

The Phantom Reliance Interest in Tort Damages

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I. INTRODUCTION

The reliance interest has fascinated me for some time.¹ As a measure of damages for breach of contract,² it seems theoretically unjustified and flawed in its implementation. In theory, it requires compensation for lost opportunities.³ In practice, such compensation is rarely provided⁴—

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1. Michael B. Kelly, *The Phantom Reliance Interest in Contract Damages*, 1992 WIS. L. REV. 1755.

2. My focus has been on contracts, full-fledged bargains, rather than promissory estoppel or other instances where the reliance interest might be applied. Much of my criticism of the reliance interest has been limited to this context. This Article will expand somewhat the scope of my criticism.

3. L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: I*, 46 YALE L.J. 52, 55, 60–61 (1936); Mark Petit, Jr., *Private Advantage and Public Power: Reexamining the Expectation and Reliance Interests in Contract Damages*, 38 HASTINGS L.J. 417, 420–21 (1987).

unless one counts the expectation interest as a proxy for opportunities lost in reliance on a promise.⁵ In theory, it justifies recoveries that may exceed expectation.⁶ Yet, even its progenitors refused to endorse that implication.⁷ Why, then, does the reliance interest have continuing appeal?

One explanation has emerged from discussions with academics: the reliance interest seems apt to some because it resembles tort remedies. Expectation is available only in contract, not in tort.⁸ Tort is perceived as the realm of reliance recoveries. That inconsistency may make people uncomfortable. Scholars who see contract as simply a subset of tort naturally prefer that tort remedies apply in each context.⁹ Similarly, scholars seeking unified principles underlying remedies generally might be drawn to prefer the reliance interest in contract.¹⁰ The perception that reliance governs in tort appears to contribute to the continuing popularity of the reliance interest in the face of scholarly challenges.¹¹

This Article challenges the assumption that the reliance interest is a tort remedy. To the extent that tort remedies can be broken down into expectation and reliance at all, tort remedies usually resemble expectation more closely than they resemble reliance. The project shall proceed in three stages. It will focus first on misrepresentation, the one tort where the reliance interest makes theoretical sense. Despite the justification for employing the reliance interest, it appears that tort law

4. E. ALLAN FARNSWORTH, *CONTRACTS* § 12.1, at 759 (3d ed. 1999).

5. Fuller & Perdue, *supra* note 3, at 60–62.

6. Pettit, *supra* note 3, at 445–48.

7. Fuller & Perdue, *supra* note 3, at 79 (“We will not in a suit for reimbursement for losses incurred in reliance on a contract knowingly put the plaintiff in a better position than he would have occupied had the contract been fully performed.”).

8. DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS* 55 (2d ed. 1994) (“The conventional wisdom is that expectancy damages are recoverable only in contract, not in tort.”).

9. See, e.g., GRANT GILMORE, *THE DEATH OF CONTRACT* 88 (1974). As David Slawson pointed out, Gilmore did not address remedies expressly, but by implication seems to support reliance recoveries. W. David Slawson, *The Role of Reliance in Contract Damages*, 76 *CORNELL L. REV.* 197, 207 (1990).

10. There are some hints of this in Laycock’s casebook. See LAYCOCK, *supra* note 8, at 55–56 (noting that distinctions between remedies for tort and contract “are unobjectionable as a matter of formal logic” but asking whether “they make any sense as a matter of policy?”). Naturally, questions in a casebook may be designed to challenge student thought rather than to express the author’s conclusions.

11. One unpublished discussion provides further support. While working on my earlier article, I had the good fortune to share an afternoon with Professor Patrick Atiyah, who was visiting the University of San Diego at the time. Professor Atiyah’s excellent work took a more favorable view of the reliance interest as an appropriate remedy in contract cases. See P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 4 (1979). In support of this position, he argued that contract was just like tort: “Somebody dug a hole; someone else fell in.” Thus, the remedy should be the same as for a tort: the reliance interest. Interview with Patrick S. Atiyah in San Diego, Cal. (Feb. 1991).

does not limit recoveries to reliance even in this context. Second, focus will shift to personal injury actions. In these cases, it makes very little difference whether we call the remedy reliance or expectation; the same results will apply in almost every case. In cases where it might make a difference, however, there is no support for the suggestion that tort law prefers reliance to expectation. Finally, the Article will assess the implications of this discussion. Fundamentally, it concludes that the reliance interest does not respond to concerns about remedies at all. Its primary rationale centers on liability. That conclusion may seem familiar. I offered it as a possible explanation in my earlier work.¹² Exploring the analogy to tort remedies reinforces the view that the reliance interest is simply an effort to preclude enforcement of promises where reliance did not exist, even when they are part of a bargain.

II. THE RELIANCE INTEREST IN MISREPRESENTATION

Courts confront the difference between expectation and reliance in addressing the tort of misrepresentation. Two rules have emerged for calculating damages for this tort. The benefit-of-the-bargain rule allows the plaintiff to recover as if the misrepresentation were true, not false. Thus, someone who purchases land in reliance on a misrepresentation that the land contains gold deposits would recover the value the land would have had if gold deposits actually existed on the land.¹³ The out-of-pocket rule allows the recovery of the difference between what the plaintiff gave up as a result of the fraud and what she received as a result of the fraud.¹⁴ Thus, our plaintiff promised a land of gold could recover the difference between the price paid and the actual value of the land (without the gold deposits).¹⁵

The benefit-of-the-bargain rule bears a clear resemblance to the expectation interest. In fact, the rule comes close to transmuting the case from tort into contract. Instead of making the defendant pay damages that have the effect of rescission, the rule in effect treats the misrepresentation as a warranty and enforces the warranty with the usual contract measure: the difference between the value the goods would

12. Kelly, *supra* note 1, at 1781.

13. RESTATEMENT (SECOND) OF TORTS § 549(2) illus. 4 (1977).

14. *Id.* § 549(1)(a).

15. If the plaintiff also incurred expenses before discovering the fraud—say, the cost of excavations—those expenses would be included in the out-of-pocket recovery. *Id.* § 549(1)(b).

have had if they had been as warranted and their actual value in the condition in which they were received.¹⁶

The out-of-pocket rule, on the other hand, resembles the reliance interest in limiting recovery to actual expenditures, and perhaps including lost opportunities. Like the reliance interest, it looks backward to the position the plaintiff occupied before the wrong, rather than forward to the position she hoped (or expected) to occupy after the successful completion of the transaction. Before the wrong, the plaintiff had money. After spending the money, she had, in our example, land worth a certain amount. The difference between those two values will restore her to the position she occupied before the wrong.¹⁷ The analysis works as well when the plaintiff is induced to sell property based on misrepresentation of its value. Before the wrong, she had property worth a certain amount. After the wrong, she had money worth less than that. The difference will restore her to her rightful position. In cases where that would not be true, plaintiff would not seek damages, but would instead demand rescission and specific restitution of the property.

The out-of-pocket rule has much to recommend it. The rule appears to comport with the normal rule of remedies: to put the plaintiff in the position she would have occupied if the wrong had not occurred.¹⁸ By hypothesis, the deceived person (plaintiff) would not have entered the transaction if she had been told the truth.¹⁹ If she had not entered the transaction, then she would not have incurred any expenses associated with the transaction. Instead, she would still have her initial money or property.

The reliance interest might require remedies to go one step further, including damages for opportunities forgone in reliance on the misrepresentation. For example, if a party holds herself out as an insurance agent and sells a policy, the buyer's out-of-pocket loss might

16. U.C.C. § 2-714(2) (1989). The rule can be translated to other settings, such as the condition of land or the qualifications of an employee, without deviating from the results dictated by the expectation interest.

17. The damages plus the proceeds from the resale of the land will equal plaintiff's total expenditures. Of course, plaintiff could keep the land if she valued it more highly than the market, thus ending up slightly better off than she was before, even if not as much better off as she would have been had she found gold on the land.

18. *United States v. Hatahley*, 257 F.2d 920, 923 (10th Cir. 1958); LAYCOCK, *supra* note 8, at 15–16 (coining the “rightful position” as a convenient shorthand for the “position plaintiff would have been in but for the wrong”).

19. This may slightly overstate the rule. A plaintiff may establish the tort of misrepresentation without proving that she would not have entered the transaction but for the misrepresentation. As long as the misrepresentation was a substantial factor in her decision to enter the transaction, reliance is satisfied. RESTATEMENT, *supra* note 13, § 546 cmt. b. Nonetheless, the remedy assumes that if properly informed, the deceived person might have rejected the transaction or at least negotiated better terms for the transaction. Thus, rescission is generally an appropriate remedy.

be limited to premiums. The greatest harm of that misrepresentation, however, lies in depriving the buyer of the opportunity to deal with a real insurer. If the defendant had told the truth, the buyer probably would have obtained insurance from another source. If, as seems likely, the buyer discovers the fraud only after submitting a claim for a covered loss, her damages would need to include any amount she could have recovered from another insurer if not misled.

The illustrations to the *Restatement (Second) of Torts* suggest that lost opportunities are recoverable under the out-of-pocket rule. Two illustrations involve situations where the use of the product sold (a bull in illustration 1, ball bearings in illustration 2) reduced the value of another product (calves and cars, respectively).²⁰ The *Restatement* supports recovery of the “loss sustained by the inferiority of the calves.”²¹ Similarly, “depreciation in the sales value of its cars because of the inferior bearings” is allowed.²² In each case, inferiority must be measured against some other, better bull or ball bearings. Each argument makes sense under section 549(1)(b) only as compensation for the lost opportunity to obtain a better bull or better ball bearings elsewhere, an opportunity lost because of the misrepresentation that this bull or these bearings were of the required quality.

Lost opportunities move the out-of-pocket rule perilously close to the expectation interest. Each illustration could easily be explained by reference to the bull or ball bearings that conformed to the representation (or warranty): having been promised a better bull, you may recover for losses you would not have suffered if this bull had been as represented. But that analysis would require us to move these illustrations under the benefit-of-the-bargain rule. Rather, let us acknowledge—as Fuller and Perdue did—that the recovery of lost opportunities often will make a reliance recovery approximately equal to an expectation recovery.²³ Some differences remain. In the insurance example, if the fraudulent policy differed from the alternative policy plaintiff would have bought, then a true reliance recovery would be measured by the terms of the alternative policy. For example, if the deceiver sold a policy with no deductible or co-insurance, but all other insurers with whom buyer could have dealt imposed deductibles or co-insurance, recovery under the

20. *Id.* § 549(1)(b) cmt. d, illus. 1–2.

21. *Id.* § 549 illus. 1.

22. *Id.* § 549 illus. 2.

23. Fuller & Perdue, *supra* note 3, at 62.

reliance interest would be limited to the amount recoverable under those policies. Similarly, if the deceiver could demonstrate that, but for the fraud, buyer would have purchased less insurance (perhaps because she was unwilling to pay higher premiums and defendant's rates permitted her to obtain more insurance than she possibly could have received from another), recovery under the reliance interest would be limited to the amount of insurance buyer would have purchased from the alternative insurers. The illustrations to the *Restatement (Second) of Torts* do not address this problem, so we have little indication whether it would follow a true reliance interest in computing the out-of-pocket loss of a fraud victim. Nonetheless, the resemblance between the out-of-pocket rule and the reliance interest is sufficiently close to permit comparisons between contract and the tort of misrepresentation.

The out-of-pocket rule makes logical sense for misrepresentation. Remedies seek to put the plaintiff in the position she would have occupied if the wrong had not occurred. The wrong was telling the lie. If the lie had not been told, buyer (by hypothesis) would not have entered the transaction. Damages, then, should restore the plaintiff to the position she would have occupied if she had not entered the transaction. The Supreme Court ruled the out-of-pocket measure was the appropriate recovery under federal common law for the tort of fraud.²⁴ Courts have applied the out-of-pocket rule to actions arising under the securities laws, at least for some violations.²⁵ And the *Restatement (Second) of Torts* identifies the out-of-pocket measure as an appropriate remedy for misrepresentation, particularly when the misrepresentation is negligent rather than fraudulent.²⁶

Despite this logic, however, most state courts have opted for the benefit-of-the-bargain rule as the appropriate measure of damages for misrepresentation, at least when the misrepresentation is fraudulent, and sometimes even when the misrepresentation is innocent.²⁷ Rather than placing the plaintiff in the position she would have occupied if defendant had not made the misrepresentation (that is, had she told the truth), they place the plaintiff in the position she would have occupied if the statement had been true.²⁸

There are several justifications for this decision. First, an out-of-

24. *Smith v. Bolles*, 132 U.S. 125, 129 (1889).

25. *Harris v. Am. Inv. Co.*, 523 F.2d 220, 224-25 (8th Cir. 1975). *But see* *Osofsky v. Zipf*, 645 F.2d 107, 113-14 (2d Cir. 1981).

26. RESTATEMENT, *supra* note 13, § 552B.

27. *Id.* § 549 cmt. g (criticizing, but acknowledging, this practice among most courts); Robert B. Thompson, *The Measure of Recovery Under Rule 10b-5: A Restitution Alternative to Tort Damages*, 37 VAND. L. REV. 349, 358 n.26 (1984).

28. RESTATEMENT, *supra* note 13, § 549(2) cmt. g.

pocket measure may do little to deter some frauds. Particularly where lost opportunity or expenditures, aside from amounts received by the defendant, are likely to be minimal, the fraudfeasor faces a no-lose situation. If the fraud is undiscovered, she can keep her ill-gotten gains. If the fraud is discovered, however, plaintiff's recovery will be limited to a refund of those gains. Aside from any costs of defending the action, the fraudfeasor does not face a net position any worse than she occupied before the fraud. To achieve an appropriate level of deterrence, courts need to include some remedy over and above the out-of-pocket measure. In some cases, punitive damages may provide sufficient incentive to be honest. The benefit-of-the-bargain measure, however, provides a deterrent in all cases, not merely those in which plaintiffs can establish an entitlement to punitive damages.

Second, courts may resolve intuitions concerning relative blameworthiness in favor of the benefit-of-the-bargain measure. On the whole, fraud seems a more serious wrong than breach of contract. Yet contract plaintiffs generally recover the expectation interest. To limit victims of fraud, or even negligent misrepresentation, to a less generous reliance-based recovery seems odd.²⁹

Third, practical difficulties may impede efforts to limit fraud recoveries to the out-of-pocket rule. Where the fraud leads to a contract, the plaintiff can elect to sue on the contract. By alleging that the fraud took the form of a promise or warranty, the plaintiff can secure an expectation recovery for exactly the same words that, in tort, would produce a reliance recovery. Courts could attempt to regulate this by insisting that the finder of fact determine whether the statements made by the defendant were in substance a promise or an assertion of fact. Such an insistence seems unlikely to succeed, at least where the statements are oral. It may be hard enough for jurors, faced with conflicting testimony, to ascertain whether the statements were made at all. To ask them to decide whether the words took the form of a promise or of a statement of fact may demand more from the finders of fact than is realistic. Rather than allow significant differences in the rule of recovery to rest on such formal and perhaps unreliable judgments concerning the nature of words spoken years before the trial, courts generally have selected the benefit-of-the-bargain rule for fraud.

29. Of course, the incongruity could be resolved in favor of awarding the reliance interest in contract cases. My views on that are expressed elsewhere and need not be repeated here. See generally Kelly, *supra* note 1.

My point, however, does not depend on justifying the choice made by the courts. The fact that courts, for the most part, have eschewed reliance in favor of expectation suffices. In the tort where reliance makes the most sense—where the out-of-pocket rule comports perfectly with the ordinary remedial goals—courts nonetheless prefer an expectation approach to produce appropriate remedies. Thus, the remedies for the tort of misrepresentation offer very little support for those who prefer reliance as a means to treat contract like tort. To treat contract like misrepresentation, we would need to employ the expectation interest, not the reliance interest. We must look elsewhere to find a tort where reliance recoveries are in fact the rule.³⁰

The decision to pursue an expectation-like recovery in fraud does not establish that a similar decision would be appropriate for any other tort. Having conceded the theoretical justification for limiting recovery to reliance in fraud, perhaps that theory supports the reliance interest in other torts. In fact, however, the theory itself is limited to misrepresentation or, more appropriately, torts involving false communication. We will search in vain for other torts where the nature of the wrong justifies the reliance-based recovery.

III. RELIANCE IN PERSONAL INJURY CASES

Personal injury actions pose a difficult context in which to discuss the reliance interest. Conventional distinctions between reliance and expectation make it difficult to imagine injury cases in which reliance and expectation differ. Let's consider a simple case. A pedestrian crossing the street is hit by a motorist who negligently failed to stop at a stop sign. We can easily apply the general rule of damages. But for the wrong, the plaintiff would not have been hit by the car. All injuries resulting from the driver's failure to stop are recoverable.

Does it make any sense to ask whether the pedestrian's damages are based on her reliance interest or expectation interest? We might ask whether the pedestrian started across the street in reliance upon the fact

30. There is an element of circularity here. At least two of the justifications could be ameliorated by using the reliance interest in both tort and contract. Perhaps the poor choice courts make in contract actions forces them to make an equally poor choice in fraud actions. This does not comport with the tone of court decisions. Despite the invitation of the *Restatement*, one does not often encounter courts expressing regrets that they must impose the benefit-of-the-bargain rule in fraud cases because of the poor decision to use the expectation measure in contracts. It is at least equally plausible that each case is handled appropriately. At the very least, there is very little authority in the fraud cases for imposing reliance in contract cases. One can distinguish contract and suggest it should be treated differently (since the wrong is lesser, justifying lesser recoveries). But one cannot use tort law's nonendorsement of reliance as the basis for arguing that contract law should follow suit.

that the driver would stop or with the expectation that the driver would stop. But that locution does not seem to pose any difference, any choice between competing ideals: spelling, not meaning, seems the only distinction. Her injuries and her remedy are identical under either characterization.

The prior paragraph, however, does not really capture the difference between expectation and reliance as applied to damages. In contract cases, we do not ask whether the plaintiff suffered harm because she relied on performance or because she expected performance. Rather, we contrast the position she would have occupied if performance had occurred with the position she would have occupied if no promise had been made in the first place. We need to find an analogous formulation for tort.

Perhaps, as with misrepresentation, we can identify an approach that looks forward and contrast it with one that looks backward, to mirror one difference between expectation and reliance. The *Restatement (Second) of Torts* certainly holds out that possibility:

While the law of contracts gives to a party to a contract as damages for its breach an amount equal to the benefit he would have received had the contract been performed, the law of torts attempts primarily to put an injured person in a position as nearly as possible equivalent to his position prior to the tort.³¹

This language explicitly describes tort remedies as backward-looking, seeking the position prior to the tort, in contradistinction to expectation remedies. But it does not exactly tell us how a forward-looking remedy for tort would differ from one that looks backward.

The obvious possibility does not seem very helpful. Reliance in tort might focus on the position the plaintiff occupied immediately before being hit by a car, while expectation might focus on the position she would have occupied if she had not been hit by the car. The former looks backward, as invited by the *Restatement*, and might be taken for reliance. The latter, by focusing forward on a position the plaintiff had not yet achieved but might have achieved but for the accident, might be taken as expectation.

This pair of choices produces the opposite result from what the *Restatement* suggests. To the extent that these two positions differ at all, tort law chooses the forward-looking recovery. If tort remedies really looked backward to the position before the wrong, they might reject any

31. RESTATEMENT (SECOND) OF TORTS § 901 cmt. a (1979) (citation omitted).

claim for money the plaintiff did not have at the time of the injury, but might have obtained in the future. But whatever is meant by the *Restatement's* rejection of expectation, it does not encompass the rejection of future earnings the injured plaintiff might have received.³² Tort law readily awards expected future gains every time it allows recovery of wages the plaintiff had not earned on the date of the breach.³³ Lost wages do not restore some earlier position the plaintiff had occupied, but a future position the plaintiff would have come to occupy if the wrong had not occurred.

The *Restatement* contains a possible response, an explanation of how the plaintiff's position before the accident really did include all of the earnings she would have received but for the accident.³⁴ Recovery of future earnings represents compensation for lost earning potential: before the tort the plaintiff had earning capacity; after, she had less earning capacity by virtue of the injury.³⁵

This explanation contains several flaws, but they are not central to the point.³⁶ At best, this view permits tort damages to be explained by either the expectation interest or the reliance interest. If both reliance and expectation can justify the recovery of future wages, the fact that tort remedies include recovery for them does not support classifying the remedy as either reliance or expectation. To determine whether tort remedies are based on reliance or expectation, we will need to consider a way in which the two approaches might differ.

Perhaps the most serious objection to the preceding analysis is that it focuses on timing (backward or forward) rather than on the nature of wrong. In contract, there is a timing component to reliance and

32. *Id.* § 910.

33. Even scholars who support the reliance interest in contract law recognize that wages not yet earned are an expectation recovery for tort victims:

Even in tort law, damages for future earnings are awarded as a matter of everyday practice in personal injury actions; and such damages do not merely take account of what the plaintiff was earning when injured, but also what he might reasonably have expected to earn in the future (inflation apart). It is difficult to understand how the common idea has grown up that expectation damages cannot be awarded in a tort action.

ATYAH, *supra* note 11, at 762–63.

34. RESTATEMENT, *supra* note 31, § 906(b).

35. *Id.*

36. Earning capacity may describe wages in personal injury cases, but must stretch to explain defamation or wrongful discharge cases. No physical disability deprived the plaintiff of earning capacity; plaintiff lost wages, not the ability to earn them. Nor is it clear why the *Restatement* would seek to recharacterize future wages as if they were lost on the date of the breach rather than as they came due, when it would be simpler simply to acknowledge that lost earnings are an expectation. Also, if lost earning capacity is a reliance measure, might it look to the next best job the plaintiff could have occupied rather than the actual job held—at least in cases of wrongful discharge—in order to determine what the earning capacity really was worth?

expectation. Reliance, by focusing on the position that would have resulted if the promise had not been made, necessarily seeks to restore a position that had existed (plus any changes that would have occurred between the date of contract formation and the present, if the contract had not been made). Expectation, by seeking to create a position that would have existed if defendant had fully performed, necessarily seeks to create a position that had not yet come into existence (plus any changes that would have occurred between the date of performance and the present, if the contract had been performed). But these timing components are not the essence of expectation and reliance. Rather, they are artifacts of the contract setting. Reliance and expectation characterize the wrong in very different ways. To evaluate whether tort is based on reliance or expectation, we need to examine the way expectation and reliance characterize the wrong and examine which characterization seems more apt in a tort setting.

Expectation characterizes the wrong as the failure to perform a promise. Thus, the expectation remedy asks where the plaintiff would have been if the promise, the duty, had been performed. Reliance characterizes the wrong as the making of a promise.³⁷ Thus, the reliance remedy asks where the plaintiff would have been if the promise had never been made, if the duty had never existed. This distinction, at last, permits us to decide whether tort remedies are more like expectation or more like reliance.

Tort law seeks the position the plaintiff would have occupied if the wrong had not occurred. Returning to our stop sign case, tort law would ask where the plaintiff would be if the defendant had not hit the plaintiff: that is, the position if the defendant had performed her duty by stopping at the stop sign.

That approach resembles the expectation interest, not the reliance interest. It posits the position if the duty had been performed, whereas the reliance interest would seek the position the plaintiff would have occupied if the defendant had no duty to stop at the stop sign.³⁸

37. See, e.g., Slawson, *supra* note 9, at 208 (recognizing that reliance recoveries imply the wrong is the making of the promise, and criticizing this implication).

38. Perhaps we could abbreviate that to the position the plaintiff would have occupied if the defendant had no duty to stop. Those two versions differ slightly. The text assumes a different state of the law: that drivers have no duty to stop at stop signs. The second opens the possibility of a different state of facts: the position the plaintiff would have occupied if the stop sign had not been there. Either approach might be apt in a particular case, though the second seems to offer a more plausible scenario for the

The oddness of asking where plaintiff would be if defendant had no duty to stop should be striking. The question ceases to bear any relation to our normal rule of recovery: to put the plaintiff in the position she would have occupied if the wrong had not occurred. Or, to the extent it continues to bear any relationship to our normal inquiry, it does so by redefining the conduct that seems wrongful—running the stop sign and hitting the pedestrian—as rightful. In this, it is precisely analogous to the reliance interest, which asks where the plaintiff would be if the defendant never assumed a duty to perform a contract by not making the promise in the first place. That question redefines the conduct we deem wrongful, the breach of promise, as rightful, by removing, counterfactually, any duty to perform the promise.

Courts could make the inquiry suggested by the reliance interest. They could discern the plaintiff's position if the stop sign had not been there. To do so we may need to choose among several possibilities.³⁹ For instance, if no stop sign had been present, the plaintiff might have remained on the curb instead of trying to cross while the car was approaching. Alternatively, the plaintiff might have stepped out in front of the car anyway in the hope that it would stop or out of neglect for the car's presence. These two alternatives present the possibility that reliance damages might differ from expectation damages.⁴⁰

Neither possibility, however, tells us much about the fundamental remedial choice tort law makes. The first poses virtually no difference from the expectation interest. The car will not hit the pedestrian, and her position, but for the wrong, is that of an uninjured person, regardless of whether the car stops or she remains on the curb as it zooms past her.⁴¹

absence of a duty.

39. The same range of possibilities can exist in contract cases. When we ask the position the plaintiff would have occupied if no promise been made, we face, at a minimum, a choice between a plaintiff who would have entered a similar contract with a different provider and a plaintiff who would have made no contract at all if she had not made a contract with the specific defendant.

40. The same two possibilities exist if a stop sign is present but the law was such that drivers had no obligation to stop at stop signs.

41. A plaintiff who remained on the curb might reach the other side of the street somewhat later than a plaintiff who was crossing the street in front of a car who obeyed a duty to stop at a stop sign. If crossing the street somewhat sooner would have produced advantages for the plaintiff, the plaintiff could recover those advantages under the expectation interest but not under the reliance interest. One might guess that tort law would protect the gains a plaintiff would have received had she crossed the street uninjured by the car. To the extent those gains were prevented by the defendant hitting her, it appears the driver's failure to stop would be a proximate cause of those losses. To the extent they could be proven to the requisite degree of certainty, plaintiff would be entitled to recover them. Courts could deny recovery of those gains, but are unlikely to do so by recourse to the reliance interest. The reason to deny those gains—a sense that plaintiff should have remained on the curb rather than crossing—is likely to produce a ruling that the plaintiff was contributorily or comparatively negligent in deciding to cross

The alternative—that the plaintiff would have stepped out in front of the car even if no stop sign were present—suggests the plaintiff's reliance interest was zero. She is in fact already in the position she would have occupied if no stop sign had been present: injured by having been struck by the car. This is, in effect, a case where plaintiff did not rely on the sign. The most we can hope is that a plaintiff, aware of the absence of a stop sign, would have hurried across the street and, thus, perhaps suffered a less serious blow from the car.

Perhaps the most revealing aspect of identifying these questions is their novelty. They are novel because courts do not ask them. Courts do not hypothesize ways in which the defendant might not have had a duty to avoid injuring the plaintiff and then hypothesize what the plaintiff might have done under those circumstances in order to ascertain how much worse off she is today than she would have been under that highly conjectural state of affairs. Instead courts are perfectly content to ask where the plaintiff would have been if the duty had been performed. They can compare a very real set of injuries with a plaintiff uninjured because the tortfeasor did not breach a duty. They may encounter some problems of causation, where claims that the plaintiff would have been injured even if the defendant had performed need to be resolved.⁴² But the driver's argument that the plaintiff might have walked in front of the car even if there had not been a stop sign present simply plays no role in damage calculations. The inquiry is entirely focused on the expectation interest.

One might imagine that context matters. Perhaps my argument works for traffic accidents but might not work for other personal injuries. This seems unlikely if my premise is correct: that the reliance interest seeks to restore the plaintiff to the position she would have occupied if the defendant had no duty to perform. That question makes no sense in tort. Tort duties, generally considered as obligations not to injure others, are imposed by society on all persons, not voluntarily undertaken.⁴³ The

the street when she did. This may not prevent inclusion to the gains plaintiff would have made had she crossed the street sooner, but will reduce the portion of the harm recoverable or bar recovery altogether.

42. This is not the same as asking whether the plaintiff would have jumped in front of the car even if the driver had no duty to stop. The claim here would have to be that even if the driver had stopped, the plaintiff would have been injured—say, by another car running the stop sign in the next lane or by a following car failing to stop, hitting the defendant's car, and driving it into the plaintiff.

43. I leave aside arguments that our obligations to society or to the government arise out of our voluntary presence within the society. While those arguments may

hypothetical possibility that a person had no duty to avoid injuring others serves no apparent purpose. Thus, remedial principles—tort or contract—need not advert to it. The counterfactual possibility that the circumstances did not give rise to a duty seems similarly pointless. We can ask what would have happened if no stop sign had been present. But why should we? It was there, the duty was breached, and the breach caused injury.

The preceding paragraph contains the seeds of an argument for the reliance interest in contract, but the argument is quite different from the one I set out to rebut. Contractual duties are not imposed by society, but voluntarily undertaken by individuals. The government really does not care whether any particular vendor and any particular vendee enter into a mutual agreement. If General Motors suddenly decided to keep all the cars it made rather than sell them to others, its folly would be immense, but would violate no law. Its duty to sell cars exists as a result of voluntary agreements (promises) to sell cars, not from any compulsion by the government or others. Thus, unlike tort, the defendant could have created a situation in which she had no duty to perform the contract. Because that situation is imaginable, perhaps it could be used as a standard for measuring recoveries.

Note first how the argument now shapes up. The expectation interest has become the standard remedy in tort. Despite this, the expectation interest might not be the appropriate remedy in contract. The reliance interest, therefore, no longer serves to unify remedies across these two fields. Rather, use of the reliance interest would differentiate contract from tort. And now, the shoe is on the other foot. Again, we must ask why? Why should contract law be treated differently?

Picking up the train of this argument, the same questions that made the reliance interest seem inapt in tort apply with equal vigor to contract. Yes, we can imagine a world in which society imposes no duty to perform promises once made. But it serves no apparent purpose to ask where the plaintiff would have been if the law did not enforce promises. Society does impose a duty to perform promises. And very few people would suggest the world would be a better place without such a rule.⁴⁴

justify governing even dissenters within society, those arguments inevitably include explanations seeking to justify disregarding the empirical falsity of the claim that all members of society consent to be governed in anything approximating the way contracts involve voluntary assent.

44. We may disagree about the circumstances under which society should impose that obligation, but few would suggest the abolition of all liability for breach of contract. I realize the reliance interest limits, but does not abolish, liability for breach. But the justification for the limit—resting, as suggested here, on the possibility that the duty to perform could have been avoided—rests on a possibility we all acknowledge is undesirable.

Yes, we can imagine the counterfactual possibility that defendant had no duty to deliver cars to plaintiff—say, because no promise was made or because no consideration was given in exchange. But that seems no more useful than imagining that no stop sign existed. If the defendant made a binding promise, why should the law pretend the promise was not really binding for purposes of calculating the remedy?

Rhetorical questions are a dangerous device. Someone always has an answer, perhaps one not anticipated by the author.⁴⁵ Nonetheless, I claim a partial victory. The Article, to this point, has illustrated that the expectation interest is no stranger to tort law, while the reliance interest finds no home there. Thus, the suggestion that the reliance interest is useful to make contract more like tort fails. That accomplishes the purpose of this Article. As to the desirability of employing reliance in contract even though it has no basis in tort, I leave the issue to other papers addressing that argument more thoroughly.⁴⁶

One other contextual difference between contract and tort merits attention. The traffic accident case, like many torts, involves a case where the breach makes the victim worse off than she was before the breach. Contract, on the other hand, often involves duties to make a party better off than she was before the breach. The reliance interest would limit recovery to cases where the breach made the plaintiff worse off than she was before the wrong. If that limitation is inherent in tort remedies, then perhaps some means of building it into contract remedies is needed to produce a uniform system of recoveries.

We can probe this by exploring torts where a defendant has an obligation to make the plaintiff better off than she was before the breach. In these cases, tort law could limit recovery to the reliance interest—the position the plaintiff would have occupied if no duty had existed—or could recognize expectation by giving the plaintiff the benefits she would have received if the duty had been performed.

We might select several contexts to explore this proposition. One,

45. I imagine arguments about insufficient promising activity might arise. That concern probably could be addressed by tinkering with contract excuses, rather than by tinkering with contract remedies for unexcused nonperformance. So soon after the holidays, perhaps few people would argue that America really suffers from too little commercial activity, despite the standard use of the expectation interest in contract law.

46. See, e.g., David W. Barnes, *Remedies for Imperfect Transactions in Contracts and Torts*, 38 SAN DIEGO L. REV. 193 (2001); Robert L. Birmingham, *Legal and Moral Duty in Game Theory: Common Law Contract and Chinese Analogies*, 18 BUFF. L. REV. 99, 103–10 (1968–1969); Kelly, *supra* note 1, at 1773–83.

misrepresentation, has already been discussed.⁴⁷ Medical malpractice cases offer several opportunities. In *Hawkins v. McGee*,⁴⁸ for example, if Dr. McGee had been guilty of negligence, would tort law really limit recovery to the harm done to the hand? Or should the recovery allow Hawkins the financial equivalent of any improvement that would have been achieved if the surgery had been performed competently (though not necessarily the benefit of the “perfect” hand warranted by Dr. McGee)? My intuition favors the expectation recovery, but the case is not so obvious. Legal malpractice cases might shed some similar light on the question. Should recovery be the amount the plaintiff would have recovered or saved if the attorney had performed competently (expectation)? Or should the plaintiff only recover the costs she incurred in pursuing the unproductive suit, thus putting her in the position she was in before the representation?

To make the clearest case, let me choose a particular type of medical malpractice: failure to diagnose. A patient seeks medical advice, the physician negligently fails to detect a treatable medical condition, such as a benign tumor, and the plaintiff suffers serious harm from the condition, such as a stroke caused by the continued growth of the tumor. Duty, negligence, and causation are built into the hypothetical. What remedy should apply?

If the doctor had performed, the plaintiff would not have suffered the stroke because the tumor would have been treated before it could cause harm. The expectation interest would support recovery of all damages resulting from the stroke.

If the doctor had no duty to discover the tumor—that is, if the patient had never hired the doctor—then the plaintiff would have suffered the stroke. The doctor did not cause the tumor, but simply failed to discover it. Had no duty existed, the tumor still would have gone undetected, just as it did in fact, and caused the precise harms the plaintiff now suffers. The reliance interest would not support any recovery in these cases.

One could try to describe this as a reliance case by mischaracterizing reliance as any change for the worse in the plaintiff’s position. Before the misdiagnosis, plaintiff had not suffered a stroke; afterwards, she had. The plaintiff is worse off than before the consultation and, thus, has suffered a reliance loss.

The stroke, however, was inherent in the plaintiff’s condition on the date of the misdiagnosis—just as future earning potential is inherent in the plaintiff’s condition on the date of the traffic accident. Absent any intervention, the tumor will grow and cause a stroke. We do not have to

47. See *supra* Part II.

48. 146 A. 641 (1929).

guess; we know this because there was no intervention and the tumor did grow and cause the stroke. One cannot claim that future earnings are part of present earning potential without admitting that future harms are part of present injurious conditions.

Focusing on harm to the plaintiff is pertinent in tort, but not to the reliance interest. Tort law typically requires harm. Harmless negligence (or harmless fraud) is not actionable. That the stroke left the plaintiff worse off than she was before the consultation is sufficient, though perhaps not essential, to establish injury. But it does not make that injury a reliance injury.

The courts, of course, choose the expectation recovery. The doctor may not have made the plaintiff worse off than she was before, but her breach failed to make the plaintiff better off. The plaintiff is entitled to the benefit of the duty.⁴⁹ The case borders on misrepresentation. By failing to reveal the tumor the doctor falsely represents, by assertion or by silence, that the tumor does not exist—or perhaps that some other condition caused the symptoms that lead the patient to seek medical advice. While not necessarily fraudulent, this misrepresentation is material. If actionable, courts would need to choose between the benefit of the bargain—where plaintiff would be if the doctor's statement had been true, which presumably does not include a stroke caused by a tumor—and the out-of-pocket measure—where plaintiff would be if the doctor had told the truth, which presumably includes treatment for the tumor.

Proponents of the reliance interest can justify this recovery by

49. See, e.g., *Bueno v. United States*, 64 F. Supp. 2d 627, 628 (W.D. Texas 1999) (failure to diagnose heart disease caused fatal heart attack); *Suttle v. Lake Forest Hosp.*, 733 N.E.2d 726, 728–29 (Ill. 2000) (\$11 million verdict reinstated where 3-hour delay in diagnosis of low blood pressure in newborn precluded timely treatment); *Galandauer v. Brookdale Hosp. Med. Ctr.*, 710 N.Y.S.2d 396, 397 (App. Div. 2000) (failure to order sonogram hastened death); *Walker v. Zdanowitz*, 696 N.Y.S.2d 509 (App. Div. 1999) (delay in diagnosing peripheral vascular disorder caused amputation of plaintiff's legs). In each of these cases, the patient's condition at time of trial was worse than it was at the time of the misdiagnosis. But some courts do not require that, allowing recovery by people who have recovered despite the late diagnosis, if the late diagnosis increased the risk of relapse or decreased life expectancy. See, e.g., *Alexander v. Scheid*, 726 N.E.2d 272 (Ind. 2000) (failure to diagnose lung cancer justified recovery for decreased life expectancy, even though cancer was in remission); *Cahoon v. Cummings*, 734 N.E.2d 535 (Ind. 2000) (death likely even if diagnosed, but 25–30% chance of survival if diagnosis made timely); *United States v. Anderson*, 669 A.2d 73 (Del. 1995) (treatment cured the disease, but there was a chance—but not a probability—that the disease might recur); *Fetherolf v. Torosian*, 759 A.2d 391 (Pa. Super. Ct. 2000) (chance of surviving breast cancer declined from 65% to 40% due to nine-month delay in diagnosis).

recourse to lost opportunities, just as they justify expectation in other contract cases. Reliance on this doctor deprived the plaintiff of the opportunity to consult a different doctor, who might have discovered the tumor. By depriving the plaintiff of the opportunity to consult another doctor, the doctor made the patient worse off than she was before the duty arose.⁵⁰ Similarly, the doctor did not really make her worse off than she was before. The doctor simply failed to improve her condition. But had the doctor refused to see her, some other doctor might have improved her condition. Thus, if the duty had not existed, the plaintiff might not have suffered the stroke.

The temptation to employ Occam's razor and claim the simpler solution is strong. But a better argument exists.

If the reliance interest actually explains expectation recoveries in failure to diagnose cases, one would expect to find cases where the absence of alternatives produced zero recovery against negligent doctors. That is, in a case where a plaintiff would not have sought advice from a different physician if she was unable to see the defendant, the defendant really did not preclude diagnosis by another doctor. Even if the defendant had refused to see her,⁵¹ no other medical advice would have been obtained. If reliance, rather than expectation, explains tort recovery for failure to diagnose, that argument is a complete defense.⁵² In situations where it could be demonstrated that the plaintiff would not have sought medical advice from another physician,⁵³ the harm would

50. To be clear, the doctor did not really deprive the plaintiff of the opportunity to seek another doctor's advice. She could always seek a second opinion. But the need for a second opinion might not occur to her. Whether the doctor told her she was fine or found and treated some other explanation for her complaints (thus missing the tumor but reassuring the plaintiff that she was receiving medical care), the plaintiff reasonably might rely on the doctor's professional competence. But if the doctor refused to see her (thus not giving rise to a duty), the patient might have sought advice from another.

51. The doctor's refusal to see her is the most plausible way to pose the absence of a duty. The doctor's refusal to enter a contract would prevent a duty. The plaintiff's failure to seek care, while it would prevent a duty, is completely counterfactual (given that the plaintiff did seek advice from a doctor) and would eliminate causation (since the failure to obtain a diagnosis would be attributable to plaintiff's failure to seek one, not defendant's failure to perform carefully).

52. The same argument can be raised in breach of contract actions, where a plaintiff was not really deprived of an opportunity to obtain performance by bargaining with another provider. See Christopher T. Wonnell, *Expectation, Reliance, and the Two Contractual Wrongs*, 38 SAN DIEGO L. REV. 53 (2001).

53. This refinement to the hypothetical may strike some as unlikely. But several situations make it plausible. For instance, suppose only one doctor served a community. It might be demonstrated—or at least argued—that the plaintiff would not have sought health care from another physician even if unable to obtain care from defendant. Similarly, a plaintiff required by her health plan to see a particular primary care physician might not have chosen to see another physician at her own expense, even if the primary care physician refused to see her—or, more plausibly, refused to see her until some time well into the future, at which point treatment might be too late. Alternatively,

have occurred even if no duty had existed, and recovery should be zero.

That result should be counterintuitive. Moreover, no case support can be found for the proposition. Perhaps no attorney has ever tried to argue that the plaintiff deserves nothing because she would not have sought advice from another doctor even if refused care by the defendant. That lack of imagination surely must stem from the fact that no court has ever suggested the argument had anything to do with the merits of the case.

Cases involving the failure to diagnose are simpler than the reliance interest would make them. Patients are entitled to the benefit of careful diagnostic services from their physicians. When a physician fails to provide due care, she is liable for any harms plaintiff suffers that would have been prevented had she discovered the condition earlier. The breach of a duty deprives the patient of a benefit. That benefit will be protected by tort remedies—in all cases, not just in cases where the benefit would have been obtained from another if the defendant (hypothetically) had refused undertake the duty involved. Even here—where the duty produces improvements rather than restoring the plaintiff to a condition already achieved on her own—tort law looks to expectation for its measure of recovery. This context provides no basis for claiming that tort is the home of reliance.⁵⁴

Is there any tort case in which reliance rather than expectation seems the better recovery? One hypothetical has been suggested that I find troubling—not because I cannot conclude that expectation is appropriate, but because I cannot find arguments that show reliance is inappropriate.

Here is the hypothetical: a lone hiker in a wilderness comes upon

a plaintiff who intended to seek care from a different physician might delay finding another suitable doctor (not always an easy task) if her regular physician had not been available. Thus, the hypothetical should not be dismissed as unrealistic.

54. I concede that some tort cases award scanty recoveries where plaintiff is claiming the benefit of improvement. For instance, in wrongful birth cases, courts have been reluctant to award compensation for the costs that would have been incurred raising a healthy child, even though those costs were causally related to a doctor's negligent failure to diagnose conditions that would have caused the parents to prevent the birth. These cases, however, cannot be explained by reliance. The doctor really failed to prevent a loss, not cause a gain. Expenses for raising a child were losses not yet incurred, not benefits sought from the services. Moreover, if reliance includes lost opportunities to seek another diagnosis—as it must to explain any cases of failure to diagnose—the doctor's failure to diagnose a pregnancy or a genetic defect while the birth can still be prevented seems just as likely to prevent plaintiffs from seeking advice from another. Stingy remedies are related more to issues of public policy and the benefits rule than to the reliance interest.

another hiker in distress, say, choking on a piece of dried apple. No one else is within miles of these two. The first hiker is well trained and experienced in the Heimlich maneuver which, properly performed, will save the other hiker's life. She attempts the Heimlich maneuver—thus assuming a duty to do it carefully.⁵⁵ But our rescuer performs the maneuver carelessly, thus failing to save the life of the victim.⁵⁶ For what damages is the defendant liable?

The reliance interest presumably would award no damages. In this case, the defendant has not caused any harm, in that the victim is no worse off than she would have been if the defendant had not undertaken the rescue (and thus no duty had arisen). She would have died in either event. The botched rescue demonstrably did not prevent anyone else from undertaking a successful rescue, so lost opportunities also drop out of the equation. Reliance produces no recovery.

Expectation allows recovery for the death. A careful rescue would have saved the life. The failure to use due care caused the death. All damages resulting from the death are recoverable.

Expectation seems perfectly plausible to me. But I have little to say to someone whose intuition runs the other way. I feel somewhat sorry for the Samaritan who could have left the victim on the path to die—and who, if she had, would suffer no legal consequences—but who now faces enormous damages because she did the right, moral, thing by trying to help. But I do find it plausible to fault her for not taking due care when trying to help. And the damages that resulted, though large, are clear.

My best attempt to offer a justification for expectation is to change the hypothetical slightly. Suppose that, instead of simply failing, the rescuer had caused the death in a different way—say, by breaking a rib that punctured a lung or the heart. Would the intuition of those who favor the reliance interest still run toward no recovery? For purposes of reliance, the facts are nearly indistinguishable. The victim would have died from no help or from botched help.⁵⁷ The negligence did not make her worse off, but merely failed to make her better off. But where the act really does cause a physical harm, the case against the rescuer is stronger. Shooting a poisoned person is still murder. Perhaps

55. Presumably no duty to rescue existed prior to undertaking the rescue.

56. If a wrongful death action skews the damage issues too greatly, assume instead that the rescuer subsequently performs the maneuver successfully, but not until after the victim's brain had been deprived of oxygen for too long, thus producing a living but seriously incapacitated plaintiff.

57. The diehard reliance supporter may suggest that the victim might have managed to perform the Heimlich maneuver on herself if the rescuer had not punctured her heart. But that simply compels me to posit a victim unfamiliar with the maneuver or already deprived of oxygen for so long that she is unconscious when the rescuer appears.

negligently puncturing the heart of a dying person is still an actionable tort. And if recovery is appropriate, how could it be measured except by expectation?

Again, I should beware rhetorical questions. Maybe the victim should recover for the loss of a minute or two of life. Maybe the pain of the wound is all that she can recover.

Still, I wonder if tort law is improved by reading into it the reliance interest. Given the possibility of an appealing scenario, will those scenarios justify zero recoveries (or reduced recoveries) for tort plaintiffs in other settings where reliance might limit a tortfeasor's liability for her negligence? I suspect that the absence of reliance in tort remedies is a good thing—that tort law would be worse off if we started reading reliance justifications into recoveries that are fundamentally based on expectation.

But at this point I have digressed. My goal is not prescriptive, but descriptive. As currently formulated, tort recoveries are not based on reliance. One would have to create new exceptions, not rely on existing principles, to impose reliance limitations on tort recoveries. Thus, the effort to limit contract damages to reliance cannot be justified as a means of making contract more like tort. Rather, to make contract like tort, contract must continue to employ the expectation interest. The plaintiff is entitled to be placed in the position she would have occupied if the duty, whether contract or tort, had been performed, not the position she would have occupied if the duty had not come into existence.

IV. WHAT DOES IT ALL MEAN?

The intellectual exercise has been fun. But does it mean anything? Does realizing that tort law really pursues an expectation interest put us in a better position to handle any issue that might arise in, say, a court of law?

Well, perhaps. If the argument is convincing, the *Restatement* may be able to give up its rather dangerous defensive posture about how tort remedies really are backward-looking, restoring states of affairs that existed before. That posture can produce some drawbacks. But improvements in tort remedies really were not my objective—nor is my research in that field nearly sufficient to start prescribing improvements at the level of detail this particular issue would require.

In contract remedies, I think I can offer two modest insights. Both relate to the role reliance should play in contract law—not exactly court

issues, but perhaps of interest to more than a few of us here. The exercise has crystallized an impression I formed earlier: that reliance really is about when not to enforce promises, not about the remedy to use when enforcing promises.⁵⁸ At the same time, one argument in the Article suggests that reliance might play a remedial role, but only outside the realm of binding contracts.⁵⁹

The second observation is easier to explain than the first, so let me get it out of the way first. In discussing both tort and contract, I argued that it served no purpose to explore the position the plaintiff would have occupied if, contrary to the facts, no duty to perform existed. But that leaves open the possibility that reliance might indeed have a role to play when a binding duty does not in fact exist. My temptation over the last few years has been to see expectation and restitution as the only two legitimate remedial interests, with not even an in-between role for reliance. But I am more and more aware that, in those situations where no duty to perform exists, reliance may play a role. To some extent, this is the point of Professor Wonnell's article.⁶⁰ He urges that, in circumstances where the promise never should have been made in the first place, perhaps we should allow the defendant to buy her way out of the contract by paying reliance.

I reserve judgment on the extent to which an option to buy out the contract at the reliance price should be made available outside the usual contract defenses. Professor Wonnell is appropriately wary of making the option available too broadly, thus undermining normal contract damages, the expectation interest, when they will produce efficient results. I am not sure that regret, even objectively justified regret, should be sufficient to excuse the duty to perform a promise.

I also reserve judgment on whether every defect in binding promises merits this treatment. Reliance remedies for promises unenforceable under the statute of frauds virtually eliminate the statute, making it harder for people who thought they had protected themselves against an unwanted contract, by keeping their discussions unwritten, to obtain the legal protection the legislature sought to provide.

But at least where the law would be inclined to grant an excuse anyway, say for mutual mistake, misrepresentation, or undue influence, conditioning the excuse on payment of the other party's reliance interest would be apt. The nonbinding nature of the promise ceases to be counterfactual in this setting. My rhetorical questions have no force here. Thus, I wonder if this portion of Fuller and Perdue's work

58. See Kelly, *supra* note 1, at 1777-82.

59. See *supra* note 44 & accompanying text.

60. Wonnell, *supra* note 52.

deserves more attention than I have given it to date. I remain wary of extending defenses beyond their current scope, but can see some potential in reliance recoveries when contract performance has been excused.

The other observation is more intricate, but it has a simple root. I wonder if efforts to impose the reliance interest in contract remedies stem not from a desire to make contract remedies more like tort remedies, but to make contract liability more like tort liability. Specifically, I wonder if proponents of the reliance interest primarily want to introduce to contract law a requirement of harm or injury.

The requirement of harm or injury is common in tort. Negligence liability does not exist unless the defendant's negligence actually injures someone. Running the stop sign, even if negligent, produces no tort if the pedestrian does remain safely on the curb. Similarly, misrepresentation is not actionable unless the plaintiff suffers a detriment of some sort, though not necessarily out-of-pocket loss. The fact of damage requirement under the antitrust laws is another example of requiring evidence of some injury before allowing the case to proceed.

No similar requirement exists in contract law. The availability of nominal damages permits recovery by a plaintiff who benefited from the breach.⁶¹ More importantly, the consideration doctrine, by permitting enforcement of entirely executory promises, makes it possible for plaintiffs to sue even when breach occurs before they suffered any detriment in reliance on the contract. The more I explore the arguments mustered for the reliance interest, the more I think they are aiming at these targets, not at the expectation interest.

Consider: The most ardent proponents of the reliance interest focus heavily on cases where the plaintiff arguably suffered no loss when the contract was broken.⁶² One wonders whether the real point of these examples is to support a different measure of damages—which would be zero, if the reliance interest governed contract remedies—or to illustrate that liability makes no sense in this setting. The effect is the same for parties to a true case of no reliance. But the effect of imposing the

61. Few plaintiffs sue just for nominal damages. Litigation costs exceed the nominal award before the client intake interview is over. Awards of nominal damages generally result from a serious miscalculation by the plaintiff (or her attorney) concerning the extent of recovery available.

62. See, e.g., Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 794–97 (1982); Pettit, *supra* note 3, at 466–68.

reliance interest on the whole range of other contracts is remarkably different from carving out an exception that denies enforcement of promises when breach precedes reliance.

This motive also explains the lure of tort. From tort law comes the requirement of injury as a prerequisite to liability. Perhaps tort's apparent use of the reliance measure is not its real attraction.

On this view, consideration is the enemy. But, like the Maginot Line, it defies direct attack. To achieve the objective, it must be flanked. The expectation interest, like Belgium, lies in the path of the flanking maneuver. Its destruction is not the goal, but a side effect.

The objective cannot be reached without conquering Belgium. Contract remedial rules will not reject claims by a party who suffered no reliance unless both injury is required and the reliance interest becomes the measure of damages. Nominal damages would allow the plaintiff who suffered no loss to maintain her suit despite the lack of reliance. But more important, if the expectation interest defines when an injury occurs, the nonperformance may produce a lost gain (an injury under expectation) even if no reliance had been incurred.

Thus, recognizing the goal may not change the discussion. The attack on the expectation interest will continue even if the reason for the attack is limited to a requirement of harm. The quest to import the harm requirement may draw support from tort. The reliance interest, however, is not found in tort law. The expectation interest is the basic remedy applied by courts in both contexts. Thus, whatever else may be said for reliance, appeals to unifying remedies under a single principle should have no appeal—or, rather, should support the use of expectation remedies in both contract and tort.