Principled Pluralism and Contract Remedies

C. Scott Pryor
Regent University School of Law

Follow this and additional works at: https://scholarlycommons.pacific.edu/mlr
Part of the Contracts Commons

Recommended Citation
Available at: https://scholarlycommons.pacific.edu/mlr/vol40/iss3/4

This Article is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in McGeorge Law Review by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.
Principled Pluralism and Contract Remedies

C. Scott Pryor*

I. EARLY ANALYSIS OF THE EXPECTATION INTEREST ........................................ 724

II. EXPECTATION UNDER THE MICROSCOPE .................................................. 726
   A. Duty-Based Justification of the Expectation Measure .......................... 727
   B. Consequentialist Explanations for the Expectation Measure.............. 729

III. PLURALISM IN THE MARKETPLACE OF THEORY ....................................... 732
   A. Rawlsian Integration ............................................................................. 733
   B. Problems with Integration ................................................................... 739

IV. PRINCIPLED PLURALISM ............................................................................ 740
   A. Law, Mandate, the Image of God, and Sin ............................................ 741
   B. Prolegomena to a Transcendent Justification for Private Law............. 746
   C. Transcendent Justifications in a Liberal Democracy............................ 751

V. CONCLUSION ................................................................................................ 754

Contract doctrine with respect to remedies is straightforward. The Restatement (Second) of Contracts describes the “expectation interest” as the benefit of a bargain that situates a promisee in the position of the anticipated performance. From this position, the Restatement goes on to describe the remedy for breach of contract: “[T]he injured party has a right to damages based on his expectation interest . . . .” Treatise writers have long agreed that an aggrieved party is entitled to compensation for any abridgement of the promised state of affairs. However, the straightforward notion of compensation for expectation

* Professor of Law, Regent University School of Law. J.D., University of Wisconsin Law School, 1980. M.A., Reformed Theological Seminary, 1997. Thanks for assistance with this piece are rightfully due to many, including the Regent University School of Law and the American Center for Law and Justice for their financial support, colleagues Tom Folsom, Mike Hernandez, and Craig Stern for their valuable insights, and Bethany Den Boer for her editorial assistance. I also wish to thank the organizers and participants of the Fourth International Conference on Contracts for giving me an opportunity to present an earlier version of this article.

1. RESTATEMENT (SECOND) OF CONTRACTS § 344(a) (1981). The Uniform Commercial Code (UCC) likewise protects the aggrieved party’s expectation interest. U.C.C. § 1-305(a) (2001) (“The remedies provided by [the Uniform Commercial Code] must be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed . . . .”).

2. RESTATEMENT (SECOND) OF CONTRACTS § 347.

3. See, e.g., JOSEPH M. PERILLO & JOHN D. CALAMARI, CALAMARI AND PERILLO ON CONTRACTS 564 (5th ed. 2003) (“For breach of contract, the law of damages seeks to place the aggrieved party in the same economic position the aggrieved party would have attained if the contract had been performed.”); SAMUEL WILLISTON, THE LAW OF CONTRACTS 2392 (1920) (“In fixing the amount of these damages, the general purpose of the law is, and should be, to give compensation—that is, to put the plaintiff in as good a position as he would have been in had the defendant kept his contract.”); JOSEPH CHITTY, JR., A PRACTICAL TREATISE ON THE LAW OF CONTRACTS 341 (1826) (“[T]he measure of damages was, not the mere difference in price between the two kinds of goods, but the amount of the [consequential] damages and costs recovered in the action against
belies the many, and contradictory, efforts to explain it. In the nineteenth and twentieth centuries, common law courts and writers alike described the legally protected interest of an aggrieved party in terms of expectation. The civil law tradition concurred. Still, no one theorized about why the law should vindicate the aggrieved party’s expectation rather than, say, the losses occasioned by the breach.

The principle of measuring damages by the value of the unrealized expectation remained largely unexamined until 1936. Beginning in the 1960s, academics have worked hard to explain what justifies the expectation measure of contract damages. Parts I and II of this Article review the origins and development of efforts to justify the expectation measure. Over the past thirty years, those efforts have fallen into two broad categories—autonomy and utility—paralleling two of the leading contemporary schools of ethics. However, the compatibility and the commensurability of these efforts have not been clear. Thus, in Part III, I review and criticize the efforts of scholars in the past decade to ground utility in autonomy through the insights of John Rawls and other contractualist thinkers. Finally, in Part IV, I outline my theory of principled pluralism, by which I suggest a unitary justification of autonomy and utility. Because I ground this justification with an appeal to a transcendent order, I also anticipate some concerns about the legitimacy of such a theory in a pluralistic, secular polity.

I. EARLY ANALYSIS OF THE EXPECTATION INTEREST

The dogmatic slumber of the law’s standard recognition of expectation as the measure of the remedy for breach of contract was shattered in 1936. In that year, L.L. Fuller and William Perdue published their critique of the nonchalance of the common law’s vindication of the promisee’s expectation. Characterizing
expectation damages as an award for something that never existed (i.e., a "queer kind of 'compensation'"). Fuller and Perdue challenged the common law’s reification of the expectation interest. Drawing on the Aristotelian notion of the virtue of justice as compensation for something that has been lost, Fuller and Perdue believed that compensation for no more than expenditures made in reliance on a promise would maintain "an equilibrium of goods among members of society." They went on to assert that an award for a promisee’s disappointed expectation represented something more:

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.

Characterizing the expectation measure of contract damages as distributive justice deeply subverted the commonplace understanding of contracts as private law. The role of the civil authority in vindicating matters of corrective justice seems self-evident. Under virtually any political theory, a purpose of the state is to guard against individual, involuntary redistribution of property. Matters of distributive justice, however, require a public law justification, which had never been provided for expectation damages.

Rather than explaining why there is a public interest in taking wealth from one private contract party and giving it to another, Fuller and Perdue tried to develop a theory of expectation that would be consistent with the private character of contract law. Fuller and Perdue began their search for a justification for the expectation measure of damages by considering and quickly rejecting a number of common reasons why the law should measure loss by expectation.

9. Id. at 53.
10. Id. at 56.
11. Id.
12. See Peter Benson, The Unity of Contract Law, in The Theory of Contract Law: New Essays 118, 122 (Peter Benson ed., 2001) ("Fuller’s characterization of the expectation interest in terms of distributive justice directly challenges the traditional understanding. For traditionally it was always supposed... that contract law, like other parts of private law, comes under corrective justice... ").
14. First, the disappointed promisee’s psychological sense of injury was deemed insufficient because the law hardly awards damages for all such feelings of loss. See Fuller & Perdue, supra note 8, at 58 ("[T]hough it may be assumed that the impulse to assuage disappointment is one shared by those who 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."). That the law awards expectation in some cases (bargained-for exchanges) but not in others (gratuitous unrelied-upon promises) demonstrates that something other than the promisee’s sense of loss is at its root. For similar reasons, it would seem, Fuller and Perdue would have rejected a duty-based explanation for the expectation interest. Because the law does not vindicate donative promises, the
Anticipating the insights of neo-classical economics, Fuller and Perdue ultimately considered the utility of judicial vindication of the expectation interest. They recognized that market capitalism had for some time treated the contractual expectation as a sort of property, and the commodification of the expectation interest had obviously contributed greatly to the modern form of economic life. They further acknowledged that participants in an economy based on credit come to understand that that which the promisee believes to have value is valuable. In other words, the psychology of anticipation becomes the economy of expectation. The economic value of expectation was not "property" before the law recognized it, but neither did the law vindicate the expectation interest before the market economy first developed. Embedded as they were in an academic tradition of Legal Realism and the current New Deal approach to state intervention in the economy, Fuller and Perdue did not offer any further justification for the authority of the civil government to engage in economic engineering. The value of increasing economic production was assumed, and the authority of the law to encourage it remained unquestioned.

II. EXPECTATION UNDER THE MICROSCOPE

Since Fuller and Perdue’s article, legal scholars have expended enormous efforts to refine an answer to the fundamental question: why expectation? Various theories have been proposed. First, in keeping with the root of the word “remedy,” theories in the deontological tradition are backward-looking and moral duty to keep self-imposed promissory obligations cannot be the justification for the legal remedy of expectation damages. Secondly, while the concept of contract as private law may explain why the courts have recognized breach of duty as a legal wrong, it cannot explain the expectation measure of damages. Most contracts do not expressly provide for the remedy of expectation damages or, for that matter, any remedy at all (and even when they do, courts critically scrutinize such liquidated damages provisions).

15. *Id.* at 59 ("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.").

16. *Id.* ("The essence of a credit economy lies in the fact that it tends to eliminate the distinction between present and future (promised) goods. Expectations of future values become, for purposes of trade, present values.").

17. Ultimately, even this was not enough to justify the law’s vindication of the expectation interest for Fuller and Perdue. From their perspective, it was the law’s protection of the expectation that created the economic utility of reification, not vice versa: “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.” *Id.* at 59-60. Fuller and Perdue believed instead that vindication of the expectation interest was the horse before the cart of market capitalism.


On deontological accounts of morality, agents cannot make certain wrongful choices even if by doing so the number of wrongful choices will be minimized (because other agents will be prevented from engaging in similar wrongful choices). For deontologists, what makes a choice right is its conformity with a moral norm. Such norms are to be simply obeyed by each moral agent; such
presuppose duty at their core.\textsuperscript{20} Remedies are understood to repair an injury; in contracts, loss caused by the failure of one party to do what was promised. Various duty-oriented theories of contract emphasize different foundations,\textsuperscript{21} but none explicitly draw on a transcendent justification for that duty. In any event, under deontological theories, contract remedies are a matter of right.

The leading alternative contemporary approach to contract remedies is forward-looking and provides analytic rigor to Fuller and Perdue’s principal argument in favor of expectation. Vindicating the expectation interest is a means to the end of facilitating efficient economic relations.\textsuperscript{22} In other words, remedies are justified because they are useful; remedies are useful because they create incentives for parties to behave more efficiently;\textsuperscript{23} and efficiency is to be pursued because it promotes human welfare.\textsuperscript{24} The range of behaviors that remedies can modify varies from the decision to perform or breach, to the myriad of pre-performance decisions the promisee may make in reliance on a promise.\textsuperscript{25} But from all points of the contracting process, efficiency emphasizes evaluating the efficiency of particular rules.

\textbf{A. Duty-Based Justification of the Expectation Measure}

Any deontological approach to contract remedies must maintain that there are fundamental ethical norms that constrain the pursuit of good consequences,
however "good" is defined. Duty, rather than results, is the metric of deontological ethics. Consequences, therefore, cannot determine the ethical rule.\textsuperscript{26} A deontological approach must then translate ethics into law. The latter effort has proved to be a difficult task.

Charles Fried is the best-known proponent of equating the goal of contract law with the ethical duty of promise-keeping.\textsuperscript{27} In \textit{Contract as Promise},\textsuperscript{28} Fried draws on the Kantian insight of the categorical imperative, asserting that:

The moralist of duty . . . sees \textit{promising} as a device that free, moral individuals have fashioned on the premise of mutual trust, and which gathers its moral force from that premise. The moralist of duty thus posits a general obligation to keep promises, of which the obligation of contract will be only a special case . . . .\textsuperscript{29}

According to Fried, because human beings are embedded in time, they cannot presently act freely in the future. To maximize one's temporally limited freedom, one may promise to do something for someone else in the future in return for a present benefit or comparable promise. Keeping promises about one's actions in the future thus has the paradoxical effect of increasing one's freedom in the present. In Fried's view, it is ultimately the duty of promise-keeping, rather than the contingent consequences of wealth maximization, that justifies contract law.\textsuperscript{30} The Right has primacy over the Good.

The problem confronting the deontological theorists' approach to contract law is their failure to deliver convincing explanations—or even persuasive criticisms—of many existing contract rules. Duty may justify contract formation rules but not much more. In other words, increasing individual autonomy by rigorously enforcing promises may justify why an abstract regime of state-sanctioned rules for contracts is justified or at least warranted.\textsuperscript{31} But legal recognition of the moral duty to keep promises gives, at best, only a hint of what

\begin{itemize}
\item \textsuperscript{26} See Alexander & Moore, \textit{supra} note 18.
\item \textsuperscript{27} See Dori Kimel, From Promise to Contract: Towards a Liberal Theory of Contract 7 (2003) ("[Charles Fried's] \textit{Contract as Promise} is the most celebrated and probably the most influential modern defence of a thesis by that name . . . .").
\item \textsuperscript{28} Charles Fried, Contract as Promise: A Theory of Contractual Obligation (1981).
\item \textsuperscript{29} \textit{Id.} at 17.
\item \textsuperscript{31} But see C. Scott Pryor, Consideration in the Common Law of Contracts: A Biblical-Theological Critique, 18 Regent U. L. Rev. 1, 26-29 (2005) (discussing ethical incoherence of categorical freedom of the will).
\end{itemize}
any specific rules (like expectation damages) should look like. Should a duty-based justification for contract remedies demand performance at all costs, permit substitutionary compensation, or rely on only moral opprobrium as a remedy for breach? A leading duty theorist, Stephen A. Smith, has simply punted: “[T]he rules regarding remedies for breach of contract are [not] a part of ‘contract’ law, strictly speaking.” On the other hand, Seana Shiffrin, another deontological academic, strongly criticizes the law for not regularly remedying contract breaches by ordering performance but instead permitting monetary compensation at the breacher’s option. Aditi Bagchi is also concerned that any coercive sanctions for failure to keep a promise undermine the very morality of promise-keeping. In short, duty has proved to be a weak reed on which to justify judicial protection of the expectation interest.

B. Consequentialist Explanations for the Expectation Measure

The raft of expositions as to the welfare-enhancing nature of the expectation measure of damages testifies to the dominance of this legal theory. Consequentialism, as an ethical theory, seeks to justify rules by their results: the Good precedes the Right. And the consequence sought to be advanced in most

32. But see KIMEL, supra note 27, at 93 (arguing that expectation damages do a better job protecting entitlement created by contract than other measures).

33. SMITH, supra note 21, at 388. Smith does not leave the justification of remedies unmentioned. When he gets to remedies, he turns to corrective justice to explain why compensation for breach of contract is appropriate:

The general idea underlying corrective justice is that individuals have a duty to repair or “correct” wrongful losses they have caused. What counts as wrongful is not specified by the concept of corrective justice; corrective justice is meant to explain (secondary) duties to repair rather than (primary) duties not to cause wrongful losses. Primary duties must be explained on other grounds.

Id. at 392; see also Benson, supra note 12, at 125 (limiting duty-based theory of contract law to an intra-systemic account, eschewing consideration of foundational justification).


[A] promisor is morally expected to keep her promise through performance. Absent the consent of the promisee, the moral requirement would not be satisfied if the promisor merely supplied the financial equivalent of what was promised. ... If contract law ran parallel to morality, then contract law would ... require that promisors keep their promise as opposed merely to paying off their promises.

Id.

35. See Aditi Bagchi, Contract v. Promise, SCHOLARSHIP PA. L., Paper 176, at 2 (2007), available at http://lsr.nellco.org/cgi/viewcontent.cgi?article=1180&context=upenn/wps (“Contractual obligation is then thought to reinforce promissory obligation. To the contrary, those private promises which are given the status of contract are not thereby elevated. ... A promise marked as contractual actually loses (at least some of) its promissory quality.”). Dori Kimel makes a similar, if less extravagant, point when he observes that between persons sharing an on-going personal relationship “the insistence on a contract can ... be offensive.” KIMEL, supra note 27, at 56. In the more typical contracting situation, however, the desire for an enforceable contract would not be out of place. Id.


37. See Walter Sinnott-Armstrong, Consequentialism, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY
accounts of contract remedies is efficiency.38 Justification of compensation for injury to the expectation interest tracks what Fuller and Perdue wrote over seventy years ago: Protection of the expectation interest makes possible a flourishing market economy.39 Some forty years later, the authors of The Economics of Contract Law40 were among the first to apply rigorous economic reasoning to the issue. These early law and economics scholars focused on the efficiency of performing contractual obligations.41 On the one hand, they concluded that at least some legal sanctions for nonperformance were necessary to sustain the welfare-increasing apparatus of contracting due to the twin dangers of party opportunism and the occurrence of unanticipated contingencies.42 On the other hand, excessive legal sanctions might diminish the efficient result.43 Measuring recovery by the expectation interest would, they concluded, do the trick by giving an incentive to perform,44 but not so much of an incentive as to compel performance when inefficient.45 More recent “second generation” economic analyses have focused less on the narrow decision of whether to perform or breach, and more on the host of other incentives that can be affected by the choice of contract remedies. The efficiency of contracting parties’ interim reliance on contractual obligations—that is, the nature and extent of actions taken or forborne by a party prior to the time the other’s performance is due—is also affected by the remedy afforded and its measure.46 Moreover, contract remedies

(Edward N. Zalta ed., 2008), available at http://plato.stanford.edu/entries/consequentialism/ (on file with the McGeorge Law Review) (“Consequentialism = whether an act is morally right depends only on consequences (as opposed to the circumstances or the intrinsic nature of the act or anything that happens before the act).”).

38. See, e.g., Craswell, supra note 23, at 21 (“[T]he hallmark of this class of theories is simply that they rest the case for enforcing a promise on some method of assessing the efficiency of the promised actions—as opposed, say, to some deontological commitment that did not depend upon the effects on individual welfare.”).

39. See supra notes 14-17 and accompanying text.


41. See Craswell, supra note 23, at 22 (“[T]he modern economic analysis began in the early 1970s, with articles that did indeed focus on the efficiency of the promised actions.”).

42. What might in an alternate vocabulary be called the results of sin and effects of providence.

43. Specifically, it might diminish the ability of the parties to utilize “efficient breach.” See POSNER, supra note 22, at 103 (“[T]he fundamental function of contract law . . . is to . . . encourage the optimal timing of economic activity and . . . obviate costly self-protective measures.”).

44. Id. at 132 (“Usually the objective of giving the promisor an incentive to fulfill his promise unless the result would be an inefficient use of resources . . . can be achieved by giving the promisee his expected profit on the transaction.”).

45. Id. at 133.

[1]In some cases a party is tempted to break his contract simply because his profit from breach would exceed his profit from completion of the contract. If it would also exceed the expected profit to the other party from completion of the contract, and if damages are limited to the loss of that profit, there will be an incentive to commit a breach. But there should be.

Id.

46. See Craswell, supra note 23, at 29.

[M]aking A’s promise enforceable will increase B’s incentive to rely in one respect, since enforceability will usually increase the probability that A will perform. . . . But the exact effect on B’s reliance incentives may depend not only on enforceability vel non, but also on the exact nature of the enforceability, including the measure of damages B will collect if A fails to perform.
even influence pre-performance actions, such as a party’s precautions to guard against the possibility of breach.\(^\text{47}\)

The increasing breadth of issues related to contract remedies and the depth and rigor of economic analyses are impressive. Yet, in one sense, the very increase in the range of contractual behaviors to be considered undermines the usefulness of any utility analysis. For example, a rule increasing the efficiency of the decision to perform or breach may decrease efficiencies of reliance or precaution. Moreover, parties must make more than end-game and interim contract decisions; they must decide about matters like price and other terms, and even the identity of parties with whom to contract. Any of these decisions can be made more or less efficiently. If increasing efficiency warrants the rules of contract law,\(^\text{48}\) then the efficiency of every rule must be considered from all points in the contracting process.\(^\text{49}\) The effect of multiple analysis points, however, coupled with the interrelatedness of the rules, makes certainty, and thus predictability, ever more elusive. Moreover, competing understandings of the concept of efficiency make ultimate proof for a theory of contract remedies almost unimaginable.\(^\text{50}\)

In addition to this systemic challenge to efficiency analysis,\(^\text{51}\) there is a widespread fundamental concern about the normative validity of consequentialism in connection with contract remedies. What, after all, justifies efficiency?\(^\text{52}\) Even if judicial rule-crafting increases net social utility, by what authority does the modern state use its coercive powers to do so?\(^\text{53}\) And if the state has the authority to sanction

\(\text{Id.}\)

\(^{47}\) Id. ("[E]nsurability can also affect each side’s incentives to take various precautions that might affect their ability to perform.").

\(^{48}\) For an economic critique of the determinacy of welfare analysis see TREBILCOCK, supra note 30, at 244-48 (summarizing tacit normative assumptions behind apparent precision of economic analysis).

\(^{49}\) See Craswell, supra note 23, at 30.

In addition, once the incentives for reliance are added into the calculus, it is possible for conflicts to arise between the form of enforceability that would optimize the incentives to perform and the form of enforceability that would optimize the incentive to rely. In that case the efficiency of any given form of enforceability will depend on its combined effect on each . . . so some trade-off may have to be made . . . .

\(\text{Id.}\)

\(^{50}\) See, e.g., Eric A. Posner, Economic Analysis of Contract Law After Three Decades: Success or Failure?, 112 YALE L.J. 829, 830 (2003) ("[T]he economic approach does not explain the current system of contract law, nor does it provide a solid basis for criticizing and reforming contract law.").

\(^{51}\) For consideration of other systemic problems, see SMITH, supra note 21, at 119-25 (summarizing "fit" criticisms of efficiency theories of contract law).

\(^{52}\) See, e.g., JAMES GORDLEY, FOUNDATIONS OF PRIVATE LAW: PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT 19 (2006) ("To make normative claims for efficiency, one must assume that it is good for people to satisfy more of their preferences. Why should that be?"); see also JOHN RAWLS, A THEORY OF JUSTICE 22 (1971) (stating that utilitarianism fails as a normative theory of ethics because it does not take seriously the distinction between persons).

\(^{53}\) See Jody S. Kraus, Legal Determinacy and Moral Justification, 48 WM. & MARY L. REV. 1773, 1777 (2007) ("Every state action, by definition, constitutes an exercise of coercion. Unlike individuals operating within the confines of deontic constraints, the state—without exception—requires an affirmative justification
a contract breacher, why should the aggrieved party keep the damages? Deontological arguments are at least tethered to widely-accepted ethical theories; utilitarian arguments are subject to some notorious ethical criticisms. In light of these problems, some utilitarians abstain from offering efficiency as a norm and merely analyze contract law intra-systemically. Others limit application of efficiency analysis to contracts involving impersonal entities such as corporations to which, presumably, deontological rules are irrelevant. In the end, the weaknesses of a purely welfare-based explanation for expectation damages render this explanation unable to serve the justificatory end to which many scholars of law and economics have put it.

III. PLURALISM IN THE MARKETPLACE OF THEORY

The failure of any single theory of contract remedies to justify the practice of protecting the expectation interest is troubling and potentially problematic. Anyone who believes that interpretive theories of law are possible struggles with the fundamental inconsistency of the leading competing theories of remedies. It appears there is no intelligible order in an important area of contract law. This may not be troubling to those for whom only descriptive or historical theories are significant, but even a committed descriptivist should be concerned

for all of its actions.


55. See SMITH, supra note 21, at 127-32 (summarizing moral objections to efficiency justifications for contract remedies).

56. See Craswell, supra note 23, at 23.

My focus . . . is not on the propriety of taking efficiency (however defined) as a goal; but merely on the difference between assessing the efficiency (however defined) of carrying out a promised action, on the one hand, and the efficiency of creating a broad set of incentives, on the other.

Id.

57. See, e.g., Alan Schwartz & Robert E. Scott, Contract Theory and the Limits of Contract Law, 113 YALE L.J. 541 (2003) (arguing that in the context of business contracts, “contract law should facilitate the efforts of contracting parties to maximize the joint gains . . . from transactions. . . .[and] nothing else”). But see Nathan Oman, Corporations and Autonomy Theories of Contract: A Critique of the New Lex Mercatoria, 83 DENV. U. L. REV. 101, 103 (2005) (demonstrating that claims that non-economic theories of contract law, like deontological ones, are irrelevant to inter-corporate transactions, “have been largely repudiated by contemporary economic analysis,” and that “contemporary law and economics explicitly assumes a model of the corporation that is particularly hospitable” to non-economic theories of contract law).

58. See SMITH, supra note 21, at 5 (describing the focus of the book as providing an interpretive account of contract theory that enhances “understanding of the law by highlighting its significance or meaning”).

59. See Benson, supra note 12, at 118 (“In common law jurisdictions at least, there is at present no generally accepted theory or even family of theories of contract.”).

60. See SMITH, supra note 21, at 4-6 (outlining four types of contract theories: historical, prescriptive, descriptive, and interpretive).
that the law’s credibility will be undermined if no one can provide a rational and intelligible account of why courts do what they do.\textsuperscript{61} And, with no prospect of a unified theory on the horizon, the incompatibility of the two leading theories—duty and utility—threatens to unravel the marked convergence of contract law over the last half-century. Unless scholars can generate some sort of widely-accepted justification for contract remedies, future efforts to unify contract law will, to paraphrase Robert Scott, cause the rules of contract law to be pitched at a high level of abstraction with numerous exceptions.\textsuperscript{62} Contract law, with only the appearance of uniformity, will turn out to be worse than inconsistent bodies of law. With the latter, parties can rationally choose their substantive law. With the former, parties will be subject to the unpredictable vagaries of judicial application of formally identical, but practically different, legal standards.\textsuperscript{63}

The separate deficiencies of deontological and consequential theories of contract remedies have prompted a number of scholars to suggest that both must somehow be combined to present a coherent whole.\textsuperscript{64} For my purposes, I will draw on the accounts of three writers who seek to reconcile the antinomies of autonomy and utility. In turn, I will explain why I find these accounts unsatisfactory. Then, I will explain my interpretive theory of how expectation damages can be justified in terms of a specifically theistic approach that can be called "principled pluralism."\textsuperscript{65} I will also deal with an anticipated objection to such an approach arising from contractualist principles of public reason.

A. Rawlsian Integration

Nathan Oman argues that John Rawls’ idea of a “basic structure”\textsuperscript{66} provides a means by which the ideas of autonomy and efficiency can be put into practice simultaneously.\textsuperscript{67} Self-imposed promissory duty is the foundation of a legal

\begin{itemize}
  \item \textsuperscript{61}See Benson, supra note 12, at 118 ("[I]n the absence of such a [comprehensive] theory, how can we vouchsafe the internal consistency and reasonableness which the law claims for its doctrines and principles?").
  \item \textsuperscript{64}See, e.g., Oman, supra note 54, at 834 (“Economic arguments must be combined with some other set of theories if we are to have a complete and coherent account of contract doctrine.”).
  \item \textsuperscript{65}See infra Part IV.
  \item \textsuperscript{66}See John Rawls, Justice as Fairness: A Restatement 10 (Erin Kelly ed., 2001) ("[T]he basic structure of society is the way in which the main political and social institutions of society fit together into one system of social cooperation, and the way they assign basic rights and duties and regulate the division of advantages that arises from social cooperation over time.").
  \item \textsuperscript{67}Oman, supra note 54, at 834.
\end{itemize}
regime for enforcing private contracts. In turn, duty authorizes the implementation of a consequential regime of remedial rules subject to some duty-derived limits. In Oman’s understanding of Rawls, a society’s basic structure is its arrangement of major political and social institutions (civil government, families, formal and informal associations, the structure of the economy, and the like). Beginning with the premise of political liberalism, Rawls concluded that, by its nature, the modern liberal state should advance both freedom and equality. No single set of basic structures best advances these concerns for all peoples, places, and times; but a polity’s political institution—those constitutionally endowed with coercive power—should seek justice (fairness) over efficiency (welfare). Oman builds upon Rawls’ disclaimer that his theory of the relationship between basic structures and political institutions can provide a basis for detailed legal rules. According to Oman, the test for determining the precise form of political institutions “is often indeterminate: it is not always clear which of several constitutions, or economic and social arrangements, would be chosen” from behind the veil of ignorance. “Institutions within the permitted range are equally just . . .”

Oman is content to follow Rawls’ agnosticism at this point, claiming only that the Rawlsian idea of the “basic structure” justifies the institution and abstract principles of contract law. In turn, Oman suggests that efficiency is presumably one of many, equally permissible, means of filling in the blanks, regardless of any criticisms of efficiency. So long as there is a functioning liberal polity, it may choose to distribute goods through private ordering by contractual relationships. For Oman, the rules of such a private ordering can be derived from

---

68. Id. at 866-67.

69. Id. at 866 ("The final version of the vertical integration strategy sees the two values [autonomy and efficiency] as operating so that one value authorizes the other value to proceed in the specification of rules within some limited domain.").

70. See RAWLS, JUSTICE AS FAIRNESS, supra note 66, at 10.

71. But see ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974) (critiquing presuppositions of modern political liberalism from a libertarian perspective).

72. RAWLS, A THEORY OF JUSTICE, supra note 52, at 266.

73. Id.

74. Id. at 201.

75. Id. (emphasis added); see also JOHN RAWLS, A Kantian Conception of Equality, in JOHN RAWLS: COLLECTED PAPERS 254, 262 (Samuel Freeman ed., 1999). But see Kraus, supra note 53, at 1779 (asserting that Rawls’ conclusion was a non sequitur).

76. See Oman, supra note 54, at 866.

The Rawlsian idea of the basic structure provides an example of such a conceptual relationship. Rawls argues for the priority of justice as he defines it. He does not, however, believe that all social relationships must pursue the principles of justice. Rather, he says, these principles apply only to the basic structure of a society. Once that basic structure complies with the rules of justice, society is free to make choices that apparently conflict with demands of justice.

efficiency. Oman thus weds deontology (as a basic structure giving priority to autonomous promissory liability) and utility (as a subsidiary tool for identifying efficient rules).

Jody Kraus is not willing to concede the level of indeterminacy that Oman permits.\textsuperscript{77} Kraus draws on Rawls’ later work, \textit{Political Liberalism},\textsuperscript{78} and concludes that state coercion (including state sanctions such as the expectation measure of damages for breach of contract) can be justified only if two propositions hold: (1) that state action is based on public reasons\textsuperscript{79} and (2) that express, public, judicial reasoning in adjudication is outcome determinative.\textsuperscript{80} Thus, in Kraus’ view of Rawls, the work of law and economics as a normative project is illegitimate as a justification for private law, including contract remedies. The good of wealth-maximization is as much a comprehensive and unique conception of the good as Kantian individual autonomy. Rawlsian political theory must derive from public reasons, and there is no overlapping consensus on the good of wealth maximization.\textsuperscript{81} Thus, normative welfare economics is unsuitable as a first-order principle of public justice: the Right precedes the Good.

Yet, Kraus has left open the possibility that a Rawlsian theory of the justification of private law can nonetheless incorporate much of the insights of economics.\textsuperscript{82} His argument proceeds in three stages. First, civil authorities must have a justifiable reason to act. In other words, public reason must support state interest in a particular institution under a state’s just constitutional arrangements. Kraus uses road building as an example of state action justifiable by public reasoning; authorizing a publicly supported judicial system would be another example.\textsuperscript{83}

\textsuperscript{77.} See Kraus, \textit{supra} note 53, at 1784 (‘‘Any theory that falls short of identifying justifying reasons that determine the outcomes of private law adjudication fails to justify the private law.’’).

\textsuperscript{78.} \textsc{John Rawls}, \textit{Political Liberalism} (1993).

\textsuperscript{79.} This is understood in the Rawlsian sense as the product of overlapping consensuses, none of which are based on a unique conception of the good.

\textsuperscript{80.} Kraus, \textit{supra} note 53, at 1785.


Rawlsian political liberalism thus excludes the religious by drawing the boundaries of public reason so that comprehensive religious doctrines fall outside them for the most part. But it also excludes comprehensive secular doctrines in the same way . . . . Instead it privileges liberal conceptions of justice over their rivals by including the substantive principles, guidelines of inquiry, and political values of a liberal conception of justice . . . but not those of competing, nonliberal conceptions, within the bounds of public reason.

\textit{Id.}; see also \textsc{Nicholas Wolterstorff}, \textit{The Role of Religion in Decision and Discussion of Political Issues}, in \textit{Religion in the Public Square} 67, 90 (Robert Audi ed., 1997).


\textsuperscript{83.} Kraus, \textit{supra} note 53, at 1779.
Second, the public reasons justifying state action may determine the detailed content of the state’s actions. Precisely how to connect justificatory public reasons to specific rules raises difficult questions. Does a state’s authority to create a judicial system extend to that system’s adjudication of private law matters? And, if so, how does it measure an injury to a contractual relationship in terms of the economic value of the promisee’s expectation? What degree of certainty about its justificatory reasons does a legitimately constituted state need before progressing to such second-order issues? The answers to these questions are not a simple matter given Kraus’ tightly drawn theory of the justification of coercive state action. Contrasting the need for justificatory reasons with the degree of their conclusiveness, however, Kraus concludes that:

In all cases... [the] state is justified in acting only on the basis of justifying reasons that conclusively or inconclusively determine the actions it takes. The state is therefore never at liberty to exercise discretion in choosing among possible state actions. But... the state can justify its decisions without undertaking relentless and debilitating Herculean analyses. All it must do is act in an epistemically responsible manner.

In other words, an overlapping consensus favoring a system of private law does not, as such, justify the particular rules of such a system. Nor does the mere justification of a regime of private law justify the state’s arbitrary choice of a particular rule. Unfettered rule-making discretion is inconsistent with the idea of justification (which is entailed by the Rawlsian version of the liberal constitutional order). If there is no reason to prefer expectation to compensation, or vice versa, then the state cannot act. If such were the case—and the parties failed to specify an agreed-upon measure of damages—then no award of damages would be legitimate. However, Kraus also believes that from a Rawlsian perspective, a polity may proceed to specific rules, such as expectation damages, so long as it has some reasonable basis for doing so. In other words, Kraus’ standard of legitimacy for determining rules is not unduly high.

Kraus never reaches a conclusion about the justification for a basic structure like a judicial system with the expectation remedy for breach of contract. Rather, he ends by noting that any justification for a private law regime, as well as its specific rules, must run the gauntlet of political theory. He leaves behind a challenge to legal theorists “to uncover the jurisprudential foundations of their
theories before advancing explanatory or normative claims on their behalf. The jurisprudential claims of the leading legal theories of autonomy and utility must, therefore, first meet the demanding criterion of being the product of an overlapping consensus without amounting to unique conceptions of the good. Once achieved, rule making can proceed subject only to reasonableness.

Sympathizing with Oman, but mindful of Kraus’ reluctance, Robin Kar uses both John Rawls’ and T.M. Scanlon’s versions of contractualism as a platform from which to justify the expectation measure of damages. For Kar’s purposes, the differences between Rawls and Scanlon are immaterial. Contrary to Rawls’ refusal to extend his theory of justice “to individualized interpersonal transactions,” Kar believes that “[Rawls’] account can be read as harmonizing contractualism with a set of contract law rules that are explicitly set up to promote efficiency.” Kar returns to Rawls’ Theory of Justice and concludes, like Kraus, that it is not possible to proceed directly from the existence of a liberal constitutional structure to efficiency-framed rules of contract law. This is the case because, according to Rawls’ second principle of justice, “social and economic inequalities are to be arranged so that they are... to the greatest benefit of the least advantaged.” And, at the very least, it has not been demonstrated that an efficiency-dominated regime of contract law allocates economic inequalities to the “greatest benefit of the least advantaged.” In addition, like Kraus, Kar rejects Oman’s simple assertion that a state may adopt whatever rules it chooses because, under Rawls’ own understanding, the principles of justice do not extend down to the level of specific rules of private law.

But what of the fact that efficiency seems to explain much of contemporary private law? Are we to conclude that the common law systems of property, tort,

89. Id. at 1787.
90. See Kar, supra note 76, at 133-40.
92. Kar, supra note 76, at 117.
93. Id.
94. RAWLS, A THEORY OF JUSTICE, supra note 52.
95. See Kar, supra note 76, at 121 (“These principles of efficiency maximization are also inconsistent with [Rawls’] two principles of justice.”).
96. Id. at 118 (quoting JOHN RAWLS, A THEORY OF JUSTICE 266 (rev. ed. 1999)).
97. Kar observes that Rawls’ second rule of prioritization mandates equality of opportunity over efficiency. Id. at 119. Thus, “[t]o meet this constraint, some limitations on private contracting will... presumably be necessary.” Id. at 120.
98. Id. at 121 (“Notice that neither of these last claims [i.e., that contractualism does not apply to rules of contract law or that contractualism authorizes efficiency-maximizing rules] can be established merely by defining the basic structure of society in a way that leaves the rules governing private transactions out.”).
99. Kar is quick to point out that efficiency cannot explain all of contract doctrine, noting in particular that “efficiency considerations cannot... explain why contractual remedies are owed to specific people, who are the specific victims of the contractual breaches.” Id. at 133. See generally Oman, supra note 54, at 851-59.
and contract are unjustifiable or, at best, unjustified? In a deft combination of Stephen Darwall and John Rawls, Kar argues that a second-person contractualist account of morality justifies not only the private law of contracts but also the widespread—but not universal—use of efficiency as a guide to particular rules of contract law (including expectation damages). First-person accounts of morality are similar to deontological explanations; they are the perspective individuals adopt when asking about a rule’s “capacity to govern us, rationally, as deliberating agents.” Similarly, third-person explanations for moral obligations exist in the perspective that “we take up when we ask questions, or come to conclusions, the validity of which are independent both of their relations to us and our relations to one another.” The first-person perspective reflects a focus on individual autonomy in the Kantian tradition; third-person accounts are similarly autonomy-based but are social rather than individual, Rawlsian instead of Kantian. Unlike Kantian first-person accounts focusing on pure autonomous reason, the second-person perspective on obligations is other-centered. Moreover, unlike Rawlsian third-person accounts of moral obligations that place a denatured self and others behind a veil of ignorance, a second-person account of moral “ought’s” takes the self and the other as they really are: “In Darwall’s view, when we make demands on one another’s conduct, we are taking up the second-person standpoint, and the legitimacy of our claims will ultimately depend in part on whether they are justifiable to the addressees of our demands.” In other words, obligations are not simply a specification of the autonomously rational; nor are they the result of the collective rationality of overlapping consensuses. Instead, obligations arise to the extent that the reasons one proffers would be sufficient for a rational other.

Of course, no basic structure of private law could survive with a case-by-case examination of the obligation-inducing reasons proffered by a promisee and their sufficiency to a particular promisor. So what happens if we take Darwall’s second-person account of obligations behind Rawls’ veil of ignorance and apply the combination to the question of contract remedies?

(outlining the problem that bilateral nature of contract remedies presents for efficiency-based justifications of private law).


102. Id. (quoting Robin Bradley Kar, Hart’s Response to Exclusive Legal Positivism, 95 GEO. L.J. 393, 426 (2007)) (internal quotation marks omitted).

103. Id. at 135.
With respect to the issue of expectation damages, Kar concludes that:

[Rational] people reasoning from behind the veil of ignorance would . . . presumably agree to a rule that requires contracting parties to excuse one another’s non-performance in circumstances where expectation damages are paid. This is because they would not lose anything of value by adopting such a limitation on remedies, and because they would obtain the ability to capitalize on new sources of increased welfare production that arise from changed circumstances.

In other words, an inducement by one potential contracting party to the welfare-maximizing nature of the substitutionary remedy of expectation damages and the efficient breach would, at least in Kar’s view, be persuasive to any other rational contracting party. Given the fundamental Rawlsian conception of justice as fairness, “[a] rule requiring parties to excuse others in these circumstances will presumably be the price of having the right to the excuse oneself.” The other-regarding nature of the second-person perspective thus does not rule out considerations of utility.

B. Problems with Integration

Oman, Kraus, and Kar thus effectively build upon each other’s attempts to ground private law legal doctrine in Rawlsian or other contractualist political theory. While each, in turn, advances the project, all of them face the weaknesses of Rawlsian or other contractualist political theories generally. Two problems stand out. First, no contractualist contends that there is, or has been, an actual “contract” among the members of a polity. Contractualism is simply a heuristic device. It assumes the givenness of a liberal democratic constitutional regime and works within that presupposition; contractualism does not attempt to justify its fundamental assumptions of freedom and equality. Second, contractualism and Darwall’s second-person perspective do little more than articulate the moral intuitions of contemporary western liberalism. The arguments of contractualism have little traction in a debate with the mandates of an illiberal ideology such as racism. Furthermore, justifying a moral obligation by presenting an argument with which no rational person could disagree offers an all-too-convenient “out” in the event of an impasse: anyone who disagrees is simply not being rational.

---

104. Kar also believes that second-person contractualism solves the vexing problems of a purely bilateral remedial scheme and also justifies applying coercive sanctions to breach of unrelieved-upon executory obligations. Id. at 136-38.
105. Id. at 138.
106. Id.

When we try to discover reasonable moral standards for the conduct of individuals and then try to integrate them with fair standards for the assessment of social and political institutions, there seems
Each of the leading contractual theories has something to offer both descriptively and prescriptively. Autonomy suggests that contracting should be permitted as a social practice. Utility augments social practice with law by noting that the problems of opportunism and transaction costs can be reduced if legal sanctions are added to the mix. Combining these theories has proved difficult, but the efforts have been helpful nonetheless. Use of the second-person perspective in a contractualist context certainly expands the opportunity for a political theory that accounts for much of contemporary private law, even if it ultimately cannot justify itself. In any event, to the extent that a Rawlsian approach to unifying autonomy and efficiency is problematic, there are few other meta-theories in contention.\textsuperscript{108}

IV. PRINCIPLED PLURALISM\textsuperscript{109}

I have previously described in another article a theistic framework for analyzing contract doctrine.\textsuperscript{110} I evaluated the doctrine of consideration from three perspectives: the normative, the situational, and the existential.\textsuperscript{111} In my account, no satisfactory way of fitting the two together. They respond to opposing pressures which cause them to break apart.

Id.; see also id. at 63 ("We can get closer [to unanimity for egalitarianism] through political institutions, but a gap remains which can be closed only by a human transformation that seems, at the moment, utopian . . . .").

108. See Kar, supra note 76, at 101 ("[C]ontactualism is commonly thought of as the most promising and robust theoretical alternative to consequentialist accounts of moral and political right."). James Gordley’s neo-scholastic revival represents a third approach to explaining, if not justifying, contract law. See generally GORDLEY, supra note 52. Gordley argues that only in the rearticulation of Roman law in terms of Aristotelian categories by the late Scholastics can we find a historically grounded explanation for the remedy of expectation damages. See id. at 388-95. However, Gordley’s approach to contract law and remedies has not yet had a significant impact in the world of contract theory. For a critical review of Gordley’s Aristotelian justification of private law, see Stephen A. Smith, Troubled Foundations for Private Law, 21 CAN. J. L. & JURISPRUDENCE 459 (2008).

109. The concept of “principled pluralism” is developed and applied at length in JAMES W. SKILLEN, RECHARGING THE AMERICAN EXPERIMENT: PRINCIPLED PLURALISM FOR GENUINE CIVIC COMMUNITY (1994). As the title suggests, Skillen focused his attention on the public constitutional/legal order rather than private law. Nonetheless, Skillen’s conceptualization of the liberal order in terms of structural and confessional pluralism is also useful when the justification of private law is considered. “Structural pluralism,” according to Skillen, “is the diversity of organizational competencies and social responsibilities” that have come to be in the course of history of a nation (e.g., family, schools, the arts, empirical science, etc.). Id. at 83. Structural pluralism evidences the communitarian insight that there are legitimate, free-standing social orders that exist apart from the political state; it is not horizontally omnicientent. “Confessional pluralism,” by contrast, presumes “that [civil] government is not competent to decide on behalf of citizens what their religious obligations and orientations may be.” Id. at 84. In other words, in neither is the state vertically omnicientent. Combining these two insights leads Skillen to conclude that “[c]ivil government’s competence to establish public justice coupled with its incompetence to define and enforce religious orthodoxy leads to a civic-moral conclusion that there should be fair and equitable confessional pluralism.” Id. (emphasis in original). In Rawlsian terms, all comprehensive viewpoints are equal and each is free to advance its claims subject to ordinary constitutional processes and the fundamental constraints of structural pluralism.

110. See generally Pryor, supra note 31 (analyzing and critiquing considerations from the normative, situational, and existential perspectives).

111. Id. at 11-19.
the three perspectives are united by the doctrines of the law of God, the cultural mandate, and humanity's creation in the image of God. The law of God obviously entails the concept of duty, but reference to the cultural mandate orients that duty to an end, while the concept of the image of God personalizes it. The doctrine of sin will be added to this analysis to provide further justification for contract remedies. In any event, I do not propose an alternative doctrine of contract damages; instead, I suggest an alternative justification for a range of alternatives including the current state of affairs. This account is explicitly religious in the sense of appealing to concepts derived from an authoritative text. The legitimacy of such an appeal is also considered.

A. Law, Mandate, the Image of God, and Sin

As I have described previously in more detail, divine law in the Christian tradition has not been limited to explicit commands inscripturated in ancient texts. Not surprisingly, in the Christian tradition, explicit divine commands have a priority over other forms of divine revelation, such as nature and conscience. But a search of the Hebrew or Christian Scriptures provides little in the way of a specific divine warrant for a legal remedy for breach of contract.

112. See infra notes 116-19 and accompanying text.
113. See infra notes 120-26 and accompanying text.
114. See infra notes 127-34 and accompanying text.
116. See Pryor, supra note 31, at 6-10.
   Notwithstanding the primary authority of the Scripture, we may also have confidence that we can discover God's norms for the law of contracts from sources other than the Bible. Non-biblical sources of divine norms are frequently labeled as general revelation. God did not abandon the world after the Fall. God the King continues His covenantal rule over His creation. Correctly interpreted, general revelation in the forms of the testimony of the human conscience, the results of trial and error throughout history, and the empirical sciences, such as economics, can also reveal the mind of God on the law of contracts.
   Id. at 10 (citations omitted); see also GORDON J. SPYKMAN, REFORMATIONAL THEOLOGY: A NEW PARADIGM FOR DOING DOGMATICS 78 (1992) ("Taking Scripture seriously as Word of God leads us to recognize that there is more to the Word of God than Scripture alone. For the Bible itself points to realities beyond itself which it identifies as Word of God.").
117. See SPYKMAN, supra note 116, at 77 (recognizing Scripture as the source of "central criterion of judgment" over matters of Christian faith).
118. The Covenant Code of Exodus 20:22-23:33 directed ancient Israel's authorities to provide remedies for a variety of "properties" or commodities apart from human life. Intentional and unintentional killings, personal injuries, as well as destruction and theft of personal property, are among the legal interests recognized in this text. Concomitant with these legally-recognized interests are biblically authorized remedies. Notably absent from these specified properties (and thus not explicitly protected by any authorized remedy) is the interest created by a promise. While Leviticus deals with vows at some length, 5:4-6; 27:1-33, enjoining their performance, prescribing cultic rules for a votary's decision to revoke a vow, and providing a monetary formula for commutation of devoted persons and property, it does not address the social practice of contacting much less legal remedies for breach of contract. As the biblical text covers Israel's wilderness experience in Numbers and
2009 / Principled Pluralism and Contract Remedies

Thus, a turn to the higher-level and more abstract biblical teachings regarding the cultural mandate and humanity's creation in the image of God can be used to justify the social practice of contracting. An additional Christian teaching about the prevalence of sin in the world provides the final justification for coercive civil remedies in contract law. Starting at the level of principles, however, means that it is possible to promote varying rules for contract remedies: competing principles can be weighed differently, different polities use different means to accomplish the same ends, and different systems deal differently with uncertainty. Despite this diversity, law in the Christian tradition is grounded in a personal, transcendent reality whose will comes to bear on the created order and those who labor in it.119 According to Gordon Spykman:

God mandates mankind, as his "junior partners," to join him as coworkers in carrying on the work of the world. The original creation was good, but not yet perfect. It stood poised at the threshold of its historical development.

. . . . This is where [the] cultural mandate comes in—the call to image God's work for the world by taking up our work in the world.120

In other words, historical and cultural development was built into a dynamic creation, developments to which human beings were to contribute.121 Moreover, the Christian tradition generally teaches that the end or goal of human cultural activity122 with respect to the earth is the eschatological Sabbath rest:123 "Genesis
clearly draws a picture of all God's creating acts as teleologically directed. That telos (end, goal, objective) is reached in the sabbath... Likewise, humanity's end or goal is to enter into God's rest, not as the termination of history, but as sharing with God "in restful and delightful participation in the wonders of his world." While the word "dominion" is used in the Genesis text mandating cultural development, the cultural mandate should not be understood as domination or as satisfaction of subjective wants. Contemporary Christian thinkers often use the term "stewardship" or the Anglicized Hebrew term "shalom" when applying the concept of dominion to environmental issues. Nonetheless, dominion is a useful term and can legitimately be understood as a means by which humanity carries out its divine directive with regard to the created order:

The relationship between the normative perspective of the dominion mandate and contracts is straightforward: contracts are a means by which human beings exercise dominion. Dominion can be distorted and become oppressive. Contractual oppression occurs when contracts become not a means for modeling God's independent work of creation, but a tool for self-aggrandizement.

Creation of humanity in the image of God is widely taught across the various strands of the Christian tradition. Contemporary formulations of this doctrine

"Behold, I have given you every plant yielding seed that is on the surface of all the earth, and every tree which has fruit yielding seed; it shall be food for you; and to every beast of the earth and to every bird of the sky and to every thing that moves on the earth which has life, I have given every green plant for food"; and it was so.

Id. 123. See Pryor, supra note 31, at 14.

This "work of the world" was and is to move the creation (including us) to the rest into which God entered on the seventh day of creation. Human beings were created for "rest." How was the original goal for creation to have been accomplished? Had Adam and Eve not eaten from the tree of the knowledge of good and evil, they ultimately would have been allowed to eat from the tree of life. The tree of life was the preredemptive sacramental sign and seal of life, which is the permanent rest of God into which Adam could have entered but did not.

Id. (citations omitted).

124. SPYKMAN, supra note 116, at 193.
125. Id. at 194.
126. Id. at 256-57.

Scripture speaks of exercising "dominion" over the earth and "subduing" it. Too often these words have been cited as excuses for wantonly plundering the creational resources of land and sky and sea. Wrongly so, however, for ours is a subservient authority, to be expressed in earthkeeping and caretaking.

Id. at 257.
128. See, e.g., CATECHISM OF THE CATHOLIC CHURCH 424-26 (1994); WESTMINSTER LARGER CATECHISM Q&A 3-4 (1648). Catechism of the Catholic Church represents official doctrine of the largest Christian communion. Westminster Larger Catechism is the most detailed doctrinal statement coming from the Protestant Reformation and continues as a confessional standard in many Presbyterian denominations.
deemphasize identifying the image of God with a particular human faculty; instead, they emphasize that “[t]he biblical idea of imago Dei is . . . a relational, referential concept. It is not to be sought in some ontic quality within us. It has rather a dynamic, active, functional meaning.”

“Image of God” encompasses relationships—with God, with other human beings, and with the remainder of the created order. Humanity’s reflection of the image of God not only draws together the ideas of God’s freedom, but also God’s character—gracious and sharing.

Acknowledging this doctrine provides the basis for the freedom to contract as well as for the limitations on that freedom, such as fraud, duress, and unconscionability. Human freedom to contract models God’s freedom to enter into promissory arrangements. Examples from the Torah exemplify limits on freedom of contract under various circumstances. Those limits can be summarized by observing that life is a prerequisite to the exercise of dominion. In turn, the goal of dominion is to enhance life and to orient it in terms of a Sabbath rest. Writers in the Christian tradition have thus concluded that the life enhanced through the cultural mandate should include not only our own but also that of our neighbor. Given the division of labor inherent in the unfolding of the

129. SPYKMAN, supra note 116, at 228.
130. See id.
It [the image of God] refers to that network of religious relationships which constitutes the framework for covenantal obedience—our relationship to God which is decisive for the normed relationships which hold for our personal lives, for our life together in human communities, and also for our dealings with God’s other creatures great and small within the cosmos as a whole.

Id.

131. Id. (“Imaging God is doing his will. . . . For life is religion; religion is service; and imaging God is serving him and our fellowmen.”).

132. Pryor, supra note 31, at 34.

Creation in the image of God suggests three additional implications. First, although human freedom in carrying out the dominion mandate is quite extensive, it is not unlimited. The covenantal relationship with God and His laws both exemplify and put limits on human freedom. While human beings are made in the image of the absolutely sovereign God, no humans individually (nor even groups of human beings collectively) are totally sovereign.

Id. at 34-35.

133. The Hebrew Scriptures specifically condemn many forms of prevarication and oppression in general terms. See, e.g., Leviticus 19:11, 13 (“You shall not steal, nor deal falsely nor lie to one another. . . . You shall not oppress your neighbor, nor rob him.”); Deuteronomy 24:14-15 (“You shall not oppress a hired servant who is poor and needy, whether he is one of your countrymen or one of your aliens who is in your land in your towns. You shall give him his wages on his day before the sun sets, for he is poor and sets his heart on it; so that he may not cry against you to the Lord and it become sin in you.”). From this one can conclude that biblical immorality includes more than theft and intentional deceit. It extends to consensual means of enriching oneself at another’s expense. See also CATECHISM OF THE CATHOLIC CHURCH, supra note 128, at 579; WESTMINSTER LARGER CATECHISM, supra note 128, at 37-39.


Now there are many kinds of thefts. . . . Another lies in a more concealed craftiness, when a man’s goods are snatched from him by seemingly legal means.

. . . . Let us remember that all those arts whereby we acquire the possessions and money of our
cultural mandate, exchanges of goods and services between persons are necessary for the preservation and enhancement of life. Thus, the social practice of contracting can be justified. But there are also biblical examples of contracts that fail to preserve and promote the goal of human life, which thus should not be enforced. The dominion aspect of the cultural mandate is cabined by the doctrine of the image of God; autonomy is limited by justice. The trilogy of law, mandate, and the image of God thus warrants a Christian theist to use the concepts of duty, utility, and justice simultaneously to justify and limit the practice of contracting. However, understanding the need for contract remedies forces us to consider another long-standing Christian doctrine: sin.

Different Christian traditions define sin differently; yet an acknowledgment of the breadth and depth of sin characterizes the classical analysis of the doctrine. Sin is original; the Scriptural record traces it to the beginning of human history. Sin is radical; it affects all aspects of human existence. The doctrine of sin is relevant to contract law because, whatever the morality of contract performance may be, a propensity toward wrongful opportunism supports state-enforced limits on contract enforcement and sanctions for contract breach. Civil sanctions promote the cultural mandate by rectifying breaches of dominion-enhancing agreements. Civil limitations reduce recognition of bargains that would efface the image of God. Moreover, not all contract breaches are a result of sin. Human inability to know the providential contingencies of the future—and the awareness of contract parties of their joint ignorance of those contingencies (and the human neighbors—when such devices depart from sincere affection to a desire to cheat or in some manner to harm—are to be considered as thefts.

Id. at 409. WILLIAM AMES, CONSCIENCE WITH THE POWER AND CASES THEREOF 231-32 (Theatrum Orbis Terrarum 1975) (1639) ("For upright meaning is required in all Contracts, and because the chieftest part of the nature of Contracts doth consist in that, the judgment as far as it can appear, is to be given out of that, and according to it. Therefore in all Contracts, we should proceed according to right, and good, not the letters, or extreme rigour of the law, in which often times the most extreme injury is found."); FRANCIS TURRETIN, INSTITUTES OF ELENCTIC THEOLOGY 123 (George Musgrave Giger trans., James T. Dennison, Jr. ed., 1994) (1682) ("To theft belong also reductively all deceits, frauds and overreaching in contracts, measures, weights, monies, monopolies and all evil arts and trickery by which another's property is appropriated.").

135. See supra note 133.
137. See Genesis 3. See generally CATECHISM OF THE CATHOLIC CHURCH, supra note 128, at 100-03; WESTMINSTER LARGER CATECHISM, supra note 128, at 5-6.
138. While the doctrinal positions of most Christian traditions espouse some form of the radical nature of sin, their expressions of the extent of that effect varies. Compare CATECHISM OF THE CATHOLIC CHURCH, supra note 128, at 102 ("[H]uman nature has not been totally corrupted: it is wounded in the natural powers proper to it . . . and inclined to sin—an inclination to evil that is called 'concupiscence.'"), with WESTMINSTER LARGER CATECHISM, supra note 128, at 5 ("The sinfulness of that estate whereinto man fell, consists in . . . the corruption of his nature, whereby he is utterly indisposed, disabled, and made opposite unto all that is spiritually good, and wholly inclined to all evil . . . "), and id. at 5-6 ("Original sin is conveyed from our first parents unto their posterity by natural generation, so as all that proceed from them in that way are conceived and born in sin.").
practice of contracting in light of awareness of that ignorance)—are circumstances outside the Christian understanding of sin. Such are simply part of the nature of being finite. Nonetheless, sin can be the efficient cause of a promisor's breach of contract as well as the response of a promisee to a breach induced by a non-sinful contingency. In any of these cases, a civil polity is warranted in remedying breaches and in limiting sanctions as a means to the ends of restful dominion and recognition of the image of God in humanity. Autonomy and efficiency also suggest a rationale for some sort of a contract remedy, but the transcendent justifications articulated in this section arguably do a better job than either purely immanent theory in justifying the use of each and limiting both.

B. Prolegomena to a Transcendent Justification for Private Law

Whatever the point of departure for justification of a legal rule might be—whether in human autonomy or efficiency, on the one hand, or in a transcendent source, on the other—there is a concern with the idea of the origins of the binding force of legal norms. Do legal norms advance freedom or increase satisfaction? Or, do they reflect a design for human life ordered to a flourishing end? Regardless of where one lies on the immanent/transcendent divide, one's concept of the source of binding norms is guided by a conviction about the nature of humanity itself. Are human beings distinguished by freedom, including the freedom to bind themselves to obligations which, when breached, should be subject to civil sanctions? Or are they characterized by individual interests, the satisfaction of which is increased with the presence of civil sanctions? Or, do humans exist as images of a freely creative being who reveals principles that, when followed, contribute to a life of restful cultural activity?

The modern era has been described as a battle between nature, understood as the relentless outworking of the laws governing matter in motion, and free-will—the ineffable sense that human beings in some way transcend the laws of nature and freely chart their courses in life. Efficiency justifications of law draw from the former; autonomy-based accounts from the latter. Both are grounded in modernity and, ultimately, neither is commensurable with the other. Efforts to


Theoretically seen, the individualistic doctrine of natural law is strongly influenced by the modern humanistic natural science ideal. This ideal sets out to control reality by reducing complex phenomena to their simplest elements. Its aim is to analyze these elements with the aid of exact mathematical concepts in order to unveil the laws determining reality fully. . . . Civil private law is totally different from primitive folk law. It is the product of a long development process, giving birth to a differentiation of society. . . . Thus it becomes possible to acknowledge the rights of the individual human being as such . . .

Id.
combine the two accounts through Rawlsian or other contractualist accounts have not proved persuasive.41 By contrast, post-modern thought seeks to overcome the nature-freedom dialectic by identifying each pole as a socially constructed version of reality. What counts as "law," and which of an infinite number of potential desires actually animates people, are equally embedded in a social reality whose "tilt" can be exposed only by determined critical thought.42 Yet modern and post-modern modes of discourse share at least one attribute: both look askance at any alleged transcendent justification for a legal order. For the modernist (efficient or autonomous), religion (at least in the form of Christianity utilized in this article) can justify itself only by an appeal to a non-empirically verifiable reality—God. Such a God, whose revelation may justify particular laws for human activities, is inconsistent with human autonomy.43 A post-modern thinker can simply relativize transcendent claims together with those of the modernists, whether duty- or efficiency-based. In any event, modern and post-modern thinkers would agree: transcendent truth is a throwback to pre-modern times, whose claims to public significance led to the Wars of Religion and mandated a secular turn in serious political thought.44

Modern and post-modern thought alike often reject the possibility of a transcendent justification for law in terms of what has come to be known as the secularization thesis. The secularization thesis is expressed in various fields, but sociological and political thought are particularly significant for my purposes. Drawing on the work of sociologist José Casanova, Mark Modak-Truran identifies the theory of secularization as the "'conceptualization of the process of societal modernization as a process of functional differential and emancipation of the secular spheres—primarily the state, the economy, and science—from the religious sphere.'"45 In other words, not only functional differentiation, but

141. See supra notes 107-08 and accompanying text.
143. See Pryor, supra note 31, at 5.

We must seek knowledge in an obedient way. In the quest to know the law—including the law of contracts—we must acknowledge our dependence and recognize that all knowledge is under authority. Our search for the correct rules and their accurate applications is not autonomous but rather is subject to the God whose will is revealed in Scripture (heteronymous).

Id. at 5-6.

144. See, e.g., Mark Lilla, The Stillborn God: Religion, Politics, and the Modern West (2007) (arguing that mere acknowledgment of a place for religious sentiment risks undermining modern social cohesion achieved by the Enlightenment's gradual elimination of legitimacy of appeals to political theology). This "Whiggish" interpretation of modern Western history is not without its critics. See, e.g., Benjamin J. Kaplan, Divided by Faith: Religious Conflict and the Practice of Toleration in Early Modern Europe (2007) (describing social practice of religious toleration that developed in Western Europe well before the Enlightenment).

"emancipation," characterizes the modern self-understanding of self-relationship to a transcendent order.\textsuperscript{146} A debatable description of the last 200 years of Western history thus takes on an aura of liberation with unmistakable moral approbation. Describing application of the secularization thesis to the law, Modak-Truran writes:

Religion makes only subjectively rational claims and has been relegated to the private or subjective realm by the secularization of society. Once religious and metaphysical world views have been eliminated as a justification for law, law must have its own independent, rational justification. Thus, under the modern paradigm, the law is autonomous from religion.\textsuperscript{147}

The secularization thesis faces its share of detractors. Some, like Peter Berger, conclude that facts fail to support secularization as the trope for modernity.\textsuperscript{148} According to Berger, the compartmental separation of instrumental rationality within life spheres from ends-oriented, non-rational thought is simply not an accurate description of modern Western culture.\textsuperscript{149} Others, associated with the critical legal studies movement, challenge the faith/fact, religious/empirical, and political/rational dichotomies implicitly assumed by the proponents of the secularization thesis. Focusing on legal indeterminacy, these scholars conclude that all, or nearly all, legal decisions are political exercises.\textsuperscript{150} Without law-determined legal decisions, legal rationality collapses into an amalgam of pre-rational but largely political, race, gender, or sexual-orientation factors. In a

\textsuperscript{146} See, e.g., LILLA, supra note 144, at 92-93. Hobbes's overriding concern was to vanquish the Kingdom of Darkness, the vast complex of church, state, and university that had governed European politics and consciousness for over a millennium. To that end he developed a new science of man that purported to reveal the inner workings of religious and political behavior and their common source in the human mind. But even when his science was partially rejected, it still had the effect he intended: it began to reorient the theological-political debates of Christendom away from disputes over divine revelation and toward the proper way to control and canalize the human passions arising from claims to revelation.

\textsuperscript{147} Modak-Truran, supra note 145, at 190.

\textsuperscript{148} See Peter L. Berger, The Desecularization of the World: A Global Overview, in THE DESECULARIZATION OF THE WORLD: RESURGENT RELIGION AND WORLD POLITICS 2 (Peter L. Berger ed., 1999) ("[T]he assumption that we live in a secularized world is false. The world today, with some exceptions . . . is as furiously religious as it ever was . . .").

\textsuperscript{149} Id. at 6 ("On the international religious scene, it is conservative or orthodox or traditionalist movements that are on the rise almost everywhere."). Even the apparent exception to "desecularization"—Western Europe—may be better understood as a "shift in the institutional location or religion," not as secularization. Id. at 10; see also John Hare, Religion and Morality, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2006), available at http://plato.stanford.edu/archives/fall2008/entries/religion-morality/ (on file with the McGeorge Law Review) ("[T]he secularization hypothesis that religion would wither away with increasing education seems to have been false. Certainly parts of Western Europe are less attached to traditional institutional forms of religion. But taking the world as a whole, religion seems to be increasing in influence rather than declining as the world's educational standards improve.").

\textsuperscript{150} See generally Pierre Schlag, Politics and Denial, 22 CARDOZO L. REV. 1135 (2001).
purely negative critique, there is no possibility of an objective or neutral answer to the question of the origins of the binding force of legal norms. "The emperor has no clothes," and the only response is to acknowledge this fact.\textsuperscript{151}

Autonomy and utility share one point in common: they assert that there is a singular foundation by which the binding force of legal norms can be justified. While their respective proponents do not agree on the identity and nature of that foundation, each asserts that legal rules ultimately rest on one and can be evaluated in terms of it. Borrowing from the field of epistemology, both approaches can be characterized as examples of foundationalism.\textsuperscript{152} Notwithstanding the appeal of a single approach to justifying contract rules, the incommensurability of the leading foundational perspectives,\textsuperscript{153} their respective weaknesses,\textsuperscript{154} and the apparent wide range of legal indeterminacy\textsuperscript{155} provide fodder for critical approaches. Critical writers, on the other hand, are anti-foundational.\textsuperscript{156} They believe there is no foundational justification for the relationship between legal rules and legal theory, and conclude that we should replace all futile normative programs with descriptive inquiries to disclose what social factors lead to a particular legal result.\textsuperscript{157}

In contrast to the narrow foundationalism of autonomy or efficiency and the anti-foundationalism of deconstructive criticism, transcendent ideas—such as the law of God and the cultural mandate,\textsuperscript{158} humanity’s reflection of the image of God,\textsuperscript{159} and the existence of sin\textsuperscript{160} advanced in this article—are foundational, but

\textsuperscript{151} Modak-Truran, supra note 145, at 197 (“The deconstructive postmodern critique only insists that ‘law has no foundation[,]’ Rather than specifying a new normative legal theory, it operates mainly as a critique of the modern paradigm without specifying how to legitimate the law under the conditions of legal indeterminacy.”). Several postmodern legal scholars reject a purely deconstructive critique of the contemporary legal order. Id. at 197-98. Such “constructive” postmodern efforts, which combine deep criticism with a normative view of justice, amount to little more than traditional left-wing politics in new rhetorical garb. See, e.g., ROBERTO MANGABEIRA ÜNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 3-4 (1983) (“If the criticism of formalism and objectivism is the first characteristic theme of leftist movements in modern legal thought, the purely instrumental use of legal practice and legal doctrine to advance leftist aims is the second.”). Like their deconstructive counterparts, constructive postmoderns reject any return to premodern approaches. See DENNIS PATTERSON, LAW AND TRUTH 158 (1996) (defining postmodern thought in terms of its critique of modernity coupled with opposition to “reverting to premodern categories”).

\textsuperscript{152} See Richard Fumerton, Foundationalist Theories of Epistemic Justification, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2005), available at http://plato.stanford.edu/archives/fall2008/entries/justep-foundational (on file with the McGeorge Law Review) (“Foundationalism is a view about the structure of justification or knowledge. The foundationalist’s thesis in short is that all knowledge and justified belief rest ultimately on a foundation of noninferential knowledge or justified belief.”).

\textsuperscript{153} See supra notes 26-47 and accompanying text.

\textsuperscript{154} See supra notes 31-35, 48-57 and accompanying text.

\textsuperscript{155} See generally Modak-Truran, supra note 145.

\textsuperscript{156} See generally RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1979).

\textsuperscript{157} PATTERSON, supra note 151, at 14-17.

\textsuperscript{158} See supra notes 128-35 and accompanying text.

\textsuperscript{159} See supra notes 128-31 and accompanying text.

\textsuperscript{160} See supra notes 136-37 and accompanying text.
broadly so. That human beings are free to bind themselves by means of promise is certainly plausible even though theories of autonomy-based ethics ultimately justify few specific rules of contract law. Moreover, it is also the case that the social practice of contracting enhanced by legal remedies is useful in promoting human welfare even though unfettered utilitarianism leads to undesirable results. Neither duty nor efficiency alone can justify the remedy of expectation damages, and neither is free from doubt as a comprehensive ethical theory. Yet both are valuable because each has seized on one aspect of the whole and done much to explain it. Freedom and efficiency are, in epistemological terms, properly basic. As I have previously argued, the biblical tradition warrants a multi-perspectival approach to legal theory in which the insights of more than a single perspective can be consistently utilized. Eschewing the single modality of autonomy or efficiency in favor of a multi-perspectival approach grounds an explanation for the expectation remedy in a way that permits apprehension of the values of each while justifying constraints on both. In other words, legal vindication of the expectation interest can be justified by its success in implementing the cultural mandate and its consistency with promissory duty, both of which, in turn, are part of the comprehensive account of the Christian faith.

161. Narrow foundationalism asserted that only self-evident or incorrigible beliefs could serve as the foundation for a chain of inferences by which we can justify the much larger number of beliefs we ordinarily hold. A problem with narrow foundationalism in epistemology is that, if correct, it would render "enormous quantities of what we all in fact believe...[to be] irrational." Alvin Plantinga, Reason and Belief in God, in FAITH AND RATIONALITY: REASON AND BELIEF IN GOD 59 (Alvin Plantinga & Nicholas Wolterstorff eds., 1983); see also NICHOLAS WOLTERSTORFF, JUSTICE: RIGHTS AND WRONGS, at xi (2008).

Once upon a time, lasting until not long ago, philosophers assumed that philosophy, like religion, had to be rationally grounded in certitudes; they understood the methodological of their discipline as foundationalist. Never mind that rarely if ever did a piece of philosophy measure up to that methodological demand; that was understood to be the demand.

Id.

162. See supra notes 31-33 and accompanying text.

163. See SMITH, supra note 21.

164. See DEWEY J. HOITENGA, JR., FAITH AND REASON FROM PLATO TO PLANTINGA: AN INTRODUCTION TO REFORMED EPISTEMOLOGY 177 (1991).

A basic belief is a proposition that one believes without basing it on other propositions that one believes. What characterizes our assent to such beliefs is the immediacy of the assent. We do not assent to these beliefs by having first assented to other beliefs as their basis.

Id.

165. See generally Pryor, supra note 31; C. Scott Pryor, Mission Possible: A Paradigm for Analysis of Contractual Impossibility at Regent University, 74 St. John's L. Rev. 691 (2000).

166. Several writers have recently argued that providing legal remedies for breach of contract is inconsistent with promotion of virtue. See, e.g., Shiffrin, supra note 34; Bagchi, supra note 35.
C. Transcendent Justifications in a Liberal Democracy

The secular nature of the modern American civil polity suggests an immediate objection to an approach that justifies an element of private law from a comprehensive transcendent perspective on the human calling and human nature. For example, attempting to provide an entirely non-transcendent foundation for modern liberal constitutional orders, John Rawls argued in *A Theory of Justice* that justice itself must be justified only on principles that everyone in a polity can accept, thus ruling out any appeals to a comprehensive order in a religiously plural democracy.\(^{167}\) However, by the time he wrote *Political Liberalism*, twenty-two years later, Rawls acknowledged that a mandatory commitment to purely secular justifications for political justice was itself a type of “comprehensive order” that was inconsistent with the exclusion of such comprehensive commitments from service as a resource for justifying justice in a liberal political order.\(^{168}\) Thus, Rawls later advocated that principles of justice be determined by an overlapping consensus of all polity members.\(^{169}\) Members of the polity might well have comprehensive viewpoints regarding justice, but that would not disqualify them from serving as constituent parts of the consensus. Whatever the consensus ultimately amounts to, however, must not represent a commitment to any comprehensive order.

Nonetheless, as Modak-Truran points out, even with this revision “Rawls’s legal liberalism [still] fails because it depends on a hidden (negative) comprehensive liberal secularism (i.e., a comprehensive denial of comprehensive convictions) that religious judges (i.e., judges recognizing the comprehensive order of reflection) cannot accept and that leads to self-contradiction.”\(^{170}\) In other

\(^{167}\) See *Rawls, A Theory of Justice*, supra note 52, at 112-17 (discussing formal constraints of the concept of right that effectively exclude appeals to any comprehensive ordering).

\(^{168}\) *Rawls, Political Liberalism*, supra note 78, at xvi.

Now the serious problem [with *A Theory of Justice*] is this. A modern democratic society is characterized not simply by a pluralism of comprehensive religious, philosophical, and moral doctrines but by a pluralism of incompatible yet reasonable comprehensive doctrines. . . . [that are] the normal result of the exercise of human reason within the framework of the free institutions of a constitutional democratic regime.

\(^{169}\) *Rawls, A Theory of Justice*, supra note 52, at 387.

[While the public justification of the political conception for political society depends on reasonable comprehensive doctrines, this justification does so only in an indirect way. That is, the express contents of these doctrines have no normative role in public justification; citizens do not look into the content of others’ doctrines, and so remain within the bounds of the political. Rather, they take into account and give some weight to only the fact—the existence—of the reasonable overlapping consensus itself.]\(^{170}\)

\(^{170}\) Modak-Truran, supra note 145, at 206. “Rawls’s claim [that law must be legitimated apart from any comprehensive doctrine] entails a comprehensive denial of all comprehensive convictions (a (negative) comprehensive liberal secularism), which according to Rawls is not possible, and thus results in an incoherent account of the modern paradigm.” Id. at 207-08; see also Michael W. McConnell, *Secular Reason and the Misguided Attempt to Exclude Religious Argument from Democratic Deliberation*, 1 J.L. PHIL. & CULTURE 159
words, no one who believes that his or her religion is fully comprehensive could adjudicate (or legislate) with integrity as if it were not. That the result in a particular case from the perspective of one who holds a comprehensive conviction overlaps with the non-comprehensive consensus does not solve the problem. For, as Rawls asserts, any ordering of values in adjudication or legislation must be made in light of the overlapping consensus, not “from how [the values] occur within citizens’ comprehensive doctrines.”

No lawmaker who holds a comprehensive viewpoint (whether transcendent or immanent, whether religious or secular) can conscientiously serve under Rawlsian conditions. We are thus left with the unpleasant choice of admitting that Rawls is wrong or limiting our choice of lawmakers to those who have no comprehensive convictions. Choosing the former does not commit us to an illiberal political order. It does, however, open the door to justifying something similar to the contemporary liberal order on transcendent grounds.

If Rawls is wrong, what can justify a polity’s application of any form of justice? If arguably the best non-transcendent justification of the modern political order collapses in incoherence, with what are we left? At least two possibilities seem plausible. One alternative is acquiescing to the postmodern deconstructive paradigm by acknowledging that no non-contingent rational principle for justification of a legal order exists. The gap between such a concession and the self-understandings of most lawyers and judges—as well as the ongoing pursuit of various normative ethical projects—suggests that pure criticism will not prove satisfying.

Another possibility is to suggest a broadly foundational paradigm that includes explicitly transcendent elements. Mark Modak-Truran pursues this when he suggests that “providing a normative theory of law [that is] consistent with legal indeterminacy requires a desecularization of law and a return to a religious legitimation of law.”

Modak-Truran does not mean that a polity need, or even should, accept a single comprehensive religious understanding to legitimate its coercive use of force in the name of law. In fact, he argues, a traditional comprehensive religion cannot provide justification for law in a liberal polity...
because “[i]t fails to take religious pluralism seriously.”\textsuperscript{176} For Modak-Truran, even if a religion provides a normative basis for law and resolves questions of legal indeterminacy, its adoption as a resource of fundamental justificatory norms would run afoul of the Establishment and Due Process Clauses.\textsuperscript{177} In addition, utilizing such comprehensive norms in judicial decision making would, as a practical matter, “radically expand the interpretative issues involved in subsequent litigation. Lawyers would find themselves arguing issues of jurisprudence, theology, philosophy of religion, [and] biblical hermeneutics . . . in addition to arguing the facts and the law.”\textsuperscript{178} One cannot help but doubt the institutional competence of lawyers and judges in a pluralistic polity to handle such abstruse issues.

Modak-Truran’s positive paradigm posits a claim and an implication that are relevant to deploying transcendent convictions in legal analysis. First, he stresses that legal scholars “should critically reflect on their religious or comprehensive convictions. The process of full justification [of a legal rule] requires critically reflecting on comprehensive convictions . . .”\textsuperscript{179} Comprehensive convictions are important because in a liberal polity, the law cannot justify itself; there must be a reason why the law is as it is and that reason requires recourse to a principle more comprehensive than the facticity of a particular legal rule.\textsuperscript{180} As established in Part II above, autonomy and efficiency are the comprehensive convictions commonly offered to justify the expectation measure of damages. But, as demonstrated in Part III, neither autonomy nor efficiency has succeeded in providing a coherent comprehensive justification for this rule. Turning to the cultural mandate, the image of God and sin, I have suggested that we find three doctrines subsisting as part of a larger transcendent comprehensive conviction concerning human nature and the human calling that can justify the expectation measure of damages. However, does use of such doctrines violate the constitutive norms of a religiously plural democratic society? Part III above suggests a negative answer in light of my claims that application of the purely immanent theories of justice of Rawls and Scanlon are ultimately incoherent. If these leading explanations fail, is not recourse to a transcendent explanation at least plausible?

More directly, the argument against explicit judicial employment of comprehensive convictions leaves open the use of such convictions when doing legal theory. Modak-Truran develops a lengthy argument that judges cannot help but employ comprehensive convictions when resolving “hard” cases (i.e., cases

\textsuperscript{176} Id.
\textsuperscript{178} Id. at 791.
\textsuperscript{179} Id. at 738.
\textsuperscript{180} See, e.g., H. L. A. Hart, \textit{The Concept of Law} (1961) (criticizing positivistic accounts of law for failing to consider the internal as well as external nature of law).
where existing legal norms are unclear or conflicting). These comprehensive convictions may be transcendent or immanent, but all function in a broadly foundational way to direct judicial discretion when the law fails to do so. If we understand religion broadly to be “the primary form of culture in terms of which we human beings explicitly ask and answer the existential question of the meaning of ultimate reality for us,” then both transcendent and immanent approaches are equally religious and each may legitimately be employed to evaluate, critique, and ultimately justify contemporary legal rules. Comprehensive convictions, including traditionally-understood religious ones, lead to comprehensive theories. Such theories are integrative; that is, they are advanced and evaluated by how well they enable persons to make sense of the world as a whole. Judges and legislators in the United States need not refer explicitly to such comprehensive convictions for the reasons noted above.

Indeed, historically, the common law has functioned at a “middle level” mode of legal analysis. Theory need only justify the practice of law, not its particularities. In this account, I have sought to provide a transcendent justification for the expectation measure of damages; I have not sought to show that a legal system demands it.

V. CONCLUSION

Since 1936, legal scholars have dug deeply into the justification for measuring damages for breach of contract by the value of the disappointed expectation rather than the harms caused by a breach; gains prevented as well as losses incurred. Of the two leading explanatory theories of contract law, only efficiency has proved fine-grained enough to provide specific reasons for the expectation measure. Yet its leading competitor, autonomy, does a better job of justifying moral foundations of contracting. Efforts to combine autonomy and

---

181. See Modak-Truran, supra note 177, at 732-34.

In hard cases, judges must rely on extra-legal norms because hard cases are, by definition, those cases in which the relevant legal norms do not provide a determinate outcome to the dispute in question. To provide this full justification, my religionist-separationist model maintains that judges ought to rely on religious convictions in their deliberations about hard cases to justify the extra-legal norms required to decide those cases. Id. at 732-33.

182. Id. at 723 (quoting SCHUBERT M. OGDEN, IS THERE ONLY ONE TRUE RELIGION OR ARE THERE MANY? 5 (1992)) (internal quotations omitted); see also WALTERSTORFF, supra note 161, at x (“[P]hilosophy speaks of how every thing, in the most general sense of 'thing,' hangs together, in the most general sense of 'hangs together.' If one believes in God, then not to bring God into the picture, when relevant, is to defect from the philosopher's calling.”).

183. See supra notes 177-78 and accompanying text.

184. See Gerald J. Postema, Classical Common Law Jurisprudence (Part II), 3 OXFORD U. COMMONWEALTH L.J. 1, 6 (2003) (“[T]he [common] law is to be found in the accumulated experience recorded in the books and memories of common law jurists, not in any theory, or articulation of this experience. Law is practice, not a theoretical representation of it.”).
efficiency in terms of modern contractarian theories of political liberalism have not yet succeeded. Moreover, the very comprehensiveness of autonomy- or efficiency-based accounts makes the primacy of either in the typical contractarian accounts of pluralist political legitimacy questionable.

This article suggests that several doctrines that are widely accepted within the Christian tradition provide a platform on which autonomy and efficiency, limited but justified, can rest. Humanity's reflection of the image of God and cultural activity oriented toward consummate rest are both drawn from Torah—teaching or law. Thus, both are examples of a wide number of foundational concepts that, in the Christian account, are grounded in a transcendent reality. Promise-keeping is an aspect of the cultural mandate, but that mandate—unlike efficiency's emphasis on preference satisfaction—is not an end in itself. Rather, the goal of human cultural activity—including contracting—is the eschatological rest in which humanity's reflection of God is ultimately realized. Coupled with a robust doctrine of sin that recognizes the pervasive postlapsarian reality of opportunism, I believe the legitimacy of expectation damages can be justified. Obviously, such a Christian theistic justification is part of a larger comprehensive account which, in a Rawlsian understanding of liberalism, is unacceptable in a pluralistic polity. Yet, because the belief that all comprehensive convictions are out of place is itself a comprehensive conviction, I must part ways with Rawls. I conclude that liberalism requires only a commitment to a liberal political order and does not exclude any motivations or arguments—regardless of their source—from the public sphere. There is no supra-political trump card by which an appeal to a comprehensive conviction can be ruled out.

My goal has been to show that a transcendent, in my case specifically Christian, account can justify the social practice of contracting as well as a legal regime in which the expectation measure of damages can be used. It also suggests that limits on legal remedies for certain contracts can be justified. In any event, I believe I have also shown that such a theory represents no greater threat to the religiously plural nature of contemporary liberal polities than unfettered autonomy or efficiency. It is neither necessary nor even desirable for judges or legislators to expressly utilize this or any other theory. It is nonetheless useful at the level of theory to have a broadly foundational but transcendentally justified basis to explain why courts are justified in doing what they do.