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Why Expectation Damages for Breach of Contract Must Be the Norm: A Refutation of the Fuller and Perdue "Three Interests" Thesis

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I. INTRODUCTION

Contract law uses three measures of damages. The expectation measure puts the injured party in as good a position as if the contract had been performed (i.e., not breached). The reliance measure puts the injured party in as good a position as if the contract had not been made. The restitution measure restores to the injured party any benefit the breaching party obtained from his breach at the injured party's expense.

Although the expectation measure has always been the norm, Lon L. Fuller and William R. Perdue, Jr. famously questioned its primary status in an article that appeared in 1936. They began by asserting that each of the measures compensates the injured party for the loss of an associated “interest” in the contract—the expectation measure compensates for the loss of the “expectation interest,” the reliance measure compensates for the loss of the “reliance interest,” etc. They then ranked these “interests” in what they considered to be the order of their importance, putting the restitution interest first and the expectation interest last:

It is obvious that the three “interests” we have distinguished do not present equal claims to judicial intervention. The “restitution interest,” involving a combination of unjust impoverishment with unjust gain, presents the strongest case for relief. If, following Aristotle, we regard the purpose of justice as the maintenance of an equilibrium of goods among members of society, the restitution interest presents twice as strong a claim to judicial intervention as the reliance interest, since if A not only causes B to lose one unit but appropr-
ates that unit to himself, the resulting discrepancy between A and B is not one unit but two.

On the other hand, the promisee who has actually relied on the promise, even though he may not thereby have enriched the promisor, certainly presents a more pressing case for relief than the promisee who merely demands satisfaction for his disappointment in not getting what was promised him. In passing from compensation for change of position to compensation for loss of expectancy we pass, to use Aristotle’s terms again, from the realm of corrective justice to that of distributive justice. The law no longer seeks merely to heal a disturbed status quo, but to bring into being a new situation. It ceases to act defensively or restoratively, and assumed [sic] a more active role. With the transition, the justification for legal relief loses its self-evident quality. It is as a matter of fact no easy thing to explain why the normal rule of contract recovery should be that which measures damages by the value of the promised performance.6

After thus concluding that “it is . . . no easy thing” to explain why the expectation measure is the norm, they went on to explore what the reason or reasons might be. They eventually concluded that although there were no good reasons for protecting the expectation interest,7 there was a good reason for using the expectation measure of damages as the norm: because, they claimed, it generally results in the same recovery as the reliance measure would and is easier to prove.8

The Fuller and Perdue article and its “three interests thesis” has had an immense scholarly and academic influence in the United States. Richard Craswell cited over sixty publications treating the three interests thesis in his article on the subject published in 2000.9 A recent Lexis search of the “Law Reviews, Combined” database revealed twenty-six citations to the article within the last two years.10 The effect of the article has been to throw the question of the proper measure of damages into doubt. Although it has been convincingly shown that the article’s conclusion is incorrect—that the expectation measure generally results in the same recovery as the reliance measure would11—so that the article’s further conclusion that the expectation measure generally makes a good surrogate for the reliance measure is wrong, no one has yet come up with any other generally accepted reason or reasons for the expectation measure being the norm. The Restatement (Second) of Contracts states the three interests thesis almost verbatim as Fuller and Perdue stated it and offers

6. Id. at 56-57.
7. Id. at 57-60.
8. Id. 60-62.
10. The search was conducted by Paul Kroeger, a student at the author’s law school, on May 31, 2001.
no reasons for preferring any one of the measures over the other two.\textsuperscript{12} No hornbook, treatise or casebook in print offers any such reasons either, and nearly all of them mention the Fuller and Perdue article and comment upon it favorably.\textsuperscript{13}

Despite its immense scholarly and academic influence, however, the article and its thesis have had no discernible effect on the law. The expectation measure continues to be the norm,\textsuperscript{14} and even in the situations for which the contracts restatements have explicitly suggested a flexible approach to damages, the courts continue to use the expectation measure almost exclusively of the other two.\textsuperscript{15}

As demonstrated below, the courts have rightfully used the expectation measure to the near exclusion of the other two measures. Toward that end, Part II of this Article sets forth the principal institutions in a modern market economy in which contracts are used. Part III refutes the Fuller and Perdue three interests thesis by explaining how the expectation measure meets the needs of these principal institutions in four crucial respects, while showing that neither of the other measures meets these needs in even one such respect. Part IV exposes further endemic weaknesses in the three interests thesis. Part V concludes by showing that the three interests thesis is too flawed to be of use for comparing the merits of the three damages measures.

\textsuperscript{12} \textit{Restatement (Second) of Contracts} § 344 (1981) (Purposes of Remedies) states:

Judicial remedies under the rules stated in this Restatement serve to protect one or more of the following interests of the promisee:

(a) his "expectation interest," which is his interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed,

(b) his "reliance interest," which is his interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made, or

(c) his "restitution interest," which is his interest in having restored to him any benefit that he has conferred on the other party.


\textsuperscript{14} \textit{See} Farnsworth, \textit{supra} note 1, § 12.8.

\textsuperscript{15} \textit{See, e.g.,} W. David Slawson, \textit{The Role of Reliance in Contract Damages}, 76 Cornell L. Rev. 197 (1990) (concluding that despite the urging in both the \textit{Restatement (First) of Contracts} section 90 and \textit{Restatement (Second) of Contracts} section 90 to take a more flexible approach, the courts, without exception, have used the expectation measure whenever they could for breaches of contracts made enforceable by detrimental reliance rather than by consideration).
II. THE PRINCIPAL INSTITUTIONS IN A MODERN MARKET ECONOMY IN WHICH CONTRACTS ARE USED

Almost every purchase and sale in a modern market economy involves a contract, even if the contract sometimes only consists of implied warranties. (By a “market economy” I mean an economy in which the dominant means of doing business is for sellers to compete with one another in largely unregulated markets.) I will deem a purchase and sale to have occurred in an economic market if the purchaser had a choice of whom to purchase from, because the availability of such a choice is the essential condition for the existence of competition. A purchaser nearly always has such a choice in a modern market economy. The economic market is one of the two principal institutions in which contracts are used.

The other is the institution of credit and finance. Contracts in this context are the things which are bought and sold as well as the usual means of buying and selling them. Stocks and bonds are contracts, for example. Although there are numerous kinds of contracts that are not typically used in either of these institutions, these two are so important to the functioning of a modern market economy that if contracts did not meet their needs, the economy could not function.

A. The Institution of the Economic Market: Contracts as Bargains

Every developed country in the world has a market economy. The few socialist economies still left are in or near collapse. Economic markets operate through bargains and could not operate without them. There is a bargain every time anything is bought and sold. Contracts are promises the law will enforce, and promises made enforceable by consideration are bargains. The consideration and the promise or promises it supports are the two sides of the bargain. Although not all bargains are contracts, because not all of them include promises, bargains must be contracts if any part of one party's performance is to come after any part of the other's. Bargains in which at least one party is to render services must therefore be contracts, for example, because the performance of services inevitably takes time. Either the payment for the services must come before the services are performed, or the services must be performed before they are paid for. Once the industrial revolution began, even most bargains for the sale of goods had to be contracts, because goods then began to be produced far from where they would be used, and buyers and sellers therefore had to deal with each other over long distances. Either the buyer had to pay for the goods before he received them, or the seller had to de-

liver the goods before he was paid for them. Therefore, since the industrial revolution, one can say the same of contracts as one could previously have said only about bargains: economic markets operate through contracts and could not operate without them.

Markets are important because, as Adam Smith so famously put it, they are the “invisible hand” by which individual gain is made to serve the public good. Contracts are both the means by which markets harness the individual gain and the means by which the individual gain is made to serve the public good. Both parties must expect to gain from a contract or they would not make it. In the large majority of instances, both parties do gain, even if not quite as much as they had hoped. For example, a lawyer contracts with a painter to paint the lawyer’s house. The house will be better painted than if the lawyer painted it herself, and the lawyer will work many fewer hours at her job as a lawyer to earn the money to pay the painter than it would take her to paint the house herself. The painter will work many fewer hours painting the house than he would need to work to do or make the things for which he spends the money he will earn from painting the house. Both parties will gain even more from the contract the painter makes with the seller of the paint, because the paint will be the product of centuries of technological and organizational progress, which would be impossible for either the painter or the lawyer to have done themselves.

Markets make the individual gain serve the public good by en-gendering economic competition. The sellers whose goods the buyers like the most make the most profits and therefore prosper and expand, while the sellers who fail to offer goods that buyers like eventually disappear. Sellers are thereby encouraged to improve their goods and to lower the costs of producing them, both of which increase the public good. Contracts play essential roles in this process both in the obvious sense that markets could not function without them, because every purchase and sale is a contract, and in the not-so-obvious sense that they are the links in the chains by which large numbers of individuals bind themselves together in the cooperative efforts that improve goods and lower the costs of producing them. The links in the chains by which individuals are organized into firms, the links in the chains by which firms distribute and sell what they produce, and the links in the chains that bind firms to their suppliers and all the other firms with which they interact, are all contracts. Adam Smith also pointed this out.

19. Id. at 11-12, 22-29; see also JOHN RAWLS, A THEORY OF JUSTICE 342-47 (1971).
Although many contracts presumably would be made and kept even if the law did not enforce them, the law's enforcing them encourages the making of more of them and increases the value of those that are made by providing an important additional assurance that they will be kept. For example, if the law did not enforce contracts, the lawyer and the painter would have had to make and accept frequent partial payments, preceded or followed by the lawyer inspecting the just completed part of the painter's work, because neither could risk investing much of his or her money or time without first knowing that the other had done his or her part. And even then, the lawyer would have no protection against defects that would not show up until months or years later, such as the painter's use of inferior paint, and the painter would have no protection against the lawyer's refusal to make the payment that was to follow his completion of the work. Thus, even if both did perform as promised, the costs of their performances would have been increased.

For all these reasons, it is extremely important that contracts be at least generally enforced. Economic markets would eventually collapse if they were not, and even in the short run they would operate much less efficiently, and technological and industrial progress would be greatly slowed.

B. The Institution of Credit and Finance: Contracts as Property

Almost all the instruments of credit and finance are contracts. Stocks, bonds, loans of all kinds, accounts of all kinds (bank accounts, charge accounts, credit card accounts, money market accounts, etc.), shares in joint ventures, partnerships, and “funds” (mutual funds, pension funds, hedge funds, etc.) are all contracts. The English equity courts had made contract rights generally assignable by the end of the seventeenth century, the English law courts had followed suit by the end of the eighteenth century, and the courts in both cases did so explicitly because the then emerging credit and finance systems required it. These systems required it because they required that stocks, bonds, loans, etc. be capable of being bought and sold.20

If something can be bought and sold, it is property. The instruments of credit and finance are therefore property. As such, any contract right that can be assigned is property, whether it is an instrument of credit and finance or not, and, as a rule, the law allows any contract right to be assigned.21 The United States Supreme Court recognized in 1972 that even unassignable contract rights are property for the purpose of protecting them against deprivation without

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21. Id.
due process of law. Without contracts, the institutions of credit and finance could not exist.

III. MEETING THE INSTITUTIONS' NEEDS

The expectation measure meets the needs of these institutions in four crucial respects: 1) it provides a remedy for every breach; 2) it makes contracts enforceable as soon as they are made; 3) it compensates the injured party for what he has lost, as the institution concerned values that loss; and 4) it provides the right incentives for decisions whether to breach. Neither of the other measures meets these institutions' needs in even one such respect. Each of these respects is discussed in turn.

A. Providing a Remedy for Every Breach

There is no situation in which the expectation measure cannot be used, whereas the law only allows either of the other measures to be used if there was a so-called "material" or "total" breach—a breach serious enough to entitle the injured party to withhold her performance and cancel the contract. This limitation is not arbitrary. A party cannot incur a reliance loss unless the other party's material breach entitles him to cancel the contract, and he cancels it. This is so because as long as the contract is still in force, the breaching party still owes the non-breaching party her performance, the receipt of which was what he relied upon. Likewise, for a restitutional entitlement, as long as the contract is still in force, the breaching party still owes the non-breaching party her performance, which was the agreed exchange for any benefits she may have received from him as a result of her breach.

Moreover, even if the law allowed him to, a plaintiff could not use either of the other measures to recover in the event of a partial breach because the notion of a reliance or a restitution recovery for a partial breach is incoherent. To illustrate, assume that Contractor enters into a typical contract with Owner to build a house for $100,000. Assume further that Contractor performs perfectly, but Owner pays her only $95,000. In this instance, what is Contractor's reliance loss or restitutional entitlement? There is no sensible answer to either ques-

22. Bd. of Regents v. Roth, 408 U.S. 564, 576-77 (1972); Perry v. Sinderman, 408 U.S. 593, 601 (1972). Of course the Court has recognized that stocks, bonds and other instruments of credit and finance are property since long before 1972. The cases cited extended this recognition to contract rights generally. The cases involved employees' rights under contracts of employment, which are generally not assignable.

23. FARNSWORTH, supra note 1, §§ 12.16 (reliance measure), 12.20 (restitution measure).

24. Id. § 8.15.
EXPECTATION DAMAGES

The opposite situation also makes the point. Suppose that Owner paid the $100,000 but Contractor left a defect that would cost Owner $5,000 to correct. There is no sensible answer to what Owner's reliance loss or restitutional entitlement is in this case either, although his expectation loss of $5,000 is clear.

Sales of tangible property also serve to illustrate the point. Suppose a sale of a shipload of crude oil warranted to have sulfur content of no more than 0.50 percent tests at 0.54 percent. Suppose further that the excess sulfur will cost the buyer $10,000 in additional refining costs to remove. Again, although the expectation loss is obviously $10,000, there is no logical answer to the question of what is the reliance loss or the restitutional entitlement. The inability of either the reliance or the restitution measure to provide a recovery in cases of only partial breach is extremely important, because neither of the principal institutions in which contracts are used could function if partial breaches were not reimbursed. Creditors could not recover damages for late payments or for small payments that were never made. Persons who had contracted for services to be performed could not recover for small defects or only moderately incomplete performances. Buyers could not recover for defects in goods they had accepted.

There is no reference to the restriction of the reliance and restitution measures to cases of total breach anywhere in the Fuller and Perdue article. The authors were evidently unaware of it.

B. Making Contracts Enforceable as Soon as They Are Made

Although any contract is enforceable in principle as soon as it is made, it is only enforceable as a practical matter if a breach would give the injured party the right to recover enough damages to make it worthwhile to sue. The expectation measure gives such a right immediately, because it entitles each party to recover the profits she could reasonably have expected to make if the contract were performed, and if each party did not expect that she would make a profit if the other performed, the contract would not have been made.25

The reliance measure, however, does not make a contract enforceable by either party until she has relied on it to her substantial detriment. Thus, either party could breach the contract without incurring any liability at all until the other had relied on it to some extent, and either could breach without incurring enough liability to make the other's litigating worthwhile until the other had relied to a substantial extent. Businesses could hardly function if damages were limited in this way, because "deals" would never "close." For example, two busi-

25. See supra section II.A.
nesses could negotiate for months over a joint venture before they finally reached agreement, but either one could still change its mind and call the whole thing off or insist on renegotiating some point to which it had already agreed, with impunity, if it did so before the other had substantially relied. Transaction costs would be greatly increased, because contracts would have to be renegotiated indefinitely until one party finally "took the plunge" and substantially relied. Productive efficiency would be reduced, because the pace of business would be slowed. Neither party could rely on obtaining the profit he expected from a contract until the other had fully performed, because all that either could recover if the other party breached would be the costs he had already incurred.

If the law were to limit injured parties to a restitution recovery, the results would be even worse. Neither party would then be entitled to a large enough recovery to make litigating worthwhile until the other had benefited substantially at her expense. That would nearly always take a long time to happen, and in the large majority of cases it would never happen, unless the benefit was merely the receipt of a deposit or a partial payment of the purchase price. Further, if the deposit or partial payment was the benefit, getting it back would still leave the injured party without her expected profits and the breaching party without any penalty for having breached. Restitution recoveries provide no deterrence against breaching even in the relatively rare situations in which they do provide sufficient compensation to the injured party.

C. Compensating the Injured Party for What He Has Lost

1. Damages Under the Expectation Measure

The expectation measure gives the injured party the value of his bargain in every case. This is the value that the economic market places on contracts, because it is in order to obtain this value that the contracts which are used in economic markets are made. The expectation measure also gives the injured party the value of his property in the contract, which is necessary if the institutions of credit and finance are to function as they should. Although particular items of property may have sentimental, personal, aesthetic or other noneconomic values, if an item has an economic value, that value is the profit or other use an owner of it could expect to get from it, discounted by the risk that the expectation will not be realized. For example, the economic value of an apartment house is estimated by reference to the profit (rents in excess of maintenance and operation costs) an owner could expect to make from it, discounted by the risk that the profit will not be realized. Likewise, the economic value of an

26. See supra section II.A.
automobile is the use one could expect to get from it, discounted by the risk that something will go wrong with it before its expected use is realized. The instruments of credit or finance are valued the same way because their values are their economic values. For example, stocks are valued according to the profits the corporations are expected to make in the future, discounted by the risk that they will not make them. If the stocks are not publicly traded, investors make these estimates for themselves. If the stocks are publicly traded, the buying and selling of them on the public markets based on these estimates by investors, brokers, fund managers, speculators and others determines the market prices at which they are bought and sold. The expectation measure is the value of a contract right in a market economy, at least if the right is assignable, as it generally is.

2. Damages Under the Reliance Measure
   a. The Shortfall

Recoveries under the reliance measure fall short of both institutions' needs, because there are no such recoveries at all for partial breaches, and even for total breaches the recoveries do not include the expected profits or the costs incurred before the contract was made.\(^2\) The last limitation is not only the law, it is inherent in the logic of the measure, because the injured party cannot have incurred costs in reliance on the contract unless he incurred them after the contract was made. Fuller and Perdue were also evidently unaware of this limitation on the use of the reliance measure,\(^2\) just as they were of the limitation of its use to cases of total breach.

This limitation makes the reliance measure especially inadequate, because most of the costs of producing or marketing products in a modern economy are incurred before the products are sold. For example, a manufacturer will likely have incurred practically all the costs of manufacturing the product before it sells it to a wholesaler or retailer and will likely incur little if any additional costs thereafter. The same will be the case for the wholesaler or retailer. The only costs most retailers incur after making a sale are the costs of a plastic or paper bag. Likewise for agricultural products, for which all the costs of owning the land and of planting, tending and harvesting the crop will generally have been incurred before the crop is sold. Even for services contracts, in which the services are to be rendered after the contract is made, the seller will at least have incurred its overhead costs before the contract was made.

For the kinds of total breaches that can occur in the systems of credit and finance, the reliance measure does even worse. If borrow-

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\(^2\) See Fuller & Perdue, supra note 5, at 74.
ers breached, lenders could recover only what they had lent, plus legal interest, no matter what the agreed interest rate had been. If corporations breached, shareholders could recover only what the purchasers of the shares had paid when the corporation first issued its shares, plus legal interest, because as assignees of the original shareholders' rights, all subsequent shareholders would have no more rights than the original shareholders would have had.29 Options to buy long or sell short would be worth no more than the paper they were printed on.

b. Attempts to Prove this Shortfall Is Unimportant or Does Not Exist

Fuller and Perdue claimed that the reliance measure provides as large a recovery as the expectation measure does when lost opportunities are taken into account. Their reasoning was that the injured party could have made the same profit on a contract with someone else if he had not made it with the party who breached.30 They offered the following example:

Physicians with an extensive practice often charge their patients the full office call fee for broken appointments. Such a charge looks on the face of things like a claim to the promised fee; it seems to be based on the "expectation interest." Yet the physician making the charge will quite justifiably regard it as compensation for the loss of the opportunity to gain a similar fee from a different patient. This foregoing of other opportunities is involved to some extent in entering most contracts, and the impossibility of subjecting this type of reliance to any kind of measurement may justify a categorical rule granting the value of the expectancy as the most effective way of compensating for such losses.31

Although the example seems to support the claim, it does not. First, the breaches were total breaches—the patients did not show up for their appointments—so the example does not include cases of only partial breach, in which the reliance measure provides no recovery at all. Second, although the example correctly describes the consequences of a total breach by a buyer—patients are buyers of a physician's services—when the seller has only a limited supply of the thing to sell, it does not include the consequences of a total breach by a buyer when the seller has an unlimited supply of the thing to sell. The latter kind of seller is much more common than the former in a modern economy. (Physicians' supplies are limited because what they sell is their time, at least as Fuller and Perdue pictured it.)

Dean William D. Hawkland was apparently the first to explain the significance of this distinction, in a book published in 1958.32

29. CALAMARI & PERILLO, supra note 13, §§ 18.3, 18.17.
30. Fuller & Perdue, supra note 5, at 60.
31. Id.
32. HAWKLAND, supra note 11, at 153-54.
buyer breaches a contract with a seller who has an unlimited supply of something, the seller loses the profits he would have made on that sale, and he does not recover them on other sales he makes thereafter, because he would have made the other sales anyway, not having only a limited supply of the thing. Therefore, he did not lose any opportunities to sell to others when the first buyer breached. For example, an automobile manufacturer can typically supply its dealers with as many cars as they can sell. Therefore, if a buyer orders a car from a dealer but refuses to accept it when the dealer tenders delivery of it, the dealer loses the profits it would have made on the sale of that car. This is so even if the dealer sells the same car for the same price to a second buyer, because if the first buyer had accepted the car, the dealer could have ordered another car from the manufacturer and sold it to the second buyer. The same is generally the case today even for sellers of services. For example, an air conditioning service can typically sell its services to as many customers as request them. It schedules its calls for a few days ahead, and if an unusually large number of requests come in, it merely schedules some of them for further ahead than it usually would or puts its employees on overtime.

Melvin Aron Eisenberg and Robert Cooter tried to salvage something from Fuller and Perdue's claim by saying it would be correct in a perfectly competitive market, because the sellers in such markets have only limited supplies by definition. Eisenberg and Cooter also pointed out, however, that the risk that the buyer with whom the seller would otherwise have contracted would also have breached was vanishingly small. They were willing to make this assumption themselves, apparently because they thought it would generally be the fact.33 However, it almost certainly would not be the fact if contracting parties were limited to recovering their reliance damages by law. Under such a limitation, every buyer or seller with whom a seller or buyer might otherwise have contracted would have had the same, potentially enormous, economic incentive to breach as did the actual buyer or seller. Suppose for example that a farmer contracted to sell his bean crop to a food processor shortly before he planted it and that by the time he harvested it, a drought in another part of the country had sent the market price of beans up to twice the contract price. If this farmer repudiated and sold his beans on the market instead, would it be reasonable to assume that some other farmer with whom the food processor might have contracted would not have done the same? More likely, every farmer in the area with a similar contract would also have repudiated. More likely still, under a law that limited recoveries to the reliance measure, neither farmers nor food processors would ever have made such contracts in the first place, because

33. Eisenberg & Cooter, supra note 11, at 1445-49.
both would have known that they could not enforce them if it turned out to be to the other party's advantage to breach.

3. Damages Under the Restitution Measure

Recoveries under the restitution measure also fall short of the institutions' needs by not providing anything at all for partial breaches. However, the question of their adequacies for meeting the institutions' needs for total breaches is complicated by the existence of some incoherencies in the concept of the restitution measure itself. The measure in theory and the measure in practice are very different things.

a. The Restitution Measure in Theory

Fuller and Perdue, and the standard authorities, all define the restitution recovery as a recovery of a benefit the defendant obtained at the plaintiff's expense as a result of the breach. They all, therefore, at some point also refer to it as avoiding "unjust enrichment." This definition, however, is inconsistent with their implicit assumption that the restitution measure provides something that the expectation measure does not. For, if the benefit the defendant obtained was at the plaintiff's expense, the expectation measure already includes it, because it would then have been the plaintiff's benefit if the defendant had not breached.

Take, for example, a contract for the sale of goods in a perfectly competitive market such as a securities or commodities market. If the market price at the time for delivery is higher than the contract price, and the seller breaches by selling the goods at the higher market price to someone else instead, the restitution measure is the difference between the contract and the market price. But this would also be the expectation measure, because the buyer could have gotten this profit himself if the seller had performed. Likewise, if the market price at the time for delivery is lower than the contract price, and the buyer breaches by buying the goods from someone else at the lower market price, the restitution measure would here again be the difference between the contract and the market price. But again, this would also be the expectation measure, because the seller could have gotten this profit herself if the buyer had performed. Another example is the buyer's right to the return of his deposit if the seller has materially breached, which courts often call "restitutional," although it could just as logically be characterized as reliance (because the buyer made

34. Fuller & Perdue, supra note 5, 53-54; Restatement (Second) of Contracts § 344(c) (1981) (Purposes of Remedies); Calamari & Perillo, supra note 13, § 15.2; Farnsworth, supra note 1, § 12.1.

35. See sources cited supra note 34.

it in reliance on the contract) or expectation (because it was a part of
the buyer's cost of performance of the contract, her performance being
paying the price).

The facts of Patterson v. Meyerhofer\(^\text{37}\) provide another illustration.
The defendant contracted to buy four parcels of land from the plaintiff
for a total price of $23,000 on the understanding that the plaintiff
would bid for them at a foreclosure auction. The plaintiff's profit (or
loss) would thus be the difference between what he could get them for
at auction and the $23,000 which the contract obligated the defendant
to pay him for them. However, the defendant attended the auction
herself and outbid the plaintiff, paying a total of $22,380 for the par-
cels. The court awarded the plaintiff $620 in expectation damages,
because this would have been his profit if the defendant had not
breached. That the $620 award also fits the description of restitu-
tional damages is obvious.

Thus, the restitution measure, by its own definition, never pro-
vides a recovery that the expectation measure would not, and the re-
covery it provides is often less. The interest it is supposed to protect is
therefore illusory; it does not exist apart from the expectation interest
and is always included in it.

\[b. \text{ The Restitution Measure in Practice} \]

In practice, however, there is one situation in which the restitution
measure provides a larger recovery than the expectation (or reliance)
measure would. This is the case in which a material breach by one
party entitles the other to cease performing a contract on which he is
losing money—the "losing contract" case. United States ex. rel.
Coastal Steel Erectors, Inc. v. Algernon Blair, Inc.\(^\text{38}\) provides a well
known example of this factual scenario. The defendant, a general con-
tractor, had contracted with the plaintiff, one of its subcontractors, "to
perform certain steel erection and supply certain equipment in con-
junction with . . . [the work]."\(^\text{39}\) The parties disputed who was to pay
the rent on the cranes the plaintiff was using. The plaintiff quit when
the defendant refused to pay the rent, after the plaintiff had com-
pleted twenty-eight percent of the work. Although the district court
found that the contract required the defendant to pay the rent, so that
the defendant was the party in breach, it declined to award any dam-
ages, because it also found that the plaintiff would have lost more
than the defendant owed it in damages if the plaintiff had completed
the work. The court of appeals, in an opinion written by Learned
Hand, reversed. It held that the plaintiff was entitled to recover the

\(^{37}\) 97 N.E. 472 (N.Y. 1912).
\(^{38}\) 479 F.2d 638 (4th Cir. 1973).
\(^{39}\) Id. at 640.
value of its work, which was to be measured by how much the defendant would have had to pay another subcontractor to do it at the same time and place, without regard to the contract price. The measure of recovery the court of appeals prescribed would provide more than the expectation measure would have, because the expectation measure was what the district court had used.

However, whatever one may think of its justice, this was not a restitution recovery, because the defendant had not benefited at the plaintiff's expense. Rather, the plaintiff had benefited at the defendant's expense. The plaintiff benefited by being excused from continuing to work on a job upon which it was losing money. The benefit was at the defendant's expense, because the defendant lost the right to have the plaintiff complete the work for less than the work was worth. Moreover, the amount of the recovery was arbitrary. By its logic, a defendant has to pay more the later he breaches, unless he does not breach until after the plaintiff has fully performed, in which case an exception applies, and the plaintiff is relegated to his expectation damages. And the amount the defendant has to pay bears no relation to how much, if anything, he may have benefited from the breach or how much, if anything, his breach may have cost the plaintiff.

The rationale of decisions like Algernon Blair seems to be the following: The law only entitles a plaintiff to use the restitution measure if the defendant canceled the contract after the defendant committed a material breach. Canceling the contract leaves the defendant unjustly enriched at the plaintiff's expense. The law of restitution—not the restitution measure of damages for breach—therefore entitles the plaintiff to recover from the defendant the value of this enrichment, the measure of which is what the defendant would have had to pay someone else to provide the same services at the same time and place. Although this rationale is logical, it arbitrarily enriches the plaintiff and punishes the defendant as just described, and it would do both of these things with or without the exception for the plaintiff having completed his performance by the time the defendant breached.

c. A Suggestion for Reducing the Unfairness and Arbitrariness of the Restitution Measure in Practice

The plaintiffs in cases like Algernon Blair should recover for the work they have done, at the contract rate, plus any incidental damages the breach may have caused them, and nothing more. This would leave them better off than if their contracts had not been breached, because they would not have to lose even more by complet-

40. Id. at 640-41.
41. CALAMARI & PERILLO, supra note 13, § 15.6.
42. RESTATEMENT OF RESTITUTION § 152 (1936) (Value of Services Acquired by Consciously Tortious Conduct).
ing them, and it would punish the defendants for having breached by depriving them of the benefit of the plaintiffs completing their performances for less than the performances were worth. However, these amounts of enrichment and punishment would be neither excessive nor arbitrary, and they would be enough to prevent the breaching party from benefiting at the injured party's expense.

D. Providing the Right Incentives for Decisions Whether to Breach

A breach of contract is "Pareto efficient" if it benefits someone and does not leave anyone worse off. Public policy favors such a breach, because society as a whole benefits if some persons benefit and no one is harmed. Only the expectation measure provides the right incentives for making breaches Pareto efficient, because only this measure leaves the party who did not breach neither worse nor better off than if the contract had been performed. A measure that provided more damages than the expectation measure would discourage some breaches that would be efficient. A measure that provided less damages than the expectation measure would encourage some breaches that would not be efficient. Therefore, both the reliance and the restitution measures would not provide the right incentives for deciding whether to breach, because they both generally provide less damages than the expectation measure would—if they provide any damages at all.

Although providing the right incentives for deciding whether to breach is important, it is the least important of all the institutional reasons for favoring the expectation measure, which is why I have put it last. These incentives are irrelevant for most breaches, because most breaches result from human weakness or miscalculation—carelessness, mistake, laziness, scheduling too many jobs to do at the same time, etc.—rather than from a conscious decision to breach. Moreover, usually nobody benefits from them, so that they could not have been made efficiently even if the breaching party had made them intentionally. And even in most cases of intentional breach, the motivation is not to use resources more profitably or more beneficially for someone else, but to reduce one's costs by "cutting a corner" or cheating in some other way, in the hope that the other party won't notice or won't do anything about it if she does.

E. The Legitimate Uses of the Restitution and Reliance Measures in Contract Law

The law of restitution comes into play in contractual situations whenever one party would otherwise be unjustly enriched at the other's expense.44 These uses of the law of restitution, however, are to be distinguished from the uses of restitution damages for breach, none of which is legitimate, at least in my opinion.45

On the other hand, the reliance measure still has some legitimate uses. Before describing them, however, I will distinguish a situation in which although the reliance measure is frequently used, it is not necessary, because the expectation measure already includes it. Injured parties who cannot prove their lost profits often use the reliance measure to recover their costs.46 There is no necessity of using this measure in this situation, however, if—but only if—the costs were costs of performance, because an injured party can recover his costs of performance under the expectation measure, whether or not he can prove his lost profits.47 Moreover, the expectation measure provides a superior ground of recovery in this situation, because it entitles the injured party to recover his costs whether or not he incurred them after the contract was made; whereas the reliance measure is limited to costs incurred after the contract was made.48

This brings us to a situation for which the reliance measure is still necessary to do justice. If the costs were not costs of performing the contract, so that the expectation measure would not include them, the reliance measure still entitles the plaintiff to recover these costs if he incurred them after the contract was made. It is just that the injured party recovers these costs, because if he had not expected the contract to be profitable enough to cover them, he would not have made it. So, he presumably would have made enough profits to cover these non-performance costs if the other party had not breached. (In my opinion, the expectation measure ought to be construed to include them by the same logic, but I have never seen this done.) For example, if the plaintiff quit her job in reliance on a contract for a new job with the defendant, which was employment-at-will or for an indeterminate duration, and the defendant totally breached, the courts have generally allowed the plaintiff to recover the compensation she lost by quitting and her

44. See, e.g., Farnsworth, supra note 1, §§ 8.14 (applying when a party's rightful termination of the contract because of the other party's total breach leaves the first party unjustly enriched at the second party's expense), 9.6 (applying when an unanticipated event makes a contract voidable).
45. See supra subsection III.C.3.
48. See supra subsection III.C.2.
costs of searching for a new job under the reliance measure.\textsuperscript{49} The current definitions of the expectation measure would not include these losses and costs, because they are neither expected profits nor costs of performance.

The reliance measure is also useful in connection with the second kind of defense of unilateral mistake, which applies when the mistake was not so obvious that the other party should have noticed it.\textsuperscript{50} The party who made the mistake is entitled to rescind the contract if certain conditions are satisfied, one of which is that the other party has not relied on the mistake to his detriment.\textsuperscript{51} Although there are no reported decisions on the issue, Melvin Aron Eisenberg has suggested that the party who made the mistake should be entitled to rescind even if the other party has relied to his detriment, provided the first party pays the other's reliance damages.\textsuperscript{52} Eisenberg's suggestion is so sensible that it will surely become part of the law at some point.\textsuperscript{53} However, such reliance damages would not be for breach of contract, they would be for compensating the other party for her detrimental reliance on the mistake. As such, if one had to categorize them, they would be considered damages for the commission of a tort.\textsuperscript{54}

\textbf{IV. THE THREE INTERESTS THESIS OF FULLER AND PERDUE}

The Fuller and Perdue three interests thesis includes the following errors in addition to those already identified.\textsuperscript{55}

\textsuperscript{49} See, e.g., Dialist Co. v. Pulford, 42 Md. App. 173, 399 A.2d 1374 (Md. Ct. Spec. App. 1979); Farnsworth, supra note 1, § 12.16.

\textsuperscript{50} The other party is not permitted to make the contract by “snapping it up,” if it is that obvious. This is the first kind of unilateral mistake. Calamari & Perillo, supra note 13, § 9.27.

\textsuperscript{51} Id.

\textsuperscript{52} Lon L. Fuller & Melvin Aron Eisenberg, Basic Contract Law 699 (6th ed. 1996).

\textsuperscript{53} Indeed, Calamari & Perillo, supra note 13, § 9.27 already states the law as though it included Eisenberg's suggestion.

\textsuperscript{54} Restatement (Second) of Torts § 1 cmt. 1 (1965) (General Principles).

\textsuperscript{55} The errors already identified are: The restitution interest as Fuller and Perdue defined it does not exist apart from the expectation interest, which already includes it, supra subsection III.C.3, and the reliance measure is not the equivalent of the expectation measure if lost opportunities are taken into account, as Fuller and Perdue maintained it was, for at least four reasons. First, it provides no recovery at all for partial breaches, id. Second, even for total breaches, it does not include the costs the plaintiff incurred before the contract was made, supra subsection III.C.2. Third, most breaches by far in a modern economy do not result in lost opportunities, so that even if including lost opportunities would make a reliance recovery equal an expectation recovery in some cases, such cases are rare, id. Fourth, the reliance measure would not include lost opportunities in practice if it were the norm, because anyone else with whom the injured party might have
A. Ignoring Context

Although there may be some very fundamental principles of justice that are true in every time or place for all mankind, surely the measure of damages for breach of contract is not one of them. Rather, the answer to the question of what such measure is the most just must depend on the answers to other questions about the context in which the measures are to play their roles. Examples of such questions include the following: How does the society concerned conceive of contracts? What purposes do contracts in that society serve? In particular, what purposes do damages for breach of contract in that society serve? Yet, Fuller and Perdue began their article not by asking, but by answering the question of what purposes contract damages serve, asserting that they serve to protect the three “interests” of restitution, reliance and expectation. They then ranked these interests in the order of importance in which I have just stated them because, they claimed, “ordinary standards of justice” made this ranking “obvious.” Although they later referred to a possible institutional justification for the expectation measure, it was only to immediately dismiss it as irrelevant on grounds of circularity.

B. Using an Inappropriate Concept of Justice

Although Fuller and Perdue grounded their ranking of the three interests on what they claimed were “obvious... ordinary standards of justice,” they still sought to justify the ranking by demonstrating that it was in accordance with Aristotle’s concept of justice, which was, in their paraphrase, “the maintenance of an equilibrium of goods among members of society.” They then had to characterize the making and performing of contracts as departures from this equilibrium in order to demonstrate this accordance.

However, whatever validity Aristotle’s concept of justice may have had for the civilization of ancient Greece, in which men, women and slaves each had their place, it is inappropriate for the modern age and for a modern market economy in particular. The ideal now is not equilibrium, but progress. People now are admired for obtaining more goods for themselves, not condemned for it, provided they use only the legitimate means that markets make available to them, including the

made the same contract presumably would have breached for the same reason that the breaching party did, id.

56. Fuller & Perdue, supra note 5, at 53.
57. Id. at 56.
58. Id. at 59-60.
59. Id. at 56.
60. Id. at 56-57.
making and performing of contracts. This is so because, as Adam Smith put it, markets make individual gain serve the public good.\footnote{See supra section II.A.}

\section*{C. Describing the Institutional Approach as Circular}

In their article, Fuller and Perdue acknowledged that "\[i\]n a society in which credit has become a significant and pervasive institution, it is inevitable that the expectancy created by an enforceable promise should be regarded as a kind of property, and breach of the promise as an injury to that property.\"\footnote{Fuller & Perdue, supra note 5, at 59.} However, they rejected the credit system as an institutional basis for the expectation measure on the ground that accepting it would be circular. They asked, "A promise has present value, why? Because the law enforces it. "The expectancy," regarded as a present value, is not the cause of legal intervention but the consequence of it."\footnote{Id. at 59-60.} They then went on to "reinforce" their rejection by pointing to the fact that the law generally enforced promises long before there was anything corresponding to a general credit system.\footnote{Id. at 60.}

However, it is an error to think that justification is a matter of cause. Even if it were a fact that contracts (i.e., enforceable promises) have present value \textit{only} because the law enforces them (i.e., because the law awards expectation damages), that would not prevent the fact that the credit system treats contracts as property from being an institutional justification for the expectation measure. For if the credit system \textit{requires} the use of the expectation measure to function effectively, as Fuller and Perdue acknowledged it does, this is all that matters for justification purposes. It is irrelevant whether the credit system or the expectation measure came first historically. Presumably, if English law was not already generally enforcing promises when England first developed a credit system, the newly emergent institutional powers would have quickly seen to it that the law was changed to generally enforce promises. Or, if English law was already generally enforcing promises when England first developed a credit system, the credit system would immediately have made use of the law because the credit system required the law in order to function effectively. The credit system would be an institutional foundation of the law either way.

Asking which came first, an institution or a law it requires, is a little like asking which came first, the chicken or the egg. The historical fact is most likely to be that they developed together. This was true with Anglo-American contract law and the institution of the mar-
ket economy. Although an Anglo-American law of contract already existed in the eighteenth century, it was rudimentary. Contracting was time-consuming, and legal technicalities made the outcome of contract litigation uncertain. Moreover, contractually set prices and other terms of sale ran the risk of being illegal for conflicting with the so-called “duties of the common callings,” the prices and other terms of which were set by law, at least in principle. The English and American courts did not begin the development of the contract law we now generally call “classical contract” until late in the eighteenth century, which, not merely by coincidence, is also the time at which historians mark the beginning of market economies in England and the United States.65

D. Asserting that Contracts Have Present Value Only Because the Law Enforces Them

In their article, Fuller and Perdue wrote that “[a] promise has present value, why? Because the law enforces it.”66 Although it is certainly true that contracts generally have greater present values because the law enforces them than they would have if the law did not enforce them, it does not follow that if the law did not enforce them, they would have no present value. All sorts of other factors—honor, reputation, reciprocity (“I will keep my promises to you if you keep yours to me.”), and simple honesty, for example—also contribute. The debts that underdeveloped countries owe to lenders in developed countries are a current example. These debts total in the trillions of dollars, and of course the lenders to whom they are owed would never have lent the money in the first place if they did not think the loans would be valuable. Yet there are no courts with the power to compel these countries to pay their debts, and during the international debt crisis of the 1980s, there was apprehension that some countries would unilaterally renounce their contracts.67 Of course many of these loans are now valued at less than their face values, but they still have some value—trillions of dollars of it. Fuller and Perdue’s assertion that “[t]he expectancy, regarded as a present value, is not the cause of legal intervention but the consequence of it,”68 is false, as this example demonstrates.

65. SLAWSON, supra note 2, at 9-11.
68. Fuller & Perdue, supra note 5, at 59-60.
E. Identifying the General Enforceability of Promises as the Legal Basis for the Credit System

It was not, as Fuller and Perdue maintained, the general enforceability of promises that made contract rights property, rather, as explained earlier, it was the general assignability of contract rights.

F. Asserting that Expectation Damages Are Generally Easier to Prove than Reliance Damages

Fuller and Perdue’s final conclusion was that, although there were no good reasons for protecting the expectation interest, a good reason for using the expectation measure of damages as the norm was that it generally results in the same recovery as the reliance measure would and is easier to prove. I have already explained why the two measures do not generally result in the same recovery. I will now explain why the expectation measure is also not generally easier to prove.

As even first year law students now learn, the very opposite is the case: Reliance damages are always easier to prove than expectation damages. Reliance damages consist of the costs the plaintiff incurred after the contract was made and before the defendant breached. Expectation damages consist of these costs, plus all the other costs the plaintiff incurred, plus the profit the plaintiff would have made if the defendant had not breached. Thus, proving expectation damages is always more difficult, because it always requires proving the reliance damages and more.

It is for this reason that the most common use of the reliance measure is to obtain a recovery when the plaintiff cannot prove the profits he would have made if the defendant had not breached. For example, in Security Stove & Manufacturing Co. v. American Railways Express Co., the defendant contracted to deliver twenty-one packages to Atlantic City, New Jersey, in time for the plaintiff to use their contents to construct an exhibit of its oil burning furnace at a convention of the American Gas Association. The defendant failed to deliver one of the packages that contained a crucial part until the convention was over. The court awarded the plaintiff its reliance damages on the ground that a plaintiff is entitled to them if he cannot prove his expectation damages.

69. Id. at 60.
70. See supra section II.B.
71. Fuller & Perdue, supra note 5, at 60-62.
72. See supra sections III.A-III.B.
73. Farnsworth, supra note 1, § 12.16 (making the same point).
74. 51 S.W.2d 572 (Mo. Ct. App. 1932).
75. Id. at 577.
V. CONCLUSION

The expectation measure, and only it, meets the needs of the principal institutions in a modern market economy in which contracts are used, in four critical respects. It provides a remedy for every breach. It makes contracts enforceable as soon as they are made. It compensates the injured party for what he has lost, as the institution concerned values that loss. And it provides the right incentives for decisions whether to breach. Neither of the other measures meets these institutions' needs in even one of these respects. These institutions would collapse if damages for breach of contract were limited to either of the other measures. The three interests thesis is much too flawed to be of use for comparing the merits of the three measures.
[53*] It is convenient to distinguish three principal purposes which may be pursued in awarding contract damages. These purposes, and the situations in which they become appropriate, may be stated briefly as follows:

First, the plaintiff has in reliance on the promise of the defendant conferred some value on the defendant. The defendant fails to perform his promise. The court may force the defendant to disgorge the value [54*] he received from the plaintiff. The object here may be termed the prevention of gain by the defaulting promisor at the expense of the promisee; more briefly, the prevention of unjust enrichment. The interest protected may be called the restitution interest.

For our present purposes it is quite immaterial how the suit in such a case be classified, whether as contractual or quasi-contractual, whether as a suit to enforce the contract or as a suit based upon a rescission of the contract. These questions relate to the superstructure of the law, not to the basic policies with which we are concerned.

Secondly, the plaintiff has in reliance on the promise of the defendant changed his position. For example, the buyer under a contract for the sale of land has incurred expense in the investigation of the seller's title, or has neglected the opportunity to enter other contracts. We may award damages to the plaintiff for the purpose of undoing the harm which his reliance on the defendant's promise has caused him. Our object is to put him in as good a position as he was in before the promise was made. The interest protected in this case may be called the reliance interest.

Thirdly, without insisting on reliance by the promisee or enrichment of the promisor, we may seek to give the promisee the value of the expectancy which the promise created. We may in a suit for specific performance actually compel the defendant to render the promised performance to the plaintiff, or, in a suit for damages, we may make the defendant pay the money value of this performance. Here our object is to put the plaintiff in as good a position as he would have occupied had the defendant performed his promise. The interest protected in this case we may call the expectation interest.

[56*] It is obvious that the three "interests" we have distinguished do not present equal claims to judicial intervention. It may be as-

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sumed that ordinary standards of justice would regard the need for judicial intervention as decreasing in the order in which we have listed the three interests. The "restitution interest," involving a combination of unjust impoverishment with unjust gain, presents the strongest case for relief. If, following Aristotle, we regard the purpose of justice as the maintenance of an equilibrium of goods among members of society, the restitution interest presents twice as strong a claim to judicial intervention as the reliance interest, since if A not only causes B to lose one unit but appropriates that unit to himself, the resulting discrepancy between A and B is not one unit but two.

On the other hand, the promisee who has actually relied on the promise, even though he may not thereby have enriched the promisor, certainly presents a more pressing case for relief than the promisee who merely demands satisfaction for his disappointment in not getting what was promised him. In passing from compensation for change of position to compensation for loss of expectancy we pass, to use Aristotle's terms again, from the realm of corrective justice to that of distributive justice. The law no longer seeks merely to heal a disturbed status quo, but to bring into being a new situation. It ceases to act defensively or restauratively, and assumed a more active role. With the transition, the [57*] justification for legal relief loses its self-evident quality. It is as a matter of fact no easy thing to explain why the normal rule of contract recovery should be that which measures damages by the value of the promised performance. Since this "normal rule" throws its shadow across our whole subject it will be necessary to examine the possible reasons for its existence. It may be said parenthetically that the discussion which follows, though directed primarily to the normal measure of recovery where damages are sought, also has relevance to the more general question, why should a promise which has not been relied on ever be enforced at all, whether by a decree of specific performance or by an award of damages?

WHY SHOULD THE LAW EVER PROTECT THE EXPECTATION INTEREST?

Perhaps the most obvious answer to this question is one which we may label "psychological." ... Whether or not he has actually changed his position because of the promise, the promisee has formed an attitude of expectancy such that a breach of the promise causes him to feel that he has been "deprived" of something which was "his." Since this sentiment is a relatively uniform one, the law has no occasion to go back of it. It accepts it as a datum and builds its rule about it.

The difficulty with this explanation is that the law does in fact go back of the sense of injury which the breach of a promise engenders.[58*] No legal system attempts to invest with juristic sanction all promises. Some rule or combination of rules effects a sifting out for enforcement of those promises deemed important enough to society to
justify the law’s concern with them. . . . Therefore, though it may be assumed that the impulse to assuage disappointment is one shared by those make and influence the law, this impulse can hardly be regarded as the key which solves the whole problem of the protection accorded by the law to the expectation interest.

A second possible explanation for the rule protecting the expectancy may be found the much-discussed “will theory” of contract law. This theory views the contracting parties as exercising, so to speak, a legislative power, so that the legal enforcement of a contract becomes merely an implementing by the state of a kind of private law already established by the parties. . . .

. . . This attitude finds a natural application to promises to pay a definite sum of money. But certainly as to most types of contracts it is vain to expect from the will theory a ready-made solution for the problem of damages.

A third and more promising solution of our difficulty lies in an economic or institutional approach. . . . In a society in which credit has become a significant and pervasive institution, it is inevitable that the expectancy created by an enforceable promise should be regarded as a kind of property, and breach of the promise as an injury to that property. . . .

The most obvious objection which can be made to the economic or institutional explanation is that it involves a petitio principii. A promise has present value, why? Because the law enforces it. “The expectancy,”[60*] regarded as a present value, is not the cause of legal intervention but the consequence of it. This objection may be reinforced by a reference to legal history. Promises were enforced long before there was anything corresponding to a general system of “credit,” and recovery was from the beginning measured by the value of the promised performance, the “agreed price.” It may therefore be argued that the “credit system,” when it finally emerged was itself in large part built on the foundations of juristic development which preceded it.

The view just suggested asserts the primacy of law over economics; it sees law not as the creature but as the creator of social institutions. The shift of emphasis thus implied suggests the possibility of a fourth explanation for the law’s protection of the unrelied-on expectancy, which we may call juristic. This explanation would seek a justification for the normal rule of recovery in some policy consciously pursued by courts and other lawmakers. . . .

What reasons can be advanced? In the first place, even if our interest were confined to protecting promisees against an out-of-pocket loss, it would still be possible to justify the rule granting the value of the expectancy, both as a cure for, and as a prophylaxis against, losses of this sort.
It is a cure for these losses in the sense that it offers the measure of recovery most likely to reimburse the plaintiff for the (often very numerous and very difficult to prove) individual acts and forbearances which make up his total reliance on the contract. If we take into account “gains prevented” by reliance, that is, losses involved in foregoing the opportunity to enter other contracts, the notion that the rule protecting the expectancy is adopted as the most effective means of compensating for detrimental reliance seems not at all far-fetched. Physicians with an extensive practice often charge their patients the full office call fee for broken appointments. Such a charge looks on the face of things like a claim to the promised fee; it seems to be based on the “expectation interest.” Yet the physician making the charge will quite justifiably regard it as compensation for the loss of the opportunity to gain a similar fee from a different patient. This foregoing of other opportunities is involved to some extent in entering most contracts, and the impossibility of subjecting this type of reliance to any kind of measurement may justify a categorical rule granting the value of the expectancy as the most effective way of compensating for such losses.[61*]

In seeking justification for the rule granting the value of the expectancy there is no need, however, to restrict ourselves by the assumption, hitherto made, that the rule can only be intended to cure or prevent the losses caused by reliance. A justification can be developed from a less negative point of view. It may be said that there is not only a policy in favor of preventing and undoing the harms resulting from reliance, but also a policy in favor of promoting and facilitating reliance on business agreements. As in the case of the stoplight ordinance we are interested not only in preventing collisions but in speeding traffic. Agreements can accomplish little, either for their makers or for society, unless they are made the basis for action. When business agreements are not only made but are also acted on, the division of labor is facilitated, goods find their way to the places where they are most needed, and economic activity is generally stimulated. These advantages would be threatened[62*] by any rule which limited legal protection to the reliance interest. Such a rule would in practice tend to discourage reliance. The difficulties in proving reliance and subjecting it to pecuniary measurement are such that the business man knowing, or sensing, that these obstacles stood in the way of judicial relief would hesitate to rely on a promise in any case where the legal sanction was of significance to him. To encourage reliance we must therefore dispense with its proof. For this reason it has been found wise to make recovery on a promise independent of reliance, both in
the sense that in some cases the promise is enforced though not relied on (as in the bilateral business agreement) and in the sense that recovery is not limited to the detriment incurred in reliance.