that larger type of claim. Rather, this Article is an inside look at a specific rule of contracts, and the rule is discussed with the reference to three sets of norms, economics, politics, and morals. The link between content and method is forcefully developed by Kennedy, Legal Formality, 2 J. LEGAL STUD. 351 (1973); Kennedy, supra note 5, at 1701-24; and Feinman, Promissory Estoppel and Judicial Method, 97 HARV. L. REV. 678 (1984).

12. Grey, supra note 9, at 52: "The neo-orthodoxies drawn from economics and moral philosophy resemble classical legal science in their capacity to promote structured puzzle-solving of a sometimes interesting kind. But, in contrast to the classical theory, they dilute the autonomy of law (and hence, potentially, the status of the profession) ... . . ." See also Fried, supra note 9, which also argues for law's disciplinary autonomy as an intellectual discipline.

13. The inside/outside dichotomy is a matter of perception. The scholar who asks "What is the point of contracts law?" looks on the whole of the body of doctrine to place it in other contexts such as into the whole of law or social theory or history as examples. The person who asks "How can I make sense of contracts law?" examines law from the inside with a view to doing law (advising clients or deciding cases). The insider's statement, "I want to make sense of contracts so that I can do it," carries with it some not inconsequential attributes, chief among which are rationalism (make sense) and pragmatism (do it). Naturally, a complete and sophisticated treatment of the topic glances both inside and outside. Nevertheless, each viewpoint presents a different orientation and
course is not to do contracts. Rather, interdisciplinary discourse makes a normative assertion about what contracts law "really" does or ought to do, thus altering traditional doctrinal analysis.\textsuperscript{14}

Interdisciplinary discourse is distinguished from and illuminative of contracts law. It is distinguishable because the principal objective of the interdisciplinary approach is to promote a particular ideological program\textsuperscript{15} by criticizing all of contracts law, criticizing the whole of law or the whole of legal method, or criticizing contemporary society, or some combination of these. In order to accomplish these broader goals, contracts law is discussed as a uniform, whole body of doctrine. Interdisciplinary discourse thus stands in opposition to doing and understanding how contracts law works from the inside. Still, the approach is illuminating because interdisciplinary discourse forces the question: What is the normative/ideological content of one's analytic method?

After admitting that different and potentially conflicting theoretical bases exist, contracts law must deal with the conflicts instead of resting on the proposition that disarray is inevitable. The first stage is to recognize the interdisciplinary form which has been done. The next stage is to test whether the form can be used to do contracts and mediate competing values.

Contracts analysis cannot accept the myth that contracts law is or should be uniform. The element of generality upon which interdisciplinary discourse is dependent must give way to accepting the diversity of contract types. After the element of generality is loosened, the form can be usefully applied. The interdisciplinary form is helpful but not wholly successful because it fails to recognize contracts are not uniform. Interdisciplinary discourse depends on discussing contracts law generally because of its commitment to an ideological program. Law and economics analysis, for example, intends to prove that law is economic. When inconsistencies arise, they are disregarded as aberrational or wrong. If generality is denied, that is, if we admit contracts are not uniform, we will be lead to the conclusion that contracts law is

\textsuperscript{14} The method of analysis employed here is distinct from the more scientific goals attributed to Langdellian doctrinal thinking. See, \textit{e.g.}, Grey, \textit{supra} note 9; C. Langdell, \textit{A SUMMARY OF THE LAW OF CONTRACTS} chs. I & II (1974).

not solely economic. If a contract is not made solely for economic reasons, then a sole economic justification cannot be given. We need another referent, but there is no single referent because there are a diversity of motivations for entering into contracts and a range of contracts types. More importantly, contract types should help locate the referent.

The next step is to identify different types of contractual transactions. Here I address only two: market and nonmarket transactions. The task remains to connect a normative basis (i.e., a principal substantive criterion and a principal analytic method) with specific contractual arrangements. Market transactions should be analyzed with a more formal, economic method and nonmarket transactions with a more particularized, morally based method. This discussion constitutes the formal contribution of modern discourse. The substantive contribution is contained in the norms of the nonlegal disciplines. Politics, morals, and economics provide the norms used to evaluate the sufficiency and test the legitimacy of particular contracts rules.16

The ambitiousness of an undertaking purporting to reconcile competing philosophical schools is mitigated by focusing on a simple, narrow contracts rule with an extended discussion.17 A specific rule is used to illustrate the transformative18 power of reflective doctrinal analysis. A legal rule is not a static thing inevitably entrenching the status quo, it can be reconstructed19 into a positive force for social justice.

B. Myth

The myth, based on the element of generality with two versions and two corollaries, is: Contract law is complete (the Completeness Myth). The myth holds contracts law can be meaningfully discussed as a complete rules system without being broken down into constituent parts.20 It may well be that no serious scholar actually believes

17. The method is similar to Unger's "expanded doctrine." See Unger, supra note 5, at 576-83.
20. The perjorative label for this wholistic view of contracts is Formalism. See Grey, supra note 9, which is an explication of the form and content of Formalism. Two attributes of Formalism are its alleged scientism and pyramidal structure. Id.; G. Gilmore, supra note 14, at 5-53. Specific critics of Formalism in contracts include Klare, supra note 5, at 876-78; Unger, supra note 5, at 570-
The first form the Completeness Myth takes is that contract law is unitary. Contracts law, the scholars posit, can be explained as a consistent body of doctrine. This assertion is in the form of interdisciplinary discourse because it always purports to explain contracts law relative to another discipline. This form leads to conflicting positions when different disciplines are used. It is impossible, for example, to justify all contracts with either a market-based economic rationale or with a promise-based moral argument. The second version of the Completeness Myth is that contracts law is indeterminate. The indeterminacy claim is consistent with the primary myth that contracts can be discussed as a whole because the claim is that the whole of contracts is meaningless or is nonsense. Often the same statement is made for the whole of law.

There are two principal corollaries which flow from the Completeness Myth. The first corollary is that contracts law is based on a single dominant criterion. For law and economics types, the criterion

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21. See, e.g., E.A. Farnsworth, Contracts (1982) A. Corbin, Contracts (1952); Eisenberg, Donative Promises, 47 U. Chi. L. Rev. 1 (1979); Eisenberg, supra note 3; and even the economically minded Goetz & Scott, Enforcing Promises: An Examination of the Basis of Contract, 89 Yale L.J. 1261, 1261-62 (1980): “Indeed, common law ‘bargain theory’ is classically simple: bargained-for promises are presumptively enforceable; nonreciprocal promises are presumptively unenforceable. But this disarmingly simple theory has never mirrored reality.”

What distinguishes these authors, together with the bulk of mainstream contracts texts and treatises, is their peculiar inside view the objective of which is precisely to make sense (not a muddle) of contracts. See also Barnett, Contract Scholarship and the Reemergence of Legal Philosophy (Book Review), 97 Harv. L. Rev. 1223, 1224 (1984) (reviewing E.A. Farnsworth, supra note 21): “It is my contention that the publication of this book at this time may be in part a product of the increased support from legal philosophers in recent years for traditional forms of legal reasoning based on principle and expressed through doctrine.”

22. See, e.g., Grey, supra note 9, at 8:

Conceputal Order. A legal system is conceptually ordered to the extent that its substantive bottom-level rules can be derived from a small number of relatively abstract principles and concepts, which themselves form a coherent system. The conceptual ordering is formal where the derivation of the decisive rules of the system from its more general principles and concepts is demonstrative; the derivation can also take some less rigorous form, producing an informal but ordered system.

23. See, e.g., Kennedy, Legal Education as Training for Hierarchy, in The Politcs of Law: A Progressive Critique, 40, 48 (D. Kairys ed. 1982) ("Rights discourse is internally inconsistent, vacuous, or circular. Legal thought can generate equally plausible rights justifications for almost any result."); Feinman, supra note 5, at 849 ("At best, contracts embodies a temporary compromise without coherence.").
is efficiency. For the more philosophically minded, contracts are based on the moral principle of voluntary obligation. And, for political ideologues, contracts law is a constitutive component of the superstructure of the state. Note that the Completeness Myth is not

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24. The generality with which law and economics scholars discuss contracts is exemplified by A. Kronman & R. Posner, supra note 4, at 1-2:

The law of contracts regulates, among other kinds of transactions, the purchase and sale of goods (including real estate) and services. Since buying and selling—and related transactions, such as leasing and borrowing, which are also governed by contract law—are quintessentially economic activities, it would seem that economics should have something useful to say to students of contract law. For example, economics may be able to tell us why people make contracts and how contract law can facilitate the operation of markets. And to the extent that contract doctrines reflect judicial efforts, whether deliberate or unconscious, to achieve efficiency, economics may help toward an understanding of the meaning of the doctrines and their appropriate limits . . .

The fundamental economic principle with which we begin is that if voluntary exchanges are permitted—if, in other words, a market is allowed to operate—resources will gravitate toward their most valuable uses.

The principle is the same whether we are speaking of the purchase of a string of pearls, a lawyer's time, a machine for making shoes, or an ingot of aluminum. The existence of a market—a locus of opportunities for mutually advantageous exchanges—facilitates the allocation of the good or service in question to the use in which it is most valuable, thereby maximizing the wealth of society.

25. See generally C. Fried, supra note 3, at 5-6 (1981):

I begin with a statement of the central conception of contract as promise. This is my version of the classical view of contract proposed by the will theory and implicit in the assertion that contract offers a distinct and compelling ground of obligation. In subsequent chapters I show how this conception generates the structure and accounts for the complexities of contract doctrine. Contract law is complex, and it is easy to lose sight of its essential unity. The adherents of the "Death of Contract" school have been left too free a rein to exploit these complexities. But exponents of the view I embrace have often adopted a far more rigid approach than the theory of contract as promise requires. For instance, they have typically tended to view contractual liability as an exclusive principle of fairness, as if relief had to be either based on a promise or denied altogether. These rigidities and excesses have also been exploited as if they proved the whole conception of contract as promise false. In developing my affirmative thesis I show why classical theory may have betrayed itself into such errors, and I propose to [sic] perennial conundrums solutions that accord with the idea of contract as promise and with decency and common sense as well.

Professor Fried later toned down his belief in the moral unity of contracts law. Fried, supra note 9, at 37: "I have not abandoned my doubts about the economic, sociological, or historicist views of the law. Lately, however, I have begun to feel doubts about the moralizing of the law as well." See also id. at 53-57 (Fried's elaboration of the weaknesses of generality as treating law too instrumentally).

26. An example of the political view of contracts appears in Gabel & Feinman, supra note 5, at 183:

The central point to understand from this is that contract law today constitutes an elaborate attempt to conceal what is going on in the world. Contemporary capitalism bears no more relation to the imagery of contemporary contract law than did nineteenth-century capitalism to the imagery of classical contract law. Contemporary capitalism is a coercive system of relationships that more or less corresponds to the brief description given here.
connected with a specific ideology, instead it is asserted and held by persons situated all along the ideological spectrum. Nevertheless, it is ideology bounded. The completeness view of contracts is colored by normative values and ideological content inherent in the specific discipline to which contracts is being referred.

The second corollary is that contracts analysis should employ a single methodology. There is a tendency, along ideological grounds, to align a particular methodology with the discipline’s guiding criterion. Law and economics analysis, for example, utilizes a rules-based system geared to formulating socially desirable rules through *ex ante* analysis. Because economic efficiency is the polestar, contracts rules, principles, and policies are evaluated by how well they contribute to a better society measured by wealth maximization. These are

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The proof of this statement inheres in the situations we all face in our daily lives in the functional roles to which we are consigned: lawyer, secretary, student, tenant, welfare recipient, consumer of the products and services of Exxon, Citibank, and Sears. Despite the doctrines of reliance and good faith, large business corporations daily disappoint our expectations as to how they should behave. Despite the doctrine of unconscionability, unfairness is rampant in the marketplace. In this reality our narrow functional roles produce isolation, passivity, unconnectedness, and impotence. Contract law, like the other images constituted by capitalism, is a denial of these painful feelings and an apology for the system that produces them.

Most of the time the socioeconomic system operates without any need for law as such because people at every level have been imbued with its inevitability and necessity. When the system breaks down and conflicts arise, a legal case comes into being. This is the “moment” of legal ideology, the moment at which lawyers and judges in their narrow, functional roles seek to justify the normal functioning of the system by resolving the conflict through an idealized way of thinking about it.

But this also can be the moment for struggle against the narrow limits imposed in law on genuine values such as freedom, equality, moral community, and good faith. By questioning whether the legal system helps or hinders the actual realization of those values in a meaningful sense in everyday life, the critical approach permits us to expose the illegitimacy of the system and to explore the possibility of a different order of things. (emphasis in original)


I suggest that it is no linguistic accident that the wholistic, interdisciplinary voice speaks about contract(s) in the singular. Notice the titles in the last three footnotes: *Contract as Promise;* The Economics of Contract Law; and *Contract as Ideology.* The singular usage naturally promotes discussing contract(s) law generally and furthers the skewing of contracts discourse.

27. *Ex ante* analysis is a form of prospective or policy argumentation. The primary question posed is: What will the effects of a rule or decision be? *Ex ante* analysis is contrasted with *ex post* analysis which attempts to resolve a past dispute between parties. See, e.g., B. Ackerman, *supra* note 19, at 53-55, 73-78; Easterbrook, *The Supreme Court, 1983 Term—Foreward: The Court and the Economic System,* 98 Harv. L. Rev. 4, 10-12, 19-33 (1984).

societal arguments preferring future social gain over past individual interest as the evaluative test. The methodology best accomplishing this goal is a formalistic utilitarian calculus which starts with a desire to establish forward looking social goals. This method focuses on the future applicability of rules in an effort to promote uniformity and predictability facilitating and advancing commercial transactions. This formalist methodology is consciously less flexible than more particularized adjudication and is interested in reducing transaction costs by lessening litigation. The successor to formalism, situation-sense, opens the contracting process slightly by attempting to honor the needs of merchants in identifiable markets much along the lines of the development of the Law Merchant. Situation-sense can be used to advance societal goals or to remedy injustice to individuals as long as those individuals are traders in a marketplace.

The method used by advocates of a moral basis for contracts starts with the transaction and the place of individuals in the contracting process instead of concentrating on the consequences of the rule that will emerge. It is motivated by a desire to define and secure rights. The method uses ex post analysis and is more rights-based and Kantian than market-oriented and utilitarian. Contracts will be honored or enforced only to the extent parties are fairly situated.


30. See, e.g., Goetz & Scott, supra note 21, at 1263-64 ("A liability or damages rule induces contracting parties to adapt their behavior in ways that will affect social welfare."), The large claim made by law and economics proponents is that law is (should be) efficient. But see Epstein, The Social Consequences of Common Law Rules, 95 Harv. L. Rev. 1717 (1982) (common law rules not necessarily efficient); Note, The Inefficient Common Law, 92 Yale L.J. 862 (1983) (same).

31. See Grey, supra note 9, at 11-32.


34. W. Mitchell, An Essay on the Early History of the Law Merchant 156 (1904): The whole history of Law Merchant in Europe during the Middle Ages was characterized by a constant advance towards uniformity and by the successful assertion of new principles of law. It was developed in local courts, in which directly or indirectly the merchants declared the law. The merchants of the fair courts of St. Ives, or the merchants and mariners of Barcelona, were alike the "doomsmen" of the court; it was the function of the judge merely to proclaim and execute the judgment of the merchants.

35. See, e.g., Feinman, supra note 11, at 708-12.
Moral norms also take on an aspect of paternalism by protecting individuals against themselves.\textsuperscript{36} Although no sophisticated analyst can ignore the effects of a rule, one can emphasize a preference for rights over end-states. A rights-based method is more particularized, placing less importance on uniformity and predictability particularly in the face of claims of individual unfairness.

The indeterminacy version of the Completeness Myth also has two corollaries. Proponents of the Completeness Myth argue that contracts law is in theoretical disarray at best and is a tool of domination and oppression at worst.\textsuperscript{37} They argue that there is no single criterion because competing criteria can be posited with equal conviction. Therefore, contracts law is meaningless. To buttress their claim of indeterminacy, they argue that there is no single contract methodology, instead, there are competing methodologies as the above paragraphs describe.\textsuperscript{38} The lack of a single criterion and single methodology irretrievably fractures contracts law in the critical view.

In practice, the methodology of those who push a political analysis, particularly those of the critical school, rejects the formal method of economic analysis and the particular method of moral philosophy. Rather, they employ variations of a method of Marxian deconstruction,\textsuperscript{39} depending on their ideological end-point,\textsuperscript{40} as a social critique rather than as an analysis of substantive contracts law. Note, I have attributed to the proponents of indeterminacy an apparently contradictory position. I have said that the political school uses and eschews a single criterion and a single method. This central contradiction in their thought remains unaddressed. They mock the tools of legal analysis announcing the incoherence of law because no single method works. Yet, they advocate a position and use a method, then refuse to apply the method to their own analysis or announce their own program.\textsuperscript{41} Is it not likely to follow that from the


\textsuperscript{37} See supra notes 5 & 6.

\textsuperscript{38} See, e.g., Feinman, supra note 11.

\textsuperscript{39} See, e.g., R. Geuss, supra note 15, ch. 3.


\textsuperscript{41} See, e.g., Feinman, supra note 11, at 718 & n.160; Frug, \textit{The Ideology of Bureaucracy in American Law}, 97 \textit{Harv. L. Rev.} 1276, 1377-88 (1984). Professor Feinman, in graciously commenting on an earlier version of this Article, refutes my assertion that critical legal studies persons
ashes of their deconstruction a particularly colored Phoenix will rise?

The two versions of the Completeness Myth with their corollaries are capable of reconciliation by realizing that as myth, the arguments are partially true but, in their excesses, are necessarily partially false. One can adopt the view that contracts law is not unitary without accepting the countervailing conclusion that contracts law is hopelessly indeterminate. Without designing a complete synthesis of the two sets of arguments, an impossible task in the space of an article, the reconciliation can be demonstrated along the following lines. Neither contracts law nor contracts methods is uniform. There are distinct types of contractual situations, some of which require more certainty and predictability than others. These more uniform situations are market transactions. Market contracts can and should be analyzed with a more formal methodology. Similarly, there are other situations, nonmarket transactions, which can and should be analyzed with a more particularized approach. The market/nonmarket distinction attempts to honor individual and social interests without reaching the conclusion that contracts law is woefully indeterminate.

C. Meaning

The meaning uncovered after the myth is exposed is only briefly described here because Parts III and IV define the market/nonmarket distinction in detail and analyze supporting policies. This distinction allows competing norms of politics, markets, and morals to coexist and the dynamic of the law to move forward instead of grinding to a halt while competing theoretical claims are resolved. Market norms are given play in certain situations and moral norms in others. They cohabitate a political universe designed to accommodate pluralist interests, and law is seen as a mechanism mediating pluralist conflicts.

Ordinary contracts are bargain-based, private, voluntary arrangements between parties of roughly equal bargaining strength. In a market,\(^{42}\) where choices are relatively unconstrained, information is fairly freely available, and prices are generally reasonably set, a formal, rule-oriented body of doctrine can be established with societal goals in mind. Individuality is honored and social welfare is promoted by a coherent set of uniform and predictable contracts rules.

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\(^{42}\) See infra note 168 and accompanying text.
However, there are a great many contractual arrangements falling outside the "ordinary law of contracts," and market-based justifications are either inapposite or counterproductive. Therefore, a set of market-honoring rules supported by social policies makes sense only for ordinary contracts.

Market-based rules distort contracts law in nonmarket situations. Uniformity and predictability may foster markets. Those attributes also tilt the market toward those already in power such as persons who initially set contract terms and prices in disregard of the needs and desires of both parties. When there is no market or when the market breaks down, however, all market bets are off. A nonmarket transaction arises due to either the peculiar relationship of the parties or the specialized subject matter of the contract. Conditions of monopoly or oligopoly or the structure of the firm or industry skew contractual relationships by disadvantageously empowering one of the parties. Sometimes the subject matter of the contract alters the need for a prospective rules-based system because no market exists for trading the stuff of the contract. Personal services, unique goods, land sales, or nonpecuniary trades are examples of subject-matter specific contracts the enforcement of which is not completely contained within a market-based rules system. With no market in which to exercise choice, the parties cannot bargain freely or fairly. With no market in which to trade the subject matter of the contract, objective value cannot be assigned. In these nonmarket situations, when a breach of contract gives rise to a claim for relief, the focus must shift from pursuing broad societal goals to promoting individual justice in the circumstances of the case sub judice.

This particularized or individualized approach appears needlessly ad hoc only if the focus is on the need for a prospective rules system. A set of consistent workable decisional rules and principles can be developed for nonmarket transactions by keying on the subject

43. See Rakoff, supra note 19, at 1175.
44. See, e.g., Eisenberg, supra note 3, at 778-85.
46. Oligopolies raises more problems for contracts law than monopolies which are frequently regulated. The primary problem is one of proof. How do litigants avoid turning oligopolistic contract disputes into, in Arthur Lef's phrase, mini-antitrust suits?
47. Rakoff, supra note 19, at 1220-48. Rakoff argues that the organizational and managerial structure of the firm created the need for use of adhesion contracts. Firm structure must be assessed in the evaluation and reevaluation of the rules of law in this area.
48. The debate between rules and principles is best carried on between H.L.A. HART, THE
matter of the contract, the relationship of the parties, or the nature of
the transaction. Individual interests are honored because emphasis is
placed on the contract and on the parties. Social interests are
respected because rules will be formulated giving notice to all players,
engaging in distorted market or nonmarket transactions, that they
cannot seek refuge behind rules designed to mimic or reproduce
markets.49

D. Method

Methodology is necessary to discern the meaning of the myth
and to separate the real from the artificial and the useful from the
polemical. Interdisciplinary discourse demonstrates how method and
substance are normatively enfolded. The closer the connection be-
tween a chosen method and a substantive criterion the sturdier the
analysis, because form and content are self-reinforcing. Economic
analysis employs a utilitarian calculus rather than ad hoc adjudication
because its objective is to promote social end goals. Particularized
adjudication stultifies this desire but promotes a system which defines
initial rights with increasing clarity.

The method used here, reflective doctrinal analysis, has two basic
characteristics. The first, the reflective leg of the analysis, consists of
self-conscious awareness of the connection between form and content,
sensitivity to the artificiality of legal categories, and willingness to
evaluate itself as a useful methodology. The reflective aspect explic-
itly asks “Of what value is method?” The question is not trivial. In-
deed, it is the central question for modern jurisprudence.

Done self-consciously, reflective doctrinal analysis leads to law
reform and is itself part of the transformative effort. A reflective
method is honest, open, explicit, and articulate about the values con-
tained in the method itself and the substantive rules being formulated
and applied. Reflective doctrinal analysis articulates, as explicitly as
possible, motivating values and policy choices even when the policy
choices are dichotomized into apparently conflicting sets such as indi-
vidualism and collectivism.50 The method consciously attempts to


(1979) in which he refers to the struggle between individualism and collectivism as the “fundamental
contradiction”:
work out and resolve or to describe and accept tensions among competing norms. In some instances, law resolves conflicts by refined or "expanded" doctrinal analysis. At other times, conflicts are consciously embraced not merely "tolerated." By embracing conflicts, tension among competing norms is accepted as a good dynamic within law and within society. What keeps all of this tension from creating complete indeterminancy is the system's commitment to mediation. This means that the search for the best state of social or individual life takes place within a system generating a dynamic pattern of compromises and accommodations. Furthermore, a well-structured search for justice is trusted more than a well-defined best end state.

The second characteristic, the doctrinal part of the method, analyzes specific, substantive rules of law in their prospective and retrospective applications. This backwards-forwards analysis concentrates on the content and application of a rule of law rather than on the place of rules in the legal system or the place of law in society. These latter issues are not ignored; however, they are not given primacy. Analysis is doctrinal when a rule is followed through various identifiable levels such as fact finding, choice, application, and policy analysis describing and evaluating the rule's efficacy. Reflective doctrinal analysis tests the sufficiency of a rule of law and reforms the rule if it is not supported by sound policy or policies. These analytic layers are the normal stuff of lawyerly thinking. Reflective doctrinal analysis is very much an "inside" view of law glancing outward to establish its bearings. The explicit program of reflective doctrinal analysis is to make sense of and do law as opposed to make sense of

Here is an initial statement of the fundamental contradiction: Most participants in American legal culture believe that the goal of individual freedom is at the same time dependent on and incompatible with the communal coercive action that is necessary to achieve it. . . .

The fundamental contradiction—that relations with others are both necessary to and incompatible with our freedom—is not only intense. It is also pervasive.

See also id. at 258-61 & 294-300.

51. See Unger, supra note 5, at 576-83.

52. See, e.g., M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); D. MACLEAN & C. MILLS (eds.), LIBERALISM RECONSIDERED (1983); and Unger, supra note 5, at 620 ("This disharmony can be resolved by any number of practical compromises.").

53. See infra note 91 and accompanying text.

law for the purpose of placing law into another discipline's ideological context.

For the ideological left, traditional doctrinal analysis is an extreme example of the poverty of legal thinking and is a mask for "deeper" political/social meaning. For the right, to debunk the rule of law as indeterminate is anarchy leading to the disintegration of order. Instead, an efficient rules system is desirable in and of itself because of the autonomous nature of law. The centrist rejects the polar positions believing law, politics, and society influence but do not completely determine each other. Relative to contracts, promising is the basis of contracts because, through this social device, individuals voluntarily connect with each other with bonds of trust and enforcing contracts promotes a market economy. Therefore, contracts methods should be sensitive to individual interests and willing to correct market imperfections in order to promote fairness. Each camp, as evidenced by their rhetoric, fights a difficult battle claiming too much in face of competing interests. The interdisciplinary fight over the nature of contract doctrine is emblematic of other oxen to be gored. I leave them their fight in order to claim other ground.

E. The Meaning of the Method

Choice of method is not a neutral maneuver. Rather, it is a phenomenon in which form and substance are normatively and ideologically interrelated. Thus, the question is fairly and rightly raised "What is the normative/ideological content of reflective doctrinal analysis?" The answer is that this method is most closely connected with liberalism.

57. See Feinman, supra note 11; Kennedy, supra note 5.
The values or norms implicit in the method and explicit in the
description of liberalism contain the following beliefs: First, the state
is seen as an important (sometimes valued, sometimes feared) actor in
a modern polity. The conception of the activist state\textsuperscript{59} captures the
idea that the state can and must mediate conflicts between the one and
the many. More specifically, the state, as protector of individual
rights, realigns power through redistributions of wealth. Simultane-
ously, the state poses a threat which cannot be discounted. Therefore,
the concept of government under law is relied on both to support the
state's mediating role and to check its abuse of power.

Liberal doctrinal analysis represents a self-conscious attempt to
describe the "second best" social state while maintaining a healthy
skepticism about either waiting for the best state or believing that the
endeavor to find the best state will be successful.\textsuperscript{60} The claim about
the second best state is both modest and pragmatic. Liberal analysts
(sometimes with claims of neutrality) cautiously approach a vision of
what the best state is or should be. At the same time, life must go on,
so a legal system is designed allowing and encouraging participation
by pluralist interests. Reflective doctrinal analysis, therefore, adopts a
mediating posture grounded in the desire to do law as a means of
making sense of and living in a complex world.

When reflective doctrinal analysis is applied specifically to the
law of contracts, the legislature and the judiciary enter the con-
tracting process to help mediate conflicts about the allocation of
power. A premium is placed on law and legal argument as valuable
contributions to daily life. Law and legal argument are not deni-
grated as inevitable tools of the dominant class. Contracts method,
then, is a decisionmaking process accepting the concept of the rule of
law as useful and using the doctrines of stare decisis and precedent,
even with their slippage, as positive factors allowing attorneys to con-
struct useful arguments for their clients.

Reflective doctrinal analysis is aware of the connection between
content and process and is willing to ascertain its own content and
measure itself against the norms of liberal theory. If the method is

\textsuperscript{59} See B. Ackerman & W. Hassler, Clean Coal/Dirty Air ch. 1 (1981); B. Ack-
erman, supra note 19, chs. 1 & 2.

\textsuperscript{60} Doing law, as opposed to conceiving a perfect legal order, puts us squarely in the middle of
an imperfect world. A perfectly just world would require no law; it would be a Utopia. See, e.g., G.
Gilmore, The Ages of American Law (1977). Thus, I envision law as an attempt to achieve a
second best state the conception of which entails the acceptance of competing principles and values.
B. Ackerman, supra note 58, at 21-29.
insufficient to further the ends of liberalism, it must be retooled. Put
less ideologically, if reflective doctrinal analysis retards the growth of
law by stifling participation or not fairly mediating conflicts, it should
be discarded or replaced. Therefore, reflective doctrinal analysis re-
fuses to be bound to the Completeness Myth. At the level of applica-
tion, there is no single criterion guiding liberalism, a fortiori, there is
no single methodology for legal analysis. Contracts methods and con-
tracts rules are dictated by contract types.

Instead of superimposing a market-based rules system and its
correlative analytic method upon all contracts, the contract type is
the basis for fashioning rules and generating appropriate methods.
Market-based transactions use an economic method and are justified
on economic grounds. Nonmarket or promise-based contract types,
are more particular and find justification in moral arguments.

Finally, reflective doctrinal analysis facilitates liberalism’s at-
tempt to mediate conflicts between the one and the many by honoring
and accommodating competing interests such as those asserted to ad-
advance individual fairness and social goals. There are two ways to
mediate conflicts. The legal system can either create a hierarchy of
value choices in which one set of values takes precedence or create
separate categories.

The market/nonmarket distinction is an example of a categorical
approach to legal analysis. In some categories (market cases), one
contracts method will be used; in other categories (nonmarket cases),
another method will be used. In clear market transactions, a more
formal, rule-oriented system is used because everyone who plays in
the market plays by the rules and wants to know the rules. The play-
ers and the game are honored because the rules reflect the tacit agree-
ment made by all. The tacit agreement is that a rules-oriented, formal
system is desirable in clear market transactions because certainty and
predictability are valued. In clear nonmarket transactions, a particu-
larized approach is necessary and desirable. The need for certainty is
obviated by the need for justice or fairness and by the absence of a
market. There is a new game. There are new players, and a new set

61. Shiffrin, supra note 58, at 1192-1215.
62. Kennedy, supra note 52. Why is the “fundamental contradiction” cast in such despairing
tones? We can assume that the accuracy of the description, i.e., self and others, (individual and
collectivity) are incompatible at times and see this as an opportunity for personal and social growth
and development instead of as a world mired in despair and paralyzed by conflict.
63. Categorization is a means for doing law. See Grey, supra note 9; Kennedy, supra note 52,
at 214-16.
of rules must be used conforming with a sense of individualized justice because the underlying bases of the tacit agreement have dissolved. Uniformity and predictability are less valued than individual justice and fairness in nonmarket situations. Again, the system is honored because everyone knows or should know that the values of a formal, rule-oriented system do not function in cases of market breakdown.

The above categories honor both individual and social arguments in clear cases. In ambiguous cases, cases in which there is no clear market or no clear nonmarket, the fight over categorization continues. However, the fight is not on the whole battlefield of contracts, that is, whether all contracts should be formal, rule-oriented or particular, principle-oriented. There are basically two ways of dealing with the gray area between clear market and nonmarket cases. The first is simply to resign ourselves to continuing to categorize. Lawyering and judging are premised on deciding and analyzing ambiguous cases. This task is the normal order of lawyering conceptualization—lawyers and judges do this all the time. Ambiguous cases are placed into one category or the other, or the dynamic of the legal system generates new categories. Reflective doctrinal analysis is consciously aware of this dynamic.

The second mediating approach adopts a hierarchy between categories. The hierarchical approach means one method and set of norms trumps the other. If the hierarchical approach is adopted, it should be used explicitly. Instead of implicitly favoring one set of values over another, a decisionmaker should explicitly articulate the values in a decision. At least for the purpose of publicity, a judge should let people know what is going on in the opinions. The hierarchical approach, which can be used either in all ambiguous cases or in all cases, essentially carries on the ideological battle already discussed.

64. Fried, supra note 9.
65. R. Dworkin, supra note 5, ch. 4.
The liberal position would be that contracts should serve individual justice first and should use a more particularized method. The situation of the parties should control the focus of adversarial disputes. The hierarchy created puts individual justice above social goals. The conservative version of contracts law inverts the hierarchy by having society's needs supersede interests of individuals, because the ultimate good is for capital expansion or market mimicking or whatever.

All contracts problems are not resolved. Rather, the argument is that useful sense can be made of contracts law and contracts methods. Further, sustained doctrinal analysis elucidates categories which can be correlated with specific methods. Consequently, we need not jump to the conclusion that the whole process is so indeterminate as to be meaningless. Reflective doctrinal analysis is a method fitting comfortably between the conservativism of the law and economics movement and the utopianism or nihilism of the critical school. It represents a modernized look at the traditional liberal view of law and society and accepts law as a useful device to reach the aspirations of justice and to better our world.

The remainder of this Article is an exercise in the application of reflective doctrinal analysis. Employing the market/nonmarket distinction, I will show how the analysis can explain, evaluate, and reform a rule of law.

III. CONTRACTUAL LIABILITY FOR NONPECUNIARY DAMAGES

A. A Class of Cases

A class of cases exists which, like ghosts, wanders the nether world between torts and contracts.\textsuperscript{68} Often, they lite as tort cases; rarely are they defended on contractual grounds. Life in the legal borderland\textsuperscript{69} between torts and contracts means that sometimes the existence of these cases is denied. They are pushed into the wrong categories for the wrong reasons. They are ejected from the legal sys-

\textsuperscript{68}. See, e.g., Fridman, The Interaction of Tort and Contract, 93 L.Q. REV. 422 (1977); and O'Connell, The Interlocking Death and Rebirth of Contract and Tort, 75 Mich. L. REV. 659 (1977). Torts and contracts converge in areas other than the one to be discussed here most notably in the areas of products liability and warranties. In Feinman & Feldman, Pedagogy and Politics, 73 GEO. L.J. 875 (1985), the authors argue that torts and contracts form similar analytic patterns and emanate from the same ideological bases.

on procedural or evidentiary grounds. They are left ambiguous, or new categories are suggested. These evasive procedures leave someone, the plaintiff-promisee, injured, victimized, and uncompensated.

The class shares in common the existence of a contract, generally between a merchant and a nonmerchant, which is breached by the merchant promisor with injuries suffered by the nonmerchant promisee. The unifying element of the class is a claim for money damages as recompense for nonpecuniary harms caused by the breach. Nonpecuniary losses include injury to comfort and well-being, mental and emotional distress, harm to mental concern and solicitude, annoyance and inconvenience, and the "shattering of dreams." Generally, relief is denied. However, the decisions granting or denying relief, the rules behind the decisions, and the policy arguments offered to support both the rules and the decisions are blurry. As a direct consequence of the faulty analysis of these cases, individual litigants are denied relief. Further, the failure to respond adequately to requests for relief adversely affects the law's legitimacy.

Cases seeking money damages for mental or emotional distress as a result of broken promises are often discarded with the flippant remark, "Well then, sue in tort." There is more than a little basis for consigning this group of cases to the domain of torts. Yet, such a response is practically unwise and intellectually unsatisfying. While torts law provides a basis of recovery in some situations, often the

70. See infra text accompanying notes 103-36.
71. Most of the cases which grant recovery have this characteristic. That need not be the case. See, e.g., Chung v. Kaonohi Center Co., 62 Hawaii 594, 618 P.2d 283 (1980) (recovery allowed for emotional distress in breach of contract action by fast-food store lessee against shopping mall operator). This analysis does not require this distinction. See also Veitch, Sentimental Damages in Contract, 16 U.W.O.L. Rev. 227, 235 (1977).
72. F. Becker Asphaltum & Roofing Co. v. Murphy, 224 Ala. 655, 141 So. 630, 631 (1932).
76. Whitener v. Clark, 356 So. 2d 1094, 1098 (La. Ct. App.), cert. denied, 358 So. 2d 638, 358 So. 2d 641 (1978) ("The lower court awarded $5,000 to the homeowner for the mental distress—even to the extent of seeking psychiatric help—caused by the shattering of her dreams of owning a beautiful home."). Louisiana cases are unique in this area because claims are often premised on a statutory cause of action based on LA. Civ. Code § 1934(3) (1977): "Where the contract has for its object the gratification of some intellectual enjoyment, whether in religion, morality or taste, or some convenience or other legal gratification, although these are not appreciated in money by the parties, yet damages are due for their breach . . . ."
77. See W. PROSSER, LAW OF TORTS § 129 (4th ed. 1971); and infra notes 143-47.
gravaman of the torts claim, the requisite intent\textsuperscript{78} or the outrageous\textsuperscript{79} or reckless conduct,\textsuperscript{80} is missing, and the injured plaintiff-promisee cannot sustain the proofs necessary to support a torts case. The promisee must then rely on his or her contractual claim. Unfortunately, the contracts side of this class of cases is not well developed. Because of the confusion surrounding these cases, litigants may be denied relief by labeling a cause of action incorrectly, the cases can be wrongly pleaded,\textsuperscript{81} a tort statute of limitations can be applied to preclude a contracts claim,\textsuperscript{82} the inappropriate remedy can be chosen, or the case can proceed to trial on the wrong theory.\textsuperscript{83} As a result, no liability is imposed on the breaching promisor.

These cases offer a classic example of the middle period in the development of a common law rule.\textsuperscript{84} Once a rule has been announced, its second stage begins during which cases are included within and without the rule,\textsuperscript{85} distinctions become fuzzy\textsuperscript{86} and some-


\textsuperscript{79} See, e.g., Sigler v. Mutual Benefit Life Ins. Co., 506 F. Supp. 542 (S.D. Iowa), aff'd, 663 F.2d 49 (8th Cir. 1981); County Escrow Serv. v. Janes, 121 Ariz. 511, 591 P.2d 999, 1001 (Ct. App. 1979) in which the court imposed a burdensome standard of conduct: "One may recover for intentional infliction of emotional distress, however, where the offending party's acts are so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded at [sic] atrocius and utterly intolerable in a civilized community" (citation omitted).


\textsuperscript{82} See Note, supra note 69.

\textsuperscript{83} See, e.g., Stanbeck v. Stanbeck, 297 N.C. 181, 254 S.E.2d 611 (1979) (The court denied recovery to a wife who sued her ex-husband for damages for mental distress due to breach of separation agreement. The court was willing to recognize such a cause of action as long as the breach related to a non-pecuniary item in the contract. In this case, the wife's mental distress was over ex-husband's failure to pay increased taxes due to disallowance of wife's claimed deduction for attorney's fees.).

\textsuperscript{84} See E. LEVI, supra note 56; B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921) and THE GROWTH OF THE LAW (1924); and K. LLEWELLYN, supra note 32.

\textsuperscript{85} There are a few notable cases which discuss the development of this area of law at any length. See, e.g., Stanbeck v. Stanbeck, 297 N.C. 181, 254 S.E.2d 611 (1979); Mieske v. Bartell Drug Co., 92 Wash. 2d 40, 593 P.2d 1308 (1979) Ducote v. Arnold, 416 So. 2d 180 (La. Ct. App. 1980); B & M Homes, Inc. v. Hogan, 376 So. 2d 667 ( Ala. 1979). Most decisions merely assign a given case to one of the many categories which deny recovery.

\textsuperscript{86} The most frequent blurring of distinctions occurs when a court does not specify whether relief is based on tort or contracts principles. For example, in Hamner v. Mutual of Omaha Ins. Co., 49 Ala. App. 214, 270 So. 2d 87, 89 (1972), the court, quoting the earlier case White Roofing Co. v.
times contradictory, and reasoning is questionable. All of which leads to the demise and replacement of the rule. The hallmark of this phase of rule development is a certain amount of lumpiness. Some lumpiness (more charitably, flexibility) is healthy because the dynamic of the process allows law to adapt. Too much flexibility is properly characterized as confusion, and this is an unhealthy state in which the dynamic of the law breaks down.

In addition to cases falling between the cracks, attendant practical problems accompany a breakdown in analogical reasoning. Courts are unclear about the basis for decisions. Judges are given too much leeway in deciding whether to grant or deny relief and base their decisions on unarticulated premises or meta-rules which are more result-oriented than is comfortable. There is a dislocation between the espoused rule and the operative principles. Labels replace logic; prediction is weakened; claims are chilled because transaction costs are too high; and lawyers cannot advise clients as precisely as they might otherwise because the signals about the likelihood of recovery are unclear.

The confusion between the decisions and their rationales stems from the operative facts which contain elements of torts and contracts. Frequently, courts fail to make meaningful distinctions between labeling the claims as torts or contracts cases. Admittedly, the distinction between torts and contracts, indeed the definition of all legal categories, is artificial. However, these artificial compartments are useful, sometimes necessary devices for articulating theories of law. Even though legal categories do not exist in the “real” world, they have explanatory power and aid in analysis as well as theory building. While recognizing that the artificiality of the categories gets in the way of clear decisionmaking, the artificial distinction will be kept momentarily for the purpose of demonstrating that these cases can and should be justified on contracts theory instead of relying on

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89. See, e.g., id. at 906-07.
torts law. Naturally, one set of facts can give rise to separate contracts and torts actions. However, the sometimes intentional running together of torts and contracts theories unnecessarily confuses this area of the law, slights the goals of contracts law, and prevents the dynamic of the law from functioning smoothly. Indeed, a central thesis of this Article is that reflective doctrinal analysis operates to prevent law from stagnating. Categorization, then, is treated as a means to the end of transformation, not as an end in itself.

This Article offers a theory to sustain a contractual claim for nonpecuniary damages. To be successful and sufficiently powerful, this theory should do two things. First, it should be broad enough to look backwards and forwards. The theory must provide a retrospective view of past cases and have the explanatory ability to distill the rules operating in this area. That is to say, it must describe the past and evaluate the present. At the same time, the theory should be prospective and portend the future application of the rule and should illuminate larger trends in the law of contracts. The second requirement of a sound theory is the alignment of the rationale for imposing contractual liability with the rationale for granting a specific remedy, thus linking right and remedy. The contracts cases in this area and scholars who analyze them (including those favoring recovery) pay little or no attention to the issue of remedies. The reasons for granting recovery must be consistent with and must reinforce the remedial measure.

A contractual right for nonpecuniary damages should be recognized. First, I will survey a range of cases and the reasons courts give for denying liability. Next, cases granting recovery will be discussed. From those, a rule of contractual liability will be developed. Section IV discusses remedial rules and principles. Particular attention is paid to designing a theory of contracts damages consistent with the rationale behind the liability rule.

90. After the analysis has run its course, we may find that the old categories are either sufficient and can be maintained or that new ones, such as contorts, are necessary.
91. Eisenberg, supra note 3, at 751.
92. See Conclusion infra.
93. See infra section III E.
94. See infra text accompanying notes 190-211.
95. See cases cited supra note 87. Although they discuss the basis of liability, little attention is given to a correlative remedy. See also Veitch, supra note 71; Bolla, supra note 69; Fridman, supra note 68; Hahlo, Contractual Damages for Mental Distress, 51 CAN. B. REV. 507 (1973); Hahlo, Sentimental Damages, 50 CAN. B. REV. 304 (1972); and Rose, Injured Feeling and Disappointment, 55 CAN. B. REV. 333 (1977).
B. The Pathology of the Rule Against Recovery

The general rule regarding damages for mental or emotional distress due to breach of contract is stated by the *Restatement (Second) of Contracts*:

Recovery for emotional disturbance will be excluded unless the breach also causes bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result.\(^{96}\)

This standard is little changed from the first Restatement definition commingling this type of case with a torts cause of action.\(^{97}\) The second Restatement establishes a presumption against recovery in accord with other general statements about this area of law.

Three symptoms characterize the demise of the rule or at least the need for radical surgery. First, the general rule admits several differing exceptions. There comes a point when the exceptions do indeed swallow the rule and that point has been reached. Although generally proscribed, the second Restatement allows damages for nonpecuniary harms when breach is accompanied by bodily or foreseeable harm. Formulations of the rule allow recovery when conduct is tortious,\(^{98}\) to discourage breach of contract,\(^{99}\) when the purpose of the contract is personal rather than commercial,\(^{100}\) and to curb reckless or wanton conduct.\(^{101}\) The second symptom in the pathology of the rule against recovery can be observed in the various reasons courts give for denying recovery. The cases denying damages obviously accept the general prohibition. However, there is little or no consistency in the opinions as to why the proscriptive rule should be followed. Consequently, many claims go uncompensated as courts use several evasive techniques to jettison these cases from court dockets. The final symptom indicative of the breakdown of the rule is that the cases as a class are poorly reasoned and, at times, contradict-
tory. The basis for the decision can be either the stated reason, the desire for a particular result, or some unarticulated premise or value judgment which may or may not be applied consciously by the judge. Perhaps not so paradoxically, once these cases are analyzed, they contain the seeds necessary to develop a theory of liability for nonpecuniary damages.

C. Cases Denying Recovery

Case law is canvassed through the use of hypotheticals to construct a theory for nonpecuniary damages. First, a catalogue of reasons courts have given for denying damages are discussed.

The Dream House

Home Owner and Contractor enter into a contract for the construction of a custom designed home. As a result of poor workmanship, various items of damages are noticed: There are slight cracks in the walls; some doors are hung improperly; the heating and air-conditioning system cannot be regulated; there is a fissure in the concrete slab in the basement; and there are occasional leaks. Most of these items are not noticeable to visitors. Nevertheless, the Home Owner is painfully, consciously aware of the defects. Home Owner sues. In addition to damages for diminution in market value, Home Owner also claims damages for mental distress caused by not having her dream house.

The cases denying relief do so for a variety of inconsistent reasons. One line of cases can be justified on no ground other than judicial convenience. These hardline cases simply deny recovery by refusing to entertain such suits. The most forceful case of this genre is Whitten v. American Mutual Liability Insurance Co., in which the court held: "[T]he law of this state makes no provision for the recovery of damages for emotional distress or mental anguish resulting from breach of contract, no matter what the intent of the breaching party was in failing to fulfill its obligations." Several other cases are slightly less emphatic in their denial by requiring the

102. See supra note 89 and compare cases infra notes 120 & 154.
103. See cases infra notes 120 & 154.
105. 468 F. Supp. at 473.
promisee to sue in tort rather than in contract. Yet the impact on the litigant is the same—the contracts claim is denied often with disastrous consequences.

The advantage of the hardline is administrative ease—suits are dismissed. The hardline furthers no legitimate aim other than the weak justification of judicial convenience. The hardline ignores the Restatement formulation, and the consequence is to encourage bad behavior. The fallout, an unrecompensed Home Owner and a slipshod Contractor, is not tolerable. In effect, inefficient or slipshod contractors are insulated from liability, and opportunistic behavior is rewarded. The failure to entertain such claims puts the Home Owner in a house for which she did not bargain.

Interpretation. The most amorphous device courts use in denying claims is the process of interpretation. Frequently, courts deny recovery without much more than saying that this is not the type of contracts claim falling within an exception. Here the judge's decision-making is most wide open. Damages have been denied for construction contracts when the court felt a custom designed home did not qualify because the "principal object" of the contract was the house, not emotional gratification. Recovery has not been allowed for faulty construction of a driveway, faulty construction of a foundation of a mobile home, and the failure to rebury a pipeline properly. The principle holding these cases together is the court's interpretive determination that these contracts are not the kind people enter for essentially nonpecuniary reasons. Rather, the courts reason, these are motivated by pecuniary gain, and emotional distress damages will not be awarded.

These cases fail to distinguish among kinds of contracts and

106. See infra notes 122-24.
107. In Forde v. Royal's Inc., 537 F. Supp. 1173 (S.D. Fla. 1982), a sales clerk alleged that her employment was terminated because she refused unsolicited sexual advances. The Florida court did not allow the claim absent a physical impact and held: "Thus a claim for damages based on infliction of mental distress cannot be based on a mere breach of contract." Id. at 1175.
among motives for entering contracts. Instead, contracts are put into overly broad classifications or wrong categories without refined elaboration. Tract homes, prefabricated housing, or custom designed residences, as examples, are treated similarly even though it can be easily argued that these contracts are entered for different purposes and with different, often mixed motivations. Courts similarly classify other kinds of contracts as types for which nonpecuniary damages will not be awarded. This list includes employment contracts, \(^{113}\) some insurance contracts, \(^{114}\) separation agreements, \(^{115}\) leaseholds, \(^{116}\) and contracts for truck or car repairs. \(^{117}\) Recovery in these cases is denied without further allegations. \(^{118}\)

Our Home Owner can be, and has been, denied relief merely because the judge was of the conclusory opinion that this was the wrong contract type. Frequently, the characterization of a contract as the wrong type is based on an undeveloped distinction between the "personal" and the "commercial" nature of the contract. \(^{119}\) The personal/commercial distinction makes intuitive sense insofar as personal contracts are entered into for nonpecuniary motives by definition. The dichotomy fails in application. Courts use the distinction to reach predetermined results and do not articulate differences among contract types.

**Physical Injury.** A bright line test for determining when a claim is properly before a court is the requirement of a physical injury, without which damages are denied. \(^{120}\) This requirement, also known as


\(^{118}\) In part III, subsection D it will be shown that many of these same contract types will yield recovery if properly pleaded. See infra text accompanying notes 137-56.

\(^{119}\) Carroll v. Rountree, 237 S.E.2d 566 (N.C. Ct. App. 1977), cert. denied, 248 S.E.2d 725 (1978) (matrimonial client sued attorney, no recovery because this was a commercial contract); see also D. Dobbs, supra note 100.

the impact rule, developed in the field of torts and is a means to cut off the chain of causation. This rule arbitrarily cuts off valid claims. The basis for contracts suits is the existence of emotional grief not physical injury. Courts, however, insist on physical impact for evidentiary purposes. It is easier to prove grief when a claimant points to physical ailments attending emotional distress. Because emotional distress does not always manifest itself physically, the trend in torts law is to do away with the impact rule. There is no logical reason to keep it in contracts law. Even the general prohibition against recovery is not so restrictive, and the second Restatement recognizes that nonpecuniary items are sometimes the heart of the bargain.

_Torts._ The overlap of contracts law and torts law is most clearly seen when courts overtly require the claimant to couple the contracts claim with tortious conduct or insist that an independent tort must be pleaded. These requirements rest on the intent or conduct of the promisor as the key to recovery and, therefore, alter the essential nature of the law suit. No longer is the basis of liability the frustrated expectations of the promisee as it would be in a contracts suit. Instead, liability is imposed primarily to coerce the promisor to behave in a socially acceptable manner. Torts law attempts to compensate an injured plaintiff while forcing the defendant to conform his or her behavior to a set of duties and obligations which are socially defined. The contracts claim is less concerned with the conduct of the defendant-promisor than it is with the manifest intentions of both par-

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123. See, e.g., Levin v. Halston Ltd., 91 Misc. 2d 601, 398 N.Y.S.2d 339 (1972) (failure to receive proper fitting custom designed dress did amount to tort).
ties in entering the contract, a contract which was bargained for and agreed to by both. There is room in contracts theory for behavioral adaptation as a secondary or incidental aspect, unlike torts in which breach of socially defined duty is the starting point. Contracts and torts cover different (although not mutually exclusive) interests requiring protection, and protection is not afforded when the causes of action are confused resulting in one set of claims being effectively cut off.

It is unlikely the Contractor's conduct is so vile as to deserve reprobation on a torts theory. More likely, the Home Owner's dream was shattered which, in the appropriate case, ought to be and has been compensated. Compensation should be based on the promisee's manifest expectations and should not be used as a device to correct promisor's defective behavior.

**Remoteness.** Another reason courts give for denying recovery centers on the difficulty of proving damages for nonpecuniary harms. Even though courts award such damages for pain and suffering, embarrassment, and humiliation regularly in torts cases, they are reluctant to do so in contracts suits. Contracts damages rules concentrate on certainty. The duty to mitigate, the prohibition against speculative damages, the rules encouraging efficient breach, and the exclusion of punitive damages are rules promoting certainty, objectivity, and predictability in the contracting process. These rules are useful for facilitating commercial transactions and assisting the smooth functioning of markets. Claims for nonpecuniary awards appear to upset the market model. Similarly, these damages are denied for the conclusory reasons that they are not in the contemplation of the parties or are too speculative.

A market-based rationale is inapposite to the class of contractual situations being discussed. It is simply wrong to assert that damages

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127. Consider the rules for proving damages with reasonable certainty, as opposed to speculative damages, and the several mechanical damages formulas that use identifiable indicia such as contract price or market value. The motivating factor is predictability.

128. *See infra* notes 160-79 and accompanying text.

129. The use of the special damages rule of Hadley v. Baxendale, 9 Exch. 341, 156 Eng. Rep. 145 (1854), appears repeatedly in these cases and is an important organizing principle which can be used both for and against recovery. *See*, e.g., Skag Way City School Bd. v. Davis, 543 P.2d 218, 225 (Alaska 1975); and Bolla, *supra* note 69, at 565.

130. Fogelman v. Peruvian Assoc., 127 Ariz. 504, 622 P.2d 63 (1980); Ma v. Community Bank, 686 F.2d 459 (7th Cir. 1982).
for nonpecuniary interest cannot be ascertained. Juries and judges as fact-finders adequately perform the function, and (as later argued) a judicial damages award is the appropriate remedy. Furthermore, there is an institutional check to prevent these claims from becoming outlandish. The credibility of the parties will be assessed by their testimony, and their greed will be tempered accordingly. The market model should not be the dispositive basis for determining nonpecuniary rights and remedies. A right to damages for nonpecuniary harms does not ignore the market model of contracts. A liability rule favoring nonpecuniary damages is justified because these contracts are entered primarily for nonpecuniary motives that should be honored. Allowing nonpecuniary damages does not vitiate economic analysis and is supported by moral and political arguments.

Procedural. The final and too often the least justifiable of tools for denying recovery are procedural avoidance techniques ignoring substantive issues. Courts avoid cases on the evidentiary ground that the burden of proof was not met, pleadings were wrong, suit should be brought under a statute, or principles of federalism required a United States district court to defer to state courts rather than make new law. Another way courts skirt the issue is to grant relief but award nominal damages. When procedural rules are used to avoid hard issues, substantive law is ignored and law remains poorly developed. Naturally, there are important justifications for deciding cases on procedural grounds. However, in this area of law, procedural dispositions are generally not supported with assertions that denial of relief is necessary to advance some institutional goal.

131. See infra text accompanying notes 201-11.


In the *Dream House* case, any of the above reasons can be used to prevent recovery on a contracts claim. A court can take the hardline and refuse to hear the claim at all. Or, physical impact or a separate tort can be required. Or, this can be the type of case not suiting the jurisprudence of the court. Finally, damages can be denied as too remote. Home Owner, given the facts of the hypothetical, can fail to surmount any of the hurdles. Yet, the hurt of now owning something less than bargained for explicitly remains, and the promisee’s promised dream is frustrated.

**D. Cases Granting Recovery**

There are three groups of cases granting recovery. These are discussed with a view to constructing a workable liability rule.

*The Vacation Victim*

Vacationer contacts a Charter Service which arranges a package deal for Vacationer and friends. The package includes round trip transportation to Hawaii from Colorado and a two-week stay in Hawaii with ten days of sailing around the islands on a premier nineteenth century sailing vessel. After their arrival in Hawaii, Vacationers learn that the sailing vessel is barely seaworthy, substitute vessels at the same price are unavailable, and they cannot afford a more costly ship. Vacationers are forced to stay on an overcrowded island for the two-week duration rather than sail from island to island as promised.\(^{137}\)

The safest basis for recovery, as indicated by the previous section, is on torts theory. The complaint should allege either that the Charter Service failed to exercise proper care in the performance of its duty or that the Charter Service intentionally misrepresented the vacation package. Clearly, it is foreseeable that the promisees’ “dream vacation” would be turned into a “mess” if the boat is unavailable. It is a breach of duty to dishonor a contract by failing to deliver the promised vacation package.\(^ {138}\) Under either negligence or misrepresentation, liability is premised on the occurrence of a tort.\(^ {139}\) Liability


is imposed to correct wrong conduct.

There are two problems, however, with limiting recovery to tort-like claims. First, the Charter Service’s conduct may not attain the requisite culpability, in which case there is no liability. Second, damages are correlated with the promisor’s conduct, not on the promisee’s alleged injury. The theory behind granting recovery in these suits is that the promisor’s behavior in breaching the contract is akin to a tort because there is a duty to honor a contract. While this may be good torts analysis (although questionable), it is bad contracts law. Contracts law recognizes a party’s power to breach as long as they stand ready to accept the consequences by paying damages. The Charter Service escapes liability if Vacationer cannot show culpability. The Charter Service, therefore, has several available defenses. It may have made an honest mistake, for example. Although mistake is enough of a defense to avoid tort-like liability, it does not alleviate the disappointment. Further, this disposition fails to honor the contract. The availability of the premier sailing vessel was the key element of the bargain, and both parties knew this. Vacationers quite simply did not get their bargain.

*The Fashion Fatality*

Bride arranges with Milliner to have five dresses made for use on her honeymoon. Bride is to marry a man of wealth and social standing, and she herself belongs to the same social class. The dresses which were ordered should have been things of beauty and delightful for a young bride to wear since they were to come from the leading millinery establishment of the leading city of the South. However, the dresses did not fit. Bride was “overcome by disappointment and chagrin” and was ashamed to wear the tasteless trousseau.

The second category of cases grants recovery not precisely on contracts or torts grounds. Rather, the distinction is blurred, and this class of cases may properly be called contorts after Grant Gilmore's

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141. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897): “The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it and nothing else.”

These cases are pulled in two directions. Compensation is made for the emotional disturbance suffered by the Bride promisee and as a way of correcting the bad behavior of the Milliner promisor. The difference between this category and the first is the recognition that the defendant promisor knew or should have known about the nonpecuniary harms occasioning breach. Here the contractual basis of liability begins to emerge. For the first time in the discussion of these cases, the contractual relationship is addressed. What the promisor knew or should have known is a necessary element of liability. Knowledge is the basis for allocating risks either explicitly or implicitly. The drug store held responsible for losing thirty-two fifty-foot reels of family film left in their care for splicing was told by the promisee: "Don’t lose these, they are my life." The cosmetology college charged with knowing inadequate instruction would not prepare their students to pass the state licensing examination was also liable for damages. Likewise, when faulty construction means a family has no use of kitchen facilities, inadequate sleeping quarters, no hot or cold water, and insect infestation, or when hotel reservations are not honored and people must stay in an inferior hotel, or when a mall operator knowingly breaches a lease, emotional damages have been awarded against promisors imputed with the knowledge that their breach would cause nonpecuniary harms.

That courts allow monetary awards in these cases is clear. What is less clear is the basis for measuring the awards. Courts have been satisfied with running torts and contracts law together in a semiconscious effort to create a new category of liability. The running together of torts and contracts without clearly delineating the limits of the new category fails to provide either a predictable basis for the future application of the rules or adequate theoretical guidance. Combining torts and contracts without elaboration is also unwise, because it fails to concentrate on protecting the expectations of promisees.

The Unburied Body

143. G. Gilmore, supra note 14, at 87-90. See also Bolla, supra note 69; and Note, supra note 69.
Children of the deceased contract with Mortician to have the remains of their dearly beloved mother buried in a vault. Instead, Mortician, in callous disregard of the contract, dumped the body in a shallow grave. Mother's corpse was unearthed by heavy equipment working in the area, and Children naturally suffered mental anguish when they learned that Mom did not rest in peace.\textsuperscript{149}

Recovery in this group rests more squarely on contracts principles than do the other two classifications. What else were Children bargaining for other than the peace of mind that their deceased mother would be buried properly? The object of the contract was peace of mind; its primary concern was mental solicitude. Both parties bargained for the exchange of goods or services intended to bring emotional comfort or satisfaction to the promisee for a sum certain to the promisor. These are at most one-sided, pecuniary transactions, and market principles are only partially applicable. Mortician receives a fee in exchange for his "consideration for the afflicted,"\textsuperscript{150} because he deals in the "tenderest feelings of the human heart."\textsuperscript{151} Similarly, an obstetrician who knows of special circumstances surrounding a pregnancy and delays arrival at the delivery room until after the birth of a stillborn child must compensate the promisee for the mental aggravation of not being with the patient to console her as assured.\textsuperscript{152}

Promisors have been held liable for damages in less delicate situations such as the failure to supply music to a wedding reception,\textsuperscript{153} faulty construction,\textsuperscript{154} breach of warranty to repair a car while promisees are vacationing,\textsuperscript{155} or for breach of a contract for nursing home

\begin{itemize}
\item \textsuperscript{149} Golston v. Lincoln Cemetery, Inc., 573 S.W.2d 700 (Mo. Ct. App. 1978).
\item \textsuperscript{152} Taylor v. Baptist Medical Center, Inc., 400 So. 2d 369 (Ala. 1981). \textit{See also} Stewart v. Rudner, 349 Mich. 459, 84 N.W.2d 816 (1957).
\item \textsuperscript{153} Deitsch v. Music Co., 6 Ohio Misc. 2d 6, 453 N.E.2d 1302 (1983).
\item \textsuperscript{155} Bogner v. General Motors Corp., 117 Misc. 2d 929, 459 N.Y.S.2d 679 (1982).
\end{itemize}
Although these fact patterns fit comfortably into the immediately preceding discussion, these cases emphasize an interest different from the contorts cases. The promisor's conduct may or may not be culpable. Culpability may influence the judge or jury relative to the amount of the award, but it is not relevant in establishing a right to damages. Instead, these cases turn on the expectation of the parties, the nonpecuniary nature of the exchange, and the attribution of knowledge to the promisor that emotional distress will accompany breach. The nonpecuniary basis of exchange and the motivation for contracting constitute the heart of liability. The promisor is being held liable for failure to deliver what was promised.

E. The Liability Rule

I offer a modest rule of liability which does little more than reverse the presumption against damages for this class of cases: Damages for nonpecuniary losses are to be awarded for breach of contract when the parties enter into a bargain which has as its principal function the exchange of a nonpecuniary interest. I concentrate on the simple one-sided exchange in which money is given in return for goods or services intended to bring emotional satisfaction rather than monetary gain.

Clearly, people enter into contracts with mixed motives. Someone may purchase an objet d'art for emotional reasons as well as an investment. The inquiry relative to imposing liability for disappointment turns on risk allocation. An art dealer may sell and a collector may buy the object as an investment in one case. Any aesthetic disappointment suffered by the collector goes uncompensated because the function of the contract as an investment was pecuniary. In another case, an artist may be commissioned to paint and a client may contract to buy a portrait for aesthetic satisfaction. The artist should be held liable for disappointment damages in the appropriate situation such as when the artist assures the client that the work will be satisfactory. Before liability is imposed, a finding, albeit imperfect, must be made about the allocation of emotional risks. This finding is generally made implicitly in most cases. This rule forces an explicit finding. What is novel about this liability rule is the assertion that the rule is justified on contracts analysis independent of torts.

The cases granting relief have specific elements in common and

provide a foundation for a liability rule. First, the primary purpose of the bargain, particularly from the promisee’s vantage point, is emotional satisfaction.\textsuperscript{157} Second, the promisor knows this and expressly or implicitly accepts the risk that breach will cause emotional harm. While it is true that these are personal injuries, the promisee’s expectations are not subjective in a secretive sense. The promisor knows or should know that nonpecuniary interests are the primary motivation for the promisee to enter the contract. In fact, the promisor holds himself or herself out as someone whose business it is to satisfy those needs—they often advertise this very fact. Third, the promisee frequently pays a premium for the service. The promisee, for example, who sends film to a discount developer for fast service assumes the risk of having the film lost or destroyed. The risk of loss passes to the photography studio assuring the promisee that the film will be protected. Fourth, the promisee directly suffers nonpecuniary injuries as a result of breach. These injuries stem either from the promisee’s reliance on the contract or from the promisee’s frustrated expectation. Most often, these are the only injuries the promisee suffers; there may be no significant pecuniary losses. The vacation is ruined, the wedding pictures are lost, the reception is a disaster, in a word, the dreams are shattered. The promisee’s bargained for expectations are not realized and in most cases are not realizable. The lost remains are forever gone. The failure of the doctor to comfort a patient in time of need, comfort bargained for as an integral part of the contract, cannot be rendered, and the haute couture original cannot be properly fitted for the debutante ball. Therefore, if the promisee is denied recovery on the nonpecuniary claim, he or she goes uncompensated. To return the cost of the film\textsuperscript{158} or to return a downpayment for wedding musicians\textsuperscript{159} is a nominal award at best; it is also an insult. Finally, the most significant aspect of these cases is that they are better described as nonmarket transactions.

“Nonmarket transaction” is used in two ways. First, a transaction is a nonmarket transaction when no market exists in which trades can be made to establish the price of the promisee’s expectation. Even though these contracts are traditional bargained-for-exchanges in which the promisee pays a sum certain in exchange for emotional gratification, only the price on the promisor’s side of the transaction is

\textsuperscript{157} Bolla, supra note 69, at 562-67; Veitch, supra note 71, at 235.


established in a market. There is no market, for example, for a set of slides of Uncle Bill’s trip to Borneo. Second, even if a market exists for the purpose of pricing the value of the promisor’s goods or services (i.e., Uncle Bill had several photography studios to choose from initially) once the slides are destroyed, the time has passed for that market to have any usefulness to the promisee.\textsuperscript{160} Although prior to entering the contract a market existed where the promisee could shop around for substitute goods or performance, once breach occurs there are no markets for substitutes. Any market existing prior to the contract has collapsed—market alternatives are no longer available. The economic value of the ice sculpture centerpiece for a promisee’s wedding is capable of being measured, but the measurement bears no relation to the amount and types of damages claimed which is the disappointment promisee suffered.\textsuperscript{161}

There are economic, moral, and political arguments for establishing a liability rule permitting a contracts cause of action and awarding damages for nonpecuniary harms. Although these arguments are not discrete, they are distinctive enough to deserve separate treatment. The liability issue is addressed here, and later similar arguments will be made for a damages remedy supporting the liability rule.

\textit{Economic Argument.} The economic basis of contracts\textsuperscript{162} asserts that contracts are and should be enforced because they contribute to a productive society,\textsuperscript{163} are wealth maximizing,\textsuperscript{164} and that these goals are consistent with and supportive of individual liberty interests inherent in the concept of freedom of contract.\textsuperscript{165} These arguments

\textsuperscript{160.} As a first step it is imperative that the contract be defined. If the contract is one for developing slides of Borneo that have special value, then these special damages should be recovered because they are the basis of the contract. Not so for a contract that is interpreted as being just for the development of film. In this instance, only general damages are awarded.

\textsuperscript{161.} The ice sculpture may be worth \$100 (the cost represents the sculptor’s contract price), but the damages for the disappointment in not having the centerpiece may be more or less. There is no mechanical way to calculate promisee’s disappointment. Promisee may not even have noticed that the sculpture was missing in which case no damages are due. Or promisee may have suffered \$125 of nonpecuniary injuries. The precise calculation is a jury determination. \textit{See infra} text accompanying notes 201-11.


\textsuperscript{163.} \textit{See, e.g.,} Goetz & Scott, supra note 21, at 1265-66.


\textsuperscript{165.} A. Kronman & R. Posner, \textit{supra} note 4, at ch. 7.
look at law from a specific place. As *ex ante* arguments, their primary purpose is to foster future social gains rather than allocate the costs of past individual disputes. The economic vision takes as its starting place the ideal that contracts law rules should further a market economy.

Although economic analysis can be criticized, it does not undercut a liability rule for nonpecuniary injuries for two reasons. First, because economic arguments are most powerful and have their greatest application where strong markets exist, they are only partially apposite to the nonmarket transactions under consideration. The economic functioning of contracts depends on workable, competitive markets, where parties can bargain fairly, where prices are accurately set, and where goods and services are allocated to their highest uses. The advancement of economic goals dissipates when the market thins. Second, the economic basis supports an efficient compensation principle when bargained for expectations are not satisfied. When bargained for expectations are not satisfied in nonmarket transactions, the promisee generally goes uncompensated or undercompensated. Therefore, economic analysis should support compensation rather than encourage waste.

The chief characteristic of these nonmarket transactions is that when the market collapses the promisee's substitute choices are foreclosed. Once the promisor breaches, even assuming the promisor competed in a vital market in which there were many competitors for the promisee's contract, the promisor effectively becomes a monopolist. Once the contract is made, the promisor, after either creating the promisee's reasonable expectations or after procuring the promisee's reasonable reliance, controls what has become a limited or unique market. One of the economic functions of the promise is to produce a state of affairs upon which the parties rely so the promisee can

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166. See, e.g., Feinman, supra note 5, at 842-44; Kennedy, supra note 5, at 1745-51; Unger, supra note 5, at 606-648; Gabel & Feinman, supra note 5.

167. See, e.g., Kennedy & Michelman, Are Property and Contract Efficient, 8 Hofstra L. Rev. 711 (1980); Sagoff, At the Shrine of Our Lady of Fatima or Why Political Questions are Not All Economic, 23 Ariz. L. Rev. 1283 (1981); Schwartz, Economics, Wealth Distribution, and Justice, 1979 Wis. L. Rev. 799 (1979); Kennedy, supra note 5; Unger, supra note 5; Feinman, supra note 5 and supra note 29.


169. See Eisenberg, supra note 3, at 746-48.

170. Goetz & Scott, supra note 168, at 1011.

171. Williamson, supra note 45, at 241.
plan and adapt behavior. When the promisor's behavior causes the promisee's injury, the costs of the broken promise should be borne by the person responsible for foreclosing the opportunities of the promisee who has no market to turn to for alternate performance. Once the promisor breaches the contract, the promisee has no opportunity to mitigate. There is generally no opportunity to modify the contract voluntarily because the promisee is a captive. There is no opportunity to purchase substitute goods or services. Thus, the compensation rationale behind the theory of efficient breach is inapposite.

Denying recovery to the injured promisee means that the promisee suffers lost opportunity costs or incurs reliance expenditures while having no real way to protect against these losses. It is easier for the merchant-promisor to insure against business risks than it is for the nonmerchant promisee to absorb this type of transaction cost. It is inefficient to require the promisee to protect herself or himself by arranging for duplicate substitute performance, because such self-protection means that the promisee must tie up another supplier on the contingency that the first promisor will breach. Further, loss sharing is inappropriate when the promisor exercises extraordinary market control. After all, the injuries come about as a result of the promisor's fault and at the promisee's expense. Any imposition of loss sharing encourages opportunistic behavior by the promisor. Liability should be imposed on promisors because they control the market once the contract is made. They are in a position to prevent loss by performing. They accept the risk as a basic element of the contractual exchange.

Moral Argument. The moral argument approaches contract law from an individualistic standpoint. Promises ought to be enforced because they advance individual goals of trust, liberty, and responsi-

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172. Goetz & Scott, supra note 21, at 1267-69.
173. The theory holds that efficient breach occurs and should be encouraged when A can breach a contract with B and sell to C at a price sufficiently above the contract price to compensate B for B's losses and still profit. For a critique of the theory, see Macneil, Efficient Breach of Contract: Circles in the Sky, 68 VA. L. REV. 947 (1982).
174. The consumer most likely will not be in a position to buy insurance except at an exorbitant cost because there is no such market for insurance in disappointed dreams. Contrariwise, a merchant can purchase business risk insurance and have the costs of that insurance reflected in the price. See, e.g., Farber, Contract Law and Modern Economic Theory, 78 NW. U. L. REV. 303, 336 (1983).
175. Id. at 319, 338.
176. Goetz & Scott, supra note 168, at 1011.
177. J. RAWLS, supra note 9, at 344-48.
Social goals are advanced as a consequence because individuals are encouraged to collaborate to further mutual interests thereby fostering a sense of community. The moral basis of contracts is viewed from a deontological Kantian perspective as distinguished from the teleological utilitarian approach of economic analysis. While the concern of economic analysis is social efficiency, the touchstone of the moral argument is individual fairness.

In a recent article, Professor Robert Hillman sets out four "fairness norms" for contracts rules: The party with the greater equities should be favored; a party should not knowingly harm another without justification; a party should act reasonably to avoid harming itself; and, each party should benefit from an agreement roughly according to the contract allocation. The fairness norms start with individualistic premises. Society will benefit to the extent individual freedom and liberty advance.

A liability rule for nonpecuniary harms neatly satisfies these four norms. First, the equities are with the promisee who is in no position to protect himself or herself after he or she has relied on the assurances of the promisor. The promisor, the breaching party, can avoid the imposition of harm more easily by either honoring the contract, insuring against the risk, or paying compensation for the nonpecuniary harms caused. The promisor can then either absorb the loss or spread it by reflecting it in future prices. Second, the reported opinions are almost completely absent of reasons justifying breach. The basic defense offered by the promisor is not excuse such as mistake, impossibility, waiver, or changed circumstances. Rather, it is the bold assertion that damages are generally not allowed and should not be allowed in the instant case. Third, once the contract is made, promisees are in no position to avoid harming themselves. They bargained for mental or emotional satisfaction which is destroyed because of breach, and breach usually comes too late to do anything about it. Finally, unless compensation is made, the allocation of risk is skewed against the nonbreaching promisee, and the promisor escapes liability for a contracted for risk, thus fostering unacceptable behavior.

The value of the contract to the promisee is idiosyncratic. Be-

178. C. FRIED, supra note 3, at 7-27.
180. Williamson, supra note 45, at 233, 238-45. Williamson argues that the market does not function to govern contractual relationships in idiosyncratic transactions. Rather, "Other things
cause the market does not offer a substitute, contracts law should support a cause of action in nonmarket situations based on a moral or fairness approach. This rationale is the basis of specific performance orders. In contracts for unique goods, for example, specific performance is uniformly granted to enforce the promised performance. By imposing liability, the promisee receives the benefit of the bargain, a benefit within the contemplation of the parties. Therefore, the motivations of both parties are recognized and honored.

Political Argument. There is a point of convergence between the moral and economic bases of the law of contracts. The width and depth of the convergence is not precise, but it is significant. From an economic view, liability and damage rules ought to promote market transactions because individuals as a whole advance when social gains are optimally realized. From a moral basis, promises ought to be enforced because it is morally good to do so since the law respects the dignity of persons, and this is conducive to a community of trust. In other words, moral and economic arguments each contain a certain perspective or worldview about how individuals and society interact. Each worldview proposes a way to mediate conflicts between individual interests and collective goals. These are political/ideological positions. The value of political discourse lies in pointing out how ideology operates in the legal system by more fully developing the normative consequences of specific legal positions.

The liberal ideological position is that contracts law can mediate individual/social conflicts and can best do so through a method of reflective doctrinal analysis. The method works by refined analysis of existing contracts rules and principles. Refined analysis of the cases under discussion leads to a distinction between market and nonmarket transactions. The market/nonmarket distinction is used to develop contracts law more fully with the hope of making law more just by mediating conflicting interests. In market situations, individual and social interests operate consistently according to economic norms. The parties know that one of the rules of the market game is that if you breach you pay and that the amount of payment can be being equal, idiosyncratic exchange relations which feature personal trust will survive greater stress and display greater adaptability.” Id. at 240-41.

183. M. POLINSKY, supra note 4; but see Macneil, supra note 173.
ascertained before breach with fair accuracy. In nonmarket transactions, however, collective and individual interests must be accommodated to a new situation. Instead of concentrating on maximizing value, individual contractual transactions are scrutinized in an attempt to assess moral fairness over economic efficiency.

Not so curiously, the legal rules remain relatively stable. If you breach, you pay. Only in nonmarket situations the amount is uncertain. As a matter of policy and institutional integrity, it makes sense to keep the rules consistent. Let parties bargain and allocate risks voluntarily. Just because some promises contain more uncertainty than others, the liability rules should not be relaxed to the point of allowing breaching parties to escape contractual liability. Parties should be held to their assumed obligations. By imposing liability for breach in nonpecuniary transactions, individual/social interests of substantive fairness are advanced because the parties are held responsible for their promises. The injured party is compensated at the expense of the party causing the harm. Further, social/individual interests of efficiency are acknowledged by imposing transaction costs on the promisor who is in a better position to absorb the costs. The thrust of the political argument is to mediate (and, if possible, reconcile) conflicts between individuals and society.

It should be noted that the class of cases will remain relatively small. Every broken promise has some emotional fallout. But every such promisee is not entitled to compensation for this item of damages. Every consumer transaction causing inconvenience will not lead to the imposition of damages on merchants. Liability will be

187. See Veitch, supra note 71, at 235-26. He warns of a floodgate of litigation: “Therefore once intangible harm has been accepted as an independent compensable harm there can be no logical restriction on the kind of situations in which it will be recognized.” Id. at 236.

The logical restriction is that most consumer transactions, the purchase of a toaster for example, are market transactions where breach should occasion little emotional harm and no liability for such damages. Even if an extremely sensitive promisee has an anxiety attack because the toaster did not function, no damages should be awarded because these special circumstances are not part of the bargain, they are not within the contemplation of the parties, and risk for emotional harm is allocated to the consumer. At the other extreme, the consumer who is remodelling a kitchen which is to be the showpiece of the house does have a legitimate right to expect emotional satisfaction because that is an integral part of the bargain.

188. Few cases brought under the Uniform Commercial Code would request such damages, for example, because these are intended by both parties as pecuniary transactions. However, in the
imposed only in those transactions in which the promisor's chief stock in trade is the sale of emotional satisfaction. The promisee willingly pays for emotional security, and risk is allocated to the assuring promisor accordingly. The consumer who purchases jeans off the rack presents a case categorically different from the consumer who negotiates a designer original for an inaugural ball. While emotional damages should be ignored in the first example, it is wrong to deny them in the second. A liability rule sensitive to this fundamental difference should award damages.\textsuperscript{189}

IV. CONTRACTUAL REMEDY FOR NONPECUNIARY INJURIES

A. Limited Range of Remedies

The function of a remedy is to vindicate a right.\textsuperscript{190} The linkage between right and remedy is forged most strongly when reasons supporting the liability rule are consistent with and supportive of the remedial measure. Contracts remedies are skewed toward protecting social economic interests and consequently downplay personal interests. This is not an argument against protecting commercial interests or suggesting that economic criteria are inappropriate to contracts law. Rather, the protection of commercial interests and the advancement of economic goals are desirable in the proper classification of contractual transactions. Contract remedies, purportedly for reasons of efficiency, discount disappointment in calculating damages explicitly and effectively. Once discounted, the injured promisee is frequently remediless. This discounting should not take place wholesale. Contracts law should be sensitive to different contractual transactions. It is unfair and maybe inefficient to deny the promisee relief in nonmarket transactions.\textsuperscript{191}

The most effective and prominent contracts remedy is a measure of money designed to compensate the promisee for lost expectations.

\textsuperscript{189} See, e.g., Goetz & Scott, supra note 168, at 1004; Kronman, Contract Law and Distributive Justice, 89 YALE L.J. 472 (1980).

\textsuperscript{190} Ubijus, ibi remedium. Where there is a right, there is a remedy. D. Dobbs, supra note 100, §§ 1.1-1.2; Gerwitz, Remedies and Resistance, 92 YALE L.J. 585, 587 (1983) ("The function of a remedy is to 'realize' a legal norm, to make it a 'living truth.' ").

\textsuperscript{191} But see Rea, Nonpecuniary Loss and Breach of Contract, 11 J. LEGAL STUD. 35 (1982).
Expectancy damages should be allowed in breaches of nonmarket contracts because the rationales behind both the liability rule and the remedial measure support each other. Both rationales are based on a rejection of the market as the measuring rod. The market must be side stepped because it does not operate effectively to vindicate the right to compensation for lost expectations.

Most of the traditional range of contract remedies (specific performance, reliance, rescission, and restitution) must be disregarded because they provide no compensation. Specific performance cannot be ordered to restore lost pictures, to bury the deceased properly, to reconstruct a dream house, or to offer an alternate vacation. Performance after the fact does not relieve the disappointment and distress occasioned by breach. Specific performance cannot accomplish the nonpecuniary purpose of the contract. Therefore, it is an ineffective remedy. Reliance damages do not address the basis of liability either. In many cases, the promisee goes through with the contract anyway. The funeral is performed, the wedding takes place, and the house is accepted. In each case, the promisee receives less than they expected and less than the promisor promised. The promisee expected peace of mind, a felicitous wedding, or a dream home—none of which was delivered. The function of reliance damages is to place the injured party into the precontract position by compensating for losses that would not have occurred but for the contract. An award of reliance damages when the promisee has performed misses the nature of the claim for nonpecuniary damages. Recission is equally ineffective because the harm has already occurred. Likewise, restitution is inappropriate. Returning a deposit for a band that never played at a wedding reception does not reflect compensation for the distress caused because the promisee received a less than hoped for affair. Therefore, the remaining contractual remedy is expectation damages—a choice not free from difficulties of its own.

192. If the Contractor has not substantially performed then the Home Owner is excused from performance. However, where the Contractor has substantially performed the Home Owner is not excused from performance. Nevertheless, the disappointment in not having the promised dream house remains. If the Home Owner chooses to perform and purchases the home, it is likely that, given the facts of the hypothetical, a court will not order reconstruction in an effort to avoid economic waste.

193. See Fuller & Perdue, supra note 7.

B. Damages Measures

There are several mechanical formulas for measuring expectancy damages in breach of contract cases. Unfortunately, most formulas hew too narrowly to contract price as the basis of the award. None of the basic formulas works well for these cases. Some suggest convenient rules of thumb, nevertheless all are deficient because they are keyed to the existence of a market. The only way to assess damages for nonpecuniary losses in these cases is to send the issue to the fact-finder with proper instructions.195

Contract Price. The simplest measurement is the contract price. It can be used either as a maximum amount of recovery or a minimum, and it has a superficial attractiveness. Contract price appears to be the value of the contract because it looks like the value which the parties assigned to its performance.196 However, the price reflects only the monetary value of the promisor’s goods or services. The explicit quid pro quo in these exchanges is that the promisor gives services and assurances to the promisee who, in turn, gives money and trust foregoing other opportunities. A photographer agrees to take pictures of the birth of a couple’s first child for fifty dollars. The amount represents the value of services to the photographer. It also represents the photographer’s competitive position in the market. The couple is bargaining for photographs of the delivery of their first child in order to capture the beauty of the moment. The value to the couple is not monetizable.

In a market with numerous traders, a homogenous commodity, cost-free information, and participants with a small market share,197 contract price may be the most efficient way to allow the proper allocation and distribution of goods. Therefore, it is justifiable to limit damages to contract price. But this does not describe these cases. The market existing in order for the photographer to set prices was only one-sided—it worked for the promisor and worked for the promisee to pick and choose initially. But once the moment of contracting passes and once breach occurs, the market collapses and substitutes

195. See infra text accompanying notes 201-11. Proper instructions would require the jury to find that the primary motivation for entering the contract was nonpecuniary and that the promisor knew or should have known that. The evidence to support this comes from the nature of the transaction, the relationship of the parties, what was expressly said or written, and the type of evidence introduced for purposes of interpretation.
196. Eisenberg, supra note 3, at 745.
197. Id. at 746-48.
are not available. The photographer's status has changed from a competitor to a monopolist who dominates the couple.

Contract price is inappropriate as either a ceiling or a floor. The promisee is claiming damages for mental distress not damages for the value of the goods and services. The exchange is one between pecuniary and nonpecuniary items. The primary motivation of the couple was happiness which they valued differently from the fifty dollars they were willing to pay. Otherwise, no exchange would have taken place.¹⁹⁸ The couple's damages may be greater or lesser than the contract price depending on how the jury or judge reacts to the evidence. Contract price does not reflect the whole bargain of the parties. It reflects the promisor's costs (including profits and insurance) not the expectations of the promisee. In market transactions, the contract price is the acknowledged value of the expectation, because money is exchanged for goods or services valued in a market. In nonmarket transactions, the product being exchanged for money cannot be externally valued.

**Market Value.** Market value is inappropriate because, like contract price, it only partially reflects the value of the bargain. The more the promisor can reduce costs and the more competitive the contract price is with market price, the more profits the promisor makes. Market value is a baseline for determining the promisor's profits. The promisee, however, has no interest in market profits. The couple, for example, could not resell these photographs in any recognizable market. Indeed, if that were their proven motivation, their claim for nonpecuniary damages would fail. Their special damages are not lost resale profits, their special damages are lost memories. To award them the market value of the photographer's services bears no relation to the idiosyncratic value they bargained for in exchange for fifty dollars. Neither the cost of lost film¹⁹⁹ nor the photographer's services was intended to be equivalent to the sentimental value of the pictures. The couple was willing to part with fifty dollars, because the recodation of memories was more valuable to them.

**Diminution in Market Value.** The classic measure of expectancy damages is the difference between contract price and market price.

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¹⁹⁸. Yorio, supra note 186, at 1390-91. It is conceivable that they value the services for less than $50 either because they are economically irrational bargainers or instead of a regular delivery, the child was delivered by caesarean section that neither parent cared to have on film in which case the couple would be overcompensated if contract price were used as a minimum.

The use of this formula, however, only compounds the dislocation in
the exchange between pecuniary and nonpecuniary promises. This
formula is also a rough way of calculating the profits the promisor
intended from the transaction. However, the promisee is not out to
make profits in a monetary sense.

Each of these measures depends on the existence of a market. Each
implicitly assumes that a goal of contracts damages is to further
competitive markets and that promisors and promisees are similarly
motivated. These formulas appear attractive because they are conve-
nient measures providing a degree of certainty, but they do not corre-
spond with the nature of the liability interest being addressed. The
promisee's expectation interests are not capable of being quantified
and cannot be set by a market; another more subjective mechanism to
set compensation must be used. Since mechanical formulas do not
work, damages must be set by a judge or jury. This increases the
economic uncertainty of these contracts, and the promisor is going to
have to bear that uncertainty.

C. Judicial Determination

Cases awarding damages for injury to nonpecuniary interests
must resort to the less than scientific and somewhat unsophisticated
method of the judicial guess. Because parties openly negotiate for
the satisfaction of the promisee’s emotional desires and market-based
remedial measures do not reflect the bargain, damages must be deter-
mined either by judge or jury. The contract price or market value can
be a starting place but cannot be the limit because, as one court said,
that would be illogical. The use of the judicial guess to set expect-
tancy damages, time tested in torts cases, can be justified with eco-

200. Goetz & Scott, supra note 162, at 569-70.
201. Veitch, supra note 71, at 240; Eisenberg, supra note 3, at 748-50 and passim to 785; Bolla,
supra 69, at 572.
vacation package $3000 judge awarded $4800):

Another important factor is the total contract price—three thousand dollars. This figure
helps the court value the charter as a whole. The amount the plaintiffs were paying for the
charter clearly bears some relation to the value they put on it.

One final factor is that the plaintiff might have accepted the Waikane offer of the two
substitute yachts . . . This is another indication of the value the plaintiffs placed [on the
contract].

All these factors are relevant. The Court is not going pretend to logically fit them all
together into a completed jigsaw puzzle that spells out a particular dollar figure. Such
precision is impossible in most cases, but is especially difficult here given the ethereal, yet
real, nature of some of the items of damages.
nomic, moral, and political arguments coinciding with the arguments used to develop the liability rule.

**Economic Argument.** The liability rule recognizes that no market exists to find substitutes for emotional distress and that some remedy should be available to protect the promisee's expectations. The catalogue of remedies, however, is rapidly depleted leaving only a less than certain jury determination of expectancy damages rather than setting damages by more rigid formulas. Most contract remedies are designed to promote commercial transactions\(^{203}\) and are based on an economic vision of what contracts remedies should do.\(^{204}\) Commercial transactions are facilitated and a credit economy is advanced when remedies rules are certain, predictable, and objective. People can rely on this information to plan, risks are reduced, and more risk-averse traders can enter the marketplace.\(^{205}\)

Such norms, however, cannot operate in nonmarket situations in which parties bargain over a nonpecuniary exchange, monetary value is indeterminate on one side of the exchange, and risk is nevertheless allocated. The need for commercial certainty is weakened in favor of honoring the bargain made by the parties when only the promisor's performance is the price given in exchange.\(^{206}\) The value of the contract to the promisee is not fixed with as much certainty as the price of the promisor's performance. The issue then becomes: Who should bear the uncertainty costs?

When nonmarket contracts are breached, an uncertain monetary value attaches to the promisee's loss. Because the market has ceased to function, competitive pricing as a goal assumes less importance. Competitive pricing operates in establishing a price going into the contract; it does not further competition once the contract is made and then breached. Likewise, the accuracy of price signals and the efficiency of the allocation of promisor's goods or services become secondary. Moreover, the promisor exercises greater control over circumstances giving rise to nonperformance. There are two alternative arguments to support an uncertain damages award in these cases.

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203. Eisenberg, *supra* note 3, at 750.

204. Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1215-16 (1970); *but see* Farber, *supra* note 100, at 339: "The picture that begins to emerge from these newer theories is that of a world in which market transactions are only one among a group of important economic institutions."


First, it may very well be economically efficient to do so. Second, efficiency analysis might be sacrificed.

The efficiency argument is that promisors have voluntarily accepted this particular risk. In accepting this risk, they should have calculated, however roughly, the costs associated with the risks in setting their prices for the goods or services promised. Prices are set in a market in which all similar promisors are similarly situated. Even though the costs of the risk are uncertain, uncertainty is part of the promisor's calculations, and the promisor bargained for the uncertainty.\textsuperscript{207} It must be recalled that the promisee usually pays a premium for the services. Hiring a limousine service to take someone to an airport to catch a plane costs more than a taxi cab because, among other things, the risks to the limousine service are greater. The premium reflects the assurances of satisfaction given to the promisee by the promisor. More likely, it is easier for the promisor to insure against risk with some line of business insurance than it is for the promisee to purchase insurance against the failure to obtain emotional satisfaction.\textsuperscript{208}

Similarly, it is unwise to have the promisee plan against the contingency of breach by arranging for a substitute promisor. This contingency planning has the effect of tying up the production of two promisor's when only one is needed to satisfy the promise. Imposing contingency planning costs on the promisee also ignores the fact that the promisee has already paid the promisor's insurance costs by paying a premium for the promisor's assurances. It is inefficient and unfair to have the promisee pay twice. It is also likely that the promisee is in less of a position to secure information about the promisor's ability to perform. Even assuming that no one will know if the agreement will be breached, the promisor is in a superior position to control the promised performance. To move the uncertainty of performance and the uncertain risk from promisor to promisee by imposing information acquisition or insurance or other self-protection costs on promisees discourages promisees from engaging in nonmarket contracts.

\textsuperscript{207} Leubsdorf, Remedies for Uncertainty, 61 B.U.L. REV. 132 (1981). Imposing uncertainty costs on the promisor seems initially attractive and fair. However, the "effects of uncertainty" are not uniform. Some promisors will over comply and others undercomply. A consequence of over compliance may be under compensation to some promises and the creation of a social externality. Likewise, the consequence of undercompliance may be over compensation to other promises. See Calfee & Croswell, Some Effects of Uncertainty on Compliance With Legal Standards, 70 VA. L. REV. 965 (1984).

\textsuperscript{208} Rea, supra note 191.
Similarly, such a move promotes opportunistic behavior by the promisor who is in a better position to absorb these losses. The promisor can spread the loss in future prices, more carefully draft contracts, fairly advertise, or honestly represent his or her goods or services. Such costs are the costs of doing business, and these costs are reflected in the market place. The costs, as reflected in prices, also signal which promisors are reliable. The more damage awards imposed upon welching promisors, the higher their prices, and inefficient promisors will be driven from the market.

Further, there is something surreal in talking about market effects when the market bursts. Promisees enter these contracts for emotional gratification, and promisors assure them of its delivery. They are willing to pay a price in exchange for delivery of a good or service which brings gratification. If promisees enter contracts with the idea that they must bear the economic costs of breach, then the transaction has been transformed from a nonpecuniary into a pecuniary one thereby subverting the promisees' very reasons for entering into the transaction. A Belmontine community has turned into a Venetian market.

Alternatively, economic efficiency analysis can be suspended in nonmarket transactions because there is little or no allocation function when goods and services are highly specialized. Further, the bargaining status of the parties has been completely altered after breach. The promisee can no longer shop around in the market. These economic arguments are based less on efficiency and wealth maximization than on the allocation of transaction costs to the promisor and on the compensation of lost opportunity costs to the injured promisee.

**Moral Argument.** There is no bright line between many of the economic arguments and the fairness arguments. The assumption behind the economic arguments is that certain costs should be allocated to the breaching promisor because it is fair to do so. This sense of fairness turns on the innocence of the promisee and on the fault of the promisor. It is fair to assess damages to the promisor, even damages which are uncertain in amount, because it is the only viable remedy remaining and because it offends a sense of justice to leave the prom-

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209. *But see id.* Rea argues that maximum compensation for nonpecuniary injuries does not advance consumer efficiency. He assumes, however, that the monetary value of the emotional damages is known or knowable. I proceed on the assumption that it is uncertain and will remain so and that the only mechanism to overcome the uncertainty is a judge-made verdict or jury award. I find it difficult to understand how noncompensation, the alternative, benefits consumers.
isee injured when risks were voluntarily allocated. Damages are flexible enough\textsuperscript{210} to compensate and lay blame when a case warrants assessing fault for wrongful conduct. Still, the idea is first to make the promisee whole, then to lay blame.

Damages are also flexible enough to compensate promisees for either the severity of the emotional distress or for a slight annoyance neither of which bears a relation to the contract or market price. In other words, it is wrong to assume that damages for nonpecuniary harms always will be greatly in excess of the market price or contract price. If the promisor can prove the wedding party did not miss the musicians until their absence was noted after the reception, the promisee's claim evaporates. Costs are imposed on the responsible party, and protection is awarded to the party injured.

A damages remedy is consistent with the liability principle because the award is keyed to the nature of the breach. The reason the promisor was held liable was because he or she accepted a risk and reneged on a promise. The award measures the value of the risk knowingly allocated to the promisor even though its exact measurement is uncertain.

\textit{Political Argument.} The strongest political argument is that the damages remedy accommodates the societal-efficiency vision of the economic argument and the individualist-fairness view of the moral argument. If the economic and moral arguments are accepted, which they should be, then individual and collective interests are satisfied. Another test of the soundness of the political argument is how well the new rule advances contractual goals. First, the remedy of expectancy damages is coordinated with the promisor's liability for failing to deliver the promised dream. The liability and remedial rules are thus compatible. The coalescence of right and remedy attests to the law's legitimacy. Second, the rules are identifiable. Parties can contract for emotional satisfaction knowing their expectations will be honored rather than disregarded. Third, a gap left by assigning these cases to torts is closed by providing a contracts cause of action. After the gap is closed, the artificial separation of torts and contracts can be disregarded. The torts side of these cases focuses on coercing socially acceptable behavior and by punishing bad conduct, while the contracts side protects the expectations of promisees. This shoring up of the realm of contorts means that lawyers should be better able to ad-

\footnotesize{\textsuperscript{210}. Hillman, \textit{supra} note 179, at 620; Goetz \& Scott, \textit{supra} note 162, at 569-70; Yorio, \textit{supra} note 186, at 1367-74, 1415-16.}
vise clients and that judges should be better able to decide cases recognizing that there are different interests to protect.

A clear rule of contractual liability, even when coupled with an uncertain damages award, provides better signals to promisors. They will be in a position to protect themselves by better use of liquidated damages provisions, more explicit contracts, more truthful advertising, or insurance.211 These signals should offer greater legitimacy to the contracting process by leaving fewer promisees uncompensated. Finally, reflective doctrinal analysis was used to reform a confused area of law, refine contracts law by recognizing the market/nonmarket distinction, and reconcile competing values.

V. Conclusion

In the world of contracts law, the nonpecuniary harm problem is small. The cases are few, and the dollar amounts involved are not significant.212 Generally, these cases are too costly to litigate, and there will be no rush to the courthouse to vindicate the right to damages for loss of emotional satisfaction. But, then, the significance of this discussion lies elsewhere. These cases do exist, and the story they tell about contracts law is revealing. Currently, they are inadequately handled by contracts law. The premise of this Article is that these cases are essentially contractual in nature and that contracts law is sufficiently rich to accommodate these claims. It is not the point of this argument to take these cases away from torts nor to deny the overlap. Rather, it is to assert that contracts law is a rich discipline not limited to market-based transactions. There are different interests to be protected arising from nonmarket situations, and contracts law currently does not provide proper protection.

More ambitiously, the discussion of nonpecuniary liability and of its corresponding remedy suggests a theory about contracts law in nonmarket transactions. The central idea is that contracts law should provide a more fully developed theory for nonmarket or defective market transactions. People enter contractual relationships with their families or between friends and find themselves in specialized relationships in which market-based theories assume secondary importance at

211. Naturally, these cases must confront the issue of bargaining equality and inequality. Unconscionable provisions, such as undercompensatory liquidated damages clauses, or excessive disclaimers should offer no more problems to promisor. See, e.g., Bogner v. General Motors Corp., 117 Misc. 2d 929, 459 N.Y.S.2d 679 (N.Y. City Ct. 1982).

212. See, e.g., Veitch, supra note 71, at 240-42.
best. Of what economic moment is it, for example, to the rank-and-file of a labor union who, because of institutional and structural restraints, are part of a collective bargaining agreement which they had little or no meaningful participation in formulating? Of what efficiency significance is it when clients contract with lawyers or patients with physicians? What is the wealth maximizing interest of a health insurance policy holder who receives the insurance as part of a benefits package in an employment agreement? Where is the market and what are the exchange values of antenuptial agreements? Because of superior knowledge and specialized expertise or because of bargaining advantage, many parties to contracts are bargaining not for direct pecuniary gain but for nonpecuniary satisfactions such as the right to participate in decisionmaking, the opportunity to express themselves, or the chance to exercise their voice in matters affecting them as individuals rather than as economic units.

This discussion of a more developed contracts law also connects with other developments in the law of contracts. The expansion of the remedy of specific performance\textsuperscript{213} and the imposition of liability in cases of unconscionability or other market dislocations require a contracts theory starting from within the contractual relationship. A refined contracts law recognizes the subleties of relationships and then moves outward toward beneficial social arrangements and institutions instead of starting with a social vision whose main goal is to replicate a market economy. We live in a heavily market-oriented society, and contracts law is and should be responsive to that world. We also live in a society in which the institution of the promise has deep meaning for reasons independent of the short term pecuniary gains at the heart of market analyses.

The change in the rule regarding nonpecuniary harms towards a presumption of liability, together with a damages remedy accepting a greater degree of uncertainty, is consistent with this developing period of contracts law.\textsuperscript{214} The change is suggestive of a move away from a contracts law ideology embodying an idealized version of a nineteenth century market economy valuing objective, certain, and predictable rules that are economically useful.\textsuperscript{215} The movement supplements that vision with rules sensitive and responsive to the noneconomic needs and expectations in exchanged promises. This picture loosens a

\textsuperscript{213} See supra note 182.

\textsuperscript{214} See, e.g., Eisenberg, supra note 3; Rakoff, supra note 19.

\textsuperscript{215} Eisenberg, supra note 3; Kennedy, supra note 5; Feinman, supra note 5.
too rigid rules system geared to market transactions. It favors a rules system prizing individual interests of parties, respecting their dignity as persons in an imperfect world, honoring their liberty to participate in unbalanced bargaining situations, requiring their responsibility for broken promises, and recognizing the interdependence of parties and the need for flexibility while tolerating uncertainty.

If contracts law is to be part of transformative efforts to improve the whole of law, smaller segments of contracts law must be part of the envisioned transformation.216 These cases belie a more flexible subjective world in which individual justice requires an inquiry into the motives of parties and the nature of contractual relationships. So conceived, the dynamic of law is a virtue promoting a fuller vision of society and the aspirations of the individuals in that society.

216. Unger, supra note 5.