Breach Is For Suckers

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I. INTRODUCTION

Contract law lacks a realistic theory of the injury caused by breach. Most judges follow Holmes and instruct that "the duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else."[1] But ordinary people think that breach is morally wrong and believe that contract damages should reflect the ethical culpability of the breaching party.[2] They prefer specific performance to monetary damages, deny that expectation interest remedies the moral harm caused by breach, and resist breaching their own contracts even when it is wealth-maximizing to do so.[3] In short, individuals act as if breach is as not as morally inert as doctrine says it ought to be.

To decide if this gap between lay intuition and legal rules presents a problem that the law needs to fix, we need to know more about why individuals feel they way they do. Data points from empirical and theoretical scholarship describe various commonsense moral distinctions between different kinds of breaches, such as willful breaches, breaches of the duty of good faith, and efficient breaches.[4] But we lack a framework that would explain the broader pattern of findings.

We propose that people often consider breach of contract to be a form of exploitation and a violation of the norm of reciprocity.[5]

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1. Oliver Wendell Holmes, Jr., Justice, Supreme Judicial Court of Mass., The Path of the Law, Address at the Dedication of the New Hall at Boston University School of Law (Jan. 8, 1897), *in* 10 HARV. L. REV. 457, 462 (1897); *see infra* notes 9–20 and accompanying text.

2. Tess Wilkinson-Ryan & Jonathan Baron, *Moral Judgment and Moral Heuristics in Breach of Contract*, 6 J. EMPIRICAL LEGAL STUD. 405, 405 (2009).

3. *Id.* at 413, 417, 422.

4. *E.g.*, *id.* at 420–21 (finding in an empirical study of the moral implications of contractual breach that "[s]ubjects distinguished between cases in which the promisor breaches in order to avoid a loss of some kind and in cases in which the promisor has been given a better offer; they imposed higher damages on the latter and indicated that he should feel guiltier for the breach").

5. For a thorough overview of the role of reciprocity in legal decision-making, see Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71 (2003).

Psychological research has shown that people are highly sensitive to the suspicion that they are being exploited,[6] and this Article demonstrates that breach of contract is particularly offensive when it makes promisees into regretful, embarrassed "suckers." (For the purposes of our discussion, we will use the terms "exploited," "suckered," "duped," and "taken advantage of" interchangeably, though we recognize that there are cases in common usage in which one term might apply but others would not.)

To illustrate the relationship between breach of contract and exploitation aversion, this Article reports on the results of an experimental series asking participants to react to circumstances involving breaches of several kinds of simple contracts. The contracts were designed to create certain "exploitation schemas" to determine what, if any, particular aspects of breach would cause an individual to feel like a sucker. To be a sucker—as the term is used in this Article—a person must consent to participate in some problematic or failed transaction, believe the breacher is profiting from the non-breacher's loss, and believe that the breacher has acted intentionally. In the experiment described in this Article, these three factors predict moral outrage in response to breach of contract. As we show, the sucker framework illuminates several puzzling results from current research on the psychology of contract damages as well as aspects of contract doctrine, ranging from the law of willful breach to promissory estoppel. It also helps to define a research agenda that promises insight into the formation of trust through contract law, the psychology of settlement, and the revitalization of the expectation interest.

We proceed in three Parts. Part II offers a literature review, including an introduction to the psychology of being suckered. Part III presents three original experiments involving damages and breach. Finally, Part IV offers a discussion, including both doctrinal and theoretical implications of this research.

II. LITERATURE REVIEW

Knowing how individuals experience the phenomenon of breach of contract is important. It helps us to predict when they will make or avoid contracts, when they will perform instead of breach, and how they will resolve disputes. Although scholars tend to defend contract damages normatively, they often rest their theories on descriptive and

6. *Id.* at 73–74.

psychological claims about behavior;[7] thus, it is essential that these psychological foundations be sound and accurate. Legal economists, for instance, have made behavioral claims about how the rule of expectation damages affects parties' choices,[8] but it may be that they have ignored the predictable, and predictably salient, role of interpersonal injury in decisionmaking about contracts. Below we offer a brief review of the current approach to psychological harm in breach of contract. We then explore some recent findings from the law and psychology literature and suggest how they might be unified with a theory of breach as creating feelings of interpersonal exploitation.

A. The (Missing) Psychology of the Expectation Interest

The remedy most often available to plaintiffs in breach of contract cases is expectation damages—money damages equal to the promisee's expected benefit of the bargain. The rule of expectation damages is meant to put the plaintiff in "as good a position as he would have occupied had the defendant performed the promise."[9] However, expectation damages in practice do not fully remediate the plaintiff's interest. Pragmatically, the doctrines of limitation—avoidability, certainty, and forseeability—together with the substantial expense and uncertainty of contract litigation make expectation awards undercompensatory.[10]

But even were litigation to be swift, cheap, and certain—and plaintiffs faced no doctrinal barriers to complete recovery of their anticipated gains—contract damages do not even attempt to address the subjective harm of breach. Expectation, restitution, and reliance form the traditional bases expressed by contract damages.[11]

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7. *See infra* notes 27–40 and accompanying text.

8. *See infra* notes 27–30.

9. Lon L. Fuller & William R. Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 54 (1936).

10. The point is often expressed. *See, e.g.*, George M. Cohen, *The Fault Lines in Contract Damages*, 80 VA. L. REV. 1225, 1228–29 (1994) (discussing reasons for undercompensatory expectation awards); Daniel A. Farber, *Reassessing the Economic Efficiency of Compensatory Damages for Breach of Contract*, 66 VA. L. REV. 1443, 1444–45 (1980) (asserting that "every prospective plaintiff is not fully compensated" and that "contracts are underenforced"); Stewart Macaulay, *The Reliance Interest and the World Outside the Law Schools' Doors*, 1991 WIS. L. REV. 247, 251–53 (calling litigation an "expensive game of chance" and disparaging expectation as an "ideology," not a reality).

11. Other candidates occasionally vie to join the trinity. *See, e.g.*, Eyal Zamir, *The Missing Interest: Restoration of the Contractual Equivalence*, 93 VA. L. REV. 59, 62 (2007) (advocating for awards based on a restoration interest whereby "courts and legislatures strive to put the injured party in a position similar to the one she would have occupied had the parties made and performed a contract in which their obligations were adjusted to the actual performance by the

Restitution disgorges the promisor's unjust enrichment, while reliance protects the promisee's justified incurred expense.[12] Neither attempts to recover the promisee's own evaluation of the harm of breach. But expectation damages are different, as they purport to remediate a unique kind of harm: the anticipated benefit of the bargain.[13] That is, the injury remedied by expectation might be solely executory, in the promisee's head. This divorce of damage from loss has resulted in some controversy.[14] Although expectation damages currently only compensate for objective loss, an expansive measure of the promisee's loss in theory could take into account the plaintiff's subjective evaluation of harm.

Lon Fuller and William Perdue acknowledged the vital role psychological factors play in expectation damages, arguing that breach creates "a sense of injury," notwithstanding reliance, arising out of a feeling of deprivation.[15] The law disfavors uncompensated harm and "builds its rule" around psychological loss.[16] But instead of examining how lay people perceived the deprivation caused by breach—and the resulting contours of their "a sense of injury"—Fuller and Perdue abandoned psychology as a basis for expectation.[17] Because the law fails to protect against *all* psychological deprivations, such as those for promises not rising to the level of contracts, Fuller and Perdue concluded that expectation could not rest on the sense of injury at all.[18] Instead, they advanced a "juristic" explanation: a "policy consciously pursued by courts and other lawmakers" to encourage reliance on bargains when that reliance would often be hard to prove

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breaching party, while maintaining the contractual equivalence in terms of the agreed value of performance, the chronological relation between their respective obligations, etc."). Richard Craswell, on the other hand, would reduce the trinity by refocusing on expectation alone. *See* Richard Craswell, *Against Fuller and Perdue*, 67 U. CHI. L. REV. 99, 109–11 (2000) (proposing that damages be understood as above expectation, approximating "true expectation" and below expectation).

12. Zamir, *supra* note 11, at 66.

13. *Id.*

14. *See generally* Leo Katz, *What to Compensate? Some Surprisingly Unappreciated Reasons Why the Problem Is So Hard*, 40 SAN DIEGO L. REV. 1345, 1360–62 (2003) ("The expectation entitlement seems a good deal more ethereal than the entitlement not to be subjected to slander, or alienation of affections, or the intentional infliction of emotional distress.").

15. Fuller & Perdue, *supra* note 9, at 57.

16. *Id.*

17. *See id.* at 58 (concluding that "though 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").

18. *Id.* at 57–58.

as such in court.[19] Expectation would be limited to the amount necessary to compensate rational promisees and to deter rational promisors from inefficient breach. The question that this Article tests empirically—how do individuals actually perceive breach?—was simply irrelevant to Fuller and Perdue's question of how judges and juries should be instructed to remedy it.[20]

Contract law's uneasy relationship with psychological harm is not limited to Fuller and Perdue's famous work. Discussions of the psychological harm caused by breach itself are rare. When they have occurred at all, scholars have equated such harms with the quite-distinct problem of trying to account for the emotional harm that individuals feel when they must deal with the consequences of incomplete or missing performance. Such "emotional distress damages" are generally unrecoverable unless the plaintiff's emotional loss is both severe and expected,[21] perhaps from a ruined wedding,[22] vacation,[23] or funeral.[24] As Mark Wessman explained:

> If the promisor breaks his promise, the disappointment of that subjective anticipation is a form of emotional or psychic harm. However, that is not the sense of "expectation" relevant to contract law. If the reason we enforced promises was to compensate for disappointment qua psychic injury, our remedial scheme would be strangely incoherent. The general rule is that, absent exceptional circumstances, we do not award damages for emotional injury resulting from the breach of a contract . . . . [This] rather inflexible limitation on emotional distress damages suggests to me that "subjective anticipation" has little to do with our grounds for enforcement of promises.[25]

Instead of plumbing the depths of a promisee's "subjective" injury, scholars have evaluated the expectation interest by asking

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19. *Id.* at 60–61.

20. Generally speaking, contract law was, until quite recently, a field marked by a lack of sustained empirical study. *See* Robert A. Hillman, *The Limits of Behavioral Decision Theory in Legal Analysis: The Case of Liquidated Damages*, 85 CORNELL L. REV. 717, 718 (2000) (explaining difficulties in importing behavioral theory into contract law theory); Russell Korobkin, *Empirical Scholarship in Contract Law: Possibilities and Pitfalls*, 2002 U. ILL. L. REV. 1033, 1036 ("[A]lthough there is a very large body of empirical studies of contracting, there is extremely little empirical contract law scholarship being produced in the legal academy today.").

21. Mara Kent, *The Common-Law History of Non-Economic Damages in Breach of Contract Actions Versus Willful Breach of Contract Actions*, 11 TEX. WESLEYAN L. REV. 481, 492–93 (2005); Alan Schwartz, *The Myth that Promisees Prefer Supracompensatory Remedies: An Analysis of Contracting for Damage Measures*, 100 YALE L.J. 369, 391 (1990).

22. *E.g.*, Diesen v. Samson, [1971] S.L.T. (Sh. Ct.) 49 (Scot.) (providing recovery for breach of contract by a wedding photographer that resulted in emotional injury to the plaintiff).

23. McConnell v. U.S. Express Co., 146 N.W. 428, 437 (Mich. 1914).

24. Lamm v. Shingleton, 55 S.E.2d 810, 813–14 (N.C. 1949) (holding that damages for mental anguish were appropriate where workmen were "on notice that a failure on their part to inter the body properly would probably produce mental suffering" on the part of plaintiff widow).

25. Mark B. Wessman, *Recent Defenses of Consideration: Commodification and Collaboration*, 41 IND. L. REV. 9, 15 n.52 (2008).

what damages the law *should* award non-breaching parties.[26] Legal economists, seeking to maximize total social wealth,[27] have debated whether expectation damages promote efficient breach[28] or inefficiently permit overinvestment by promisees.[29] Regardless, economists largely assume that individuals have no preferences for—or against—expectation damages.[30]

A telling exception to contract scholars' dismissal of psychology may be found in relational contract theory. Relational contract theorists argue that people in long-term, repeated transactions have different incentives to perform, negotiate, or terminate contracts depending on the effect of their choices on their reputation and the future of the contractual relationship.[31] But the theory does not bring the same interpersonal insight to short-term or one-shot contracts as it does to "relational" agreements.[32] Discrete, short-term contracts are of "short duration, involving limited personal interactions, and with precise party measurements of easily measured objects of exchange . . . ."[33] Relational contracts, by contrast, are "characterized by long duration, personal involvement by the parties and the

26. For a good overview of such normative work, see Craswell, *supra* note 11, at 107–36.

27. *See* David A. Hoffman & Michael P. O'Shea, *Can Law and Economics Be Both Practical and Principled?*, 53 ALA. L. REV. 335, 340–45 (2002) (describing wealth maximization as the main principled norm for mainstream law and economics).

28. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 31–34 (1989) (describing how an expectation remedy leads to Kaldor-Hicks efficient outcome).

29. *See, e.g.*, Aaron S. Edlin, *Cadillac Contracts and Up-Front Payments: Efficient Investment Under Expectation Damages*, 12 J.L. ECON. & ORG. 98, 98 (1996); *cf.* Ian R. Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947, 950–53 (1982) (disputing efficiency of efficient breach).

30. Eric Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 832 (2003). Of course, other interests have their adherents. *See*, *e.g.*, Joseph M. Perillo, *Restitution in the Second Restatement of Contracts*, 81 COLUM. L. REV. 37, 51 (1981) (advocating the approach taken by the Second Restatement on restitution); Steven Shavell, *Specific Performance Versus Damages for Breach of Contract: An Economic Analysis*, 84 TEX. L. REV. 831, 847–54 (2006) (arguing that an economic analysis supports specific performance as a remedy for breach of contracts to convey property); Seana Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 709, 714 (2007) (elaborating a general theory of the moral commitment to perform). The underlying moral bases for evaluating contract damages are a recurring subject of contention. *See, e.g.*, Nathan B. Oman, *The Failure of Economic Interpretations of the Law of Contract Damages*, 64 WASH. & LEE L. REV. 829, 851–59 (2007).

31. *See* Melvin A. Eisenberg, *Why There is No Law of Relational Contracts*, 94 NW. U. L. REV. 805, 812–13 (2000) (describing the foundations of relational contract theory).

32. *See id*. at 817–18 (explaining the definitional problem).

33. IAN R. MACNEIL, CONTRACTS: EXCHANGE TRANSACTIONS AND RELATIONS 12 (2d ed. 1978).

exchange, at least in part, of things difficult to monetize or otherwise measure."[34]

Theorists like Stewart Macaulay suggest that people's behavior with respect to contract law is defined by this distinction.[35] Where contracts are discrete, individuals pay little heed to psychology, norms, reputation, or morality. They simply "breach, at best offer an insulting token settlement, and practice scorched earth litigation tactics, taken out of that unpublished but very real text, *Discovery Abuse for Fun and Profit*."[36] By contrast, relational contracts are defined, in the real world, by norms and reciprocity, not black-letter law.[37] As one scholar has observed, "parties treat their [relational] contracts more like marriages than like one-night stands."[38] Breach of relational agreements is governed by the reputational market, not law.[39] This observation—grounded in empirical studies of commercial parties—is then leveraged to a normative point. Courts ought to be more attentive to the "real" (i.e., relationally infused) deal, and not simply to the "paper" contracts before them.[40]

Relational jurists, concerned primarily with how social practices relate to certain contracts, assume that the psychological dimensions of discrete, one-off agreements are shallow at best. In this Article, we offer evidence that individuals perceive a kind of relational

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34. Paul J. Gudel, *Relational Contract Theory and the Concept of Exchange*, 46 BUFF. L. REV. 763, 765 (1998).

35. Stewart Macaulay, *Relational Contracts Floating on a Sea of Custom? Thoughts About the Ideas of Ian Macneil and Lisa Bernstein*, 94 NW. U. L. REV. 775, 775–84 (2000) (contending that the most realistic theory of the behavior of contracting parties consists of an admixture of the relational approach with cognizance that, in certain contexts, the tenets of that theory are empirically false).

36. *Id.* at 782.

37. IAN R. MACNEIL, THE NEW SOCIAL CONTRACT 62 (1980) (criticizing enforcement of expectancy interest as inconsistent with relational expectations).

38. Robert W. Gordon, *Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law*, 1985 WIS. L. REV. 565, 569.

39. The early work on this problem is Stewart Macaulay's classic, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963). Later work includes Daniel Keating, *Exploring the Battle of the Forms in Action*, 98 MICH. L. REV. 2678 (2000); Daniel Keating, *Measuring Sales Law Against Sales Practice: A Reality Check*, 17 J.L. & COM. 99 (1997); Russell J. Weintraub, *A Survey of Contract Practice and Policy*, 1992 WIS. L. REV. 1. A different set of papers examines contract terms embedded in actual agreements. *See, e.g.*, Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (Or "The Economics of Boilerplate")*, 83 VA. L. REV. 713 (1997).

40. *See, e.g.*, Stewart Macaulay, *The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules*, *in* IMPLICIT DIMENSIONS OF CONTRACT: DISCRETE, RELATIONAL AND NETWORK CONTRACTS 51, 51 (David Campbell et al. eds., 2003) ("Often, however, the paper deal will not reflect the real deal: a writing can be inconsistent with the actual expectations of the parties.").

harm even when the contract itself is a simple, one-shot commercial arrangement. They believe that breach is immoral.

But why should individuals' views that breach is immoral matter to contract law? After all, legal rules often exist to constrain law-related moral outrage and thus to reduce the social conflict that would otherwise attend litigation.[41] Consider this goal in relation to the expectation interest. Ordinarily, the law tells juries (and citizens generally) to treat contractual bargains as purely economic exchanges, defended by a calibrated and unsentimental remedy. We can think of expectation damages as a form of deterrence: What precise remedy would make the promisor efficiently perform?[42] Such calculated thinking might produce its own set of problems, but it would be unlikely to transform contract law into the locus of expressive conflict. Put differently, contract law is usually considered to be the most technical and least political of the first-year law courses for a reason: the framing of damages has dampened the stakes.

Contract litigation that expressly invited citizens to think of breach as morally fraught—that transformed expectation into a contest about the proper scope of moral obligation—would make citizens confront the hard issues that now are routinely buried by the scientific nature of the expectation measure. When do contracts merit legal enforcement? Which types of bargaining power disparities are permissible? What kinds of reasons justify nonperformance? And, in particular, how much social harm did the breach create? These questions sometimes are explicitly raised in decisions about the formation and interpretation of contracts, and they arise in various defenses. But they almost never enter into the question of contractual damages. If questions of damages were to turn on individuals' sense of the wrongness of breach, the argument goes, parties would find it harder to reconcile, and society would find it harder to permit the kind of occasional deal-breaking that invites contracting in the first instance.[43] This explanation would thus conclude that individuals' subjective views about the morality of breach are purposefully excluded from the courtroom because to admit them would turn contract law into an unhealthy expressive contest.

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41. *Cf.* Dan M. Kahan, *The Secret Ambition of Deterrence*¸ 113 HARV. L. REV. 413, 413–19 (1999) (arguing that deterrence-talk plays a similar role in criminal law).

42. Unlike Kahan's discussion of the idiom of criminal deterrence, it isn't as clear that public (as opposed to scholarly and judicial) discussions of breach revolve around prevention. *Cf. id.*

43. To those professors who may think that this is a farfetched possibility, we would ask you to consider how different the atmosphere of the traditional contract class is on the day that unconscionability is discussed.

The above explanation is not the only one for why contract doctrine has excluded psychological research. Another possibility, popular in the literature, is that lay intuitions about breach are whimsical: they are erratic and unbounded "heuristic errors that the law should reject or try to overcome."[44] Policymakers may well be suspicious that laypersons—unlike judges (whose informed ideas about fairness in contract law deserve a certain degree of deference)[45]—have not thought in intelligent ways about contract law. Laypersons' mistaken and ill-formed views, if given rein, would lead to chaos in commercial law, which is particularly in need of certainty. This explanation thus concludes that contract law represses jurors' perspectives on the moral harms of breach because of the possibility that untrained individuals will make a mess.

It is important to distinguish between these explanations when considering the significance of any work on the psychology of breach. For those who believe that contract law excludes moral outrage by design, theorizing about the roots of that emotional response would not undermine the normative justifications for current doctrine. By contrast, the uncertainty explanation would need to be revisited in light of evidence that breach responses were relatively stable preferences, not errors. Of course, both explanations—to one degree or another—rest on implicit assumptions about how individuals will respond to changes in the law. To that degree, information about the psychology of breach necessarily must matter to policymakers.[46]

Indeed, as evidence has accrued that citizens' views of breach are not entirely random, scholars have begun to focus on doctrinal areas where ordinary intuitions of justice seem to play a role. For example, scholars have considered the role of intentionality and willfulness in remedies, arguing that contract doctrine has created numerous special rules for especially blameworthy promisors, some of which might be justified by lay intuitions of attribution and blame.[47] Unfortunately, the nature of willfulness in contract law is poorly

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44. Richard Craswell, *When is a Willful Breach "Willful"? The Link Between Definitions and Damage*, 107 MICH. L. REV. 1501, 1506 (2009) (internal quotations omitted). Notably, Craswell does not adopt this position, but simply notes it as a possible solution to the existence of lay preferences about contracts. *Id.*

45. *See, e.g.*, Benjamin Taibleson, Note, *Forgiving Breach: Understanding the Preference For Damages Over Specific Performance*, 27 QUINNIPIAC L. REV. 541, 541–45 (2009) (examining the validity, bases, and usefulness of one such informed preference).

46. *See* William J. Woodward, *Contractarians, Community, and the Tort of Interference with Contract*, 80 MINN. L. REV. 1103, 1156–60 (1996) (describing "empirical vacuum" about the amount of damages that would make promisees indifferent to breach, and the resulting strength of the case for the tort of interference with contract).

47. *See infra* text accompanying notes 147–158.

defined. A promisor's conduct might be bad, terrible, willful, nasty, in bad faith—you pick the adjective—but with respect to what baseline? If by "bad" we mean intentional, then most promisors will be subject to large awards since most breaches of contract are deliberate choices. Alternatively, if we mean "motivated by an illicit motive," we must find a way to distinguish good motives (e.g., helping a sick relative) from bad ones (e.g., spite).

In summary, contract theorists largely have ignored lay intuitions about breach of contract. Instead, they have relied either on normative theories or on relational contract literature concerned mainly with long-term commercial contracts. In the absence of a psychologically realistic theory of breach, jurists have conflated the psychological harm of breach with emotional damages, and they have been unable to determine when individuals' views of willfulness would or should change their intuitions about harm.

B. The Moral Psychology of Contractual Breach

In the last several years, experimenters have begun to explore how individuals react to breach.[48] Behavioral research has generally concluded that breach creates in its victims a feeling of injury that cannot be fully remedied with money, but studies have also demonstrated that the quality and valence of commonsense responses to breach are susceptible to changes in experimental setting.[49] This Article attempts to address a puzzle that has emerged from previous experiments: people seem to prefer performance and disdain money damages as a remedy, even when the level of damages appears to be fully or even overly compensatory from an objective standpoint. In this section, we describe the existing findings and then argue that these results are best explained by the cognitive psychology of exploitation. We review current literature on breach and exploitation and use these findings to propose a series of experiments designed to help formulate an explanatory model of the psychological aversion to breach of contract.

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48. *See, e.g.*, Sandra L. Robinson & Denise M. Rousseau, *Violating the Psychological Contract: Not the Exception but the Norm*, 15 J. ORG. BEHAV. 245, 245, 249–52 (1994) (surveying employees about their understanding of employment contracts and their reactions to perceived breaches of their respective agreements); Steven Shavell, *Is Breach of Contract Immoral?*, 56 EMORY L.J. 439, 439–42 (2006) (reporting the results of a survey study of moral judgments of breach); Wilkinson-Ryan & Baron, *supra* note 2, at 412–19 (using experimental manipulations of variables like breacher motivation, timing of breach, and relationship of promisor and promisee to evaluate responses to breach).

49. *See* Wilkinson-Ryan & Baron, *supra* note 2, at 420–23 (finding that subjects' chosen damages awards for breach varied in response to framing effects).

The first systematic exploration of the moral psychology of contracts found that subjects believed breach was morally objectionable and should, in turn, be punished with supracompensatory damages.[50] In one experiment from that series of studies, subjects were asked to choose the appropriate level of damages themselves; subjects were then asked to indicate whether breach was morally problematic if the promisor paid the specified damages.[51] On average, subjects asked for damages 2.19 times the expectation value.[52] And, further, on a scale of 1 to 7, where 1 was "not immoral," 4 was "somewhat immoral" and 7 was "extremely immoral," participants thought that breach rated over 5—even though in many cases subjects had chosen supracompensatory awards.[53] As part of the same experiment, subjects were asked to consider specific performance for a fairly run-of-the-mill contract for home renovation services.[54] Not only did 75 percent of participants believe that the promisor *ought* to perform rather than pay damages, 66.7 percent of subjects believed that the court should enforce specific performance.[55] Subjects thought that even supracompensatory damages were morally inferior to performance.[56] This result should be somewhat surprising in light of the traditional assumption in legal scholarship that contracts are tools for facilitating economic exchange rather than promises per se.[57]

These experiments yielded two other puzzling findings. First, people treat harms in contract and tort differently. The study asked subjects to consider two cases: one in which a contractor did not complete a home renovation because he was offered a more lucrative job elsewhere and another in which a contractor did not complete that same home renovation because the homeowner's negligent neighbor caused a dangerous gas leak that prevented the contractor from working on the promisee's home.[58] Subjects asked to award damages based on the neighbor's negligence tended to award money to simply compensate the victim for the lost work.[59] In the contracts case, however, subjects wanted punitive damages for the breaching

50. *Id.* at 414, 420–21.

51. *Id.* at 417–19.

52. *Id.* at 419–20.

53. *Id.*

54. *Id.* at 412–13, 417–20.

55. *Id.* at 420.

56. *Id.*

57. *See, e.g.*, Holmes, *supra* note 1, at 462 ("[T]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else.").

58. Wilkinson-Ryan & Baron, *supra* note 2, at 418–19.

59. *Id.* at 422.

contractor but ultimately preferred performance as a remedy.[60] Moreover, subjects chose greater punishment for breachers who breached to make a bigger profit than for breachers who were facing a loss on the existing contract.[61]

Although people do not seem to be troubled by the prospect of assigning a dollar value to a loss in tort, these findings show us that a breached contract is different. Specifically, the studies demonstrate that people think that there is some special harm in breaching contracts, that the breacher's motives matter, and that the harm is not entirely remediable with money damages. We propose here that the difference between breached contracts and torts lies in the relationship of the parties to one another—or, to be more specific, the parties' respective perceptions of the obligations and norms entailed in their contractual relationship. Promising implicates a sort of solidarity in the requisite meeting of the minds.[62] It is not that people have difficulty placing a dollar value on the actual lost profits or even the hassles that arise from breach of contract. Instead, they are surprised and angry when one party takes unilateral action in contravention of the mutual agreement. Trust is broken and the non-breaching party feels betrayed.

Of course, one might argue that there is no reason for a person to feel disadvantaged when he expected a certain profit from performance and is now being offered that very amount as money damages. Nonetheless, these experiments demonstrate that most people believe that a contract is a promise to perform as agreed. The layperson does not know that the law of contracts disfavors specific performance[63] and, in any case, believes that breaking promises is morally wrong no matter what the law says.[64] Psychology researchers have found that ordinary citizens believe that they are legally and morally bound by the language of a contract they have signed even if

60. *Id.* at 420–23.

61. *Id.*

62. *See* Daniel Markovits, Solidarity at Arm's Length 3 (Oct. 30, 2008) (unpublished manuscript), *available at* http://www.law.upenn.edu/academics/institutes/ilp/2008papers/MarkovitsSolidarityatArmsLength.pdf ("Promise—promise-making and promise-keeping—is a form of social solidarity, a way for persons to engage one another through their intentions.").

63. *See* Tess Wilkinson-Ryan, *Moral Psychology of Contracts*, *in* FAULT IN AMERICAN CONTRACT LAW (Omri Ben-Shahar & Ariel Porat eds.) (forthcoming Sept. 2010) (showing survey data in which respondents routinely reported that a judge would award specific performance and/or supracompensatory damages).

64. Wilkinson-Ryan & Baron, *supra* note 2, at 405.

parts of the contract are in fact unenforceable.[65] The fact is that most people do not expect that contracts will be breached.

Although most laypeople do not take a Holmesian perform-or-pay approach to contracts, they need not necessarily reject expectation damages as an appropriate remedy—but they do. In the torts context, by contrast, you may not expect someone to crash into your parked car, but if it happens, you will not demand damages above the cost of repair. However, the harm in contract is different. When parties sign a contract, they form a special relationship with one another;[66] this relationship involves expectations of trust and reciprocity.[67] Psychological evidence suggests that when individuals consider themselves to be in certain kinds of reciprocal transactions, they are offended at a perceived downgrading or commoditizing of the relationship.[68] This idea is intuitive: if a good friend invited you to her birthday celebration but you did not feel like attending, it would be strange and rude for you to offer to write her a check instead.

This feeling is not, of course, quite so stark with contracts as it is with birthdays. Parties to a contract are not necessarily (or even frequently) friends, and they are involved in an explicitly commercial activity. Nonetheless, much of contracts scholarship emphasizes the central role of the interpersonal element of contracts. As mentioned above, this notion has spawned an entire relational theory of contracts,[69] and a number of deontological philosophers have observed the quality of human solidarity embodied by contracts.[70] Assuming that this notion is correct and the contractual relationship matters, psychological evidence suggests that people will be offended at the

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65. Dennis P. Stolle & Andrew J. Slain, *Standard Form Contracts and Contract Schemas: A Preliminary Investigation of the Effects of Exculpatory Clauses*, 15 BEHAV. SCI. & L. 83, 91–93 (1997).

66. *See* MACNEIL, *supra* note 37, at 16–17 (discussing the obligations inherent in contractual relationships).

67. *See* Edward Lorenz, *Trust, Contract and Economic Cooperation*, 23 CAMBRIDGE J. ECON. 301, 301–304, 314–15 (1999) (finding evidence that trust enhances the social surplus in contracts).

68. *See* Alan P. Fiske & Nick Haslam, *Social Cognition is Thinking About Relationships*, CURRENT DIRECTIONS IN PSYCHOL. SCI., Oct. 1996, at 143, 143–48 (1996) (arguing that cognition about social interactions is strongly governed by the type of relationship a party believes to exist between herself and her co-party and that one's conception of the type of relationship one has with another will strongly influence the behavior towards that other).

69. *See* Symposium, *Relational Contract Theory*, 94 NW. L. REV. 735 (2000); *e.g.*, Jay M. Feinman, *Relational Contract Theory in Context*, 94 NW. L. REV. 737, 737–48 (2000) (discussing the development of relational contract theory within the broader context of the evolution of modern contract law in general).

70. *See* Markovits, *supra* note 62, at 3 (arguing that breach of contract represents an alienation of human solidarity).

idea that money will remediate the perceived betrayal inherent in breach, which is ultimately an interpersonal rather than an economic harm.[71]

In fact, the nature of the harm in breach of contract—including misplaced trust, potential economic loss, and betrayal—resonates with a set of cohesive psychology findings that deal with the cognitive phenomenon of exploitation. Feeling exploited, or "suckered," often has predictable implications for legal and economic transactions, including retaliation and termination of the relationship. This Article proposes that contractual breach makes its victims feel like suckers. Because the experience of feeling suckered is uniquely aversive, or unpleasant, we think that it provides a novel lens to help understand the behavioral economics of contract law. It unifies the extant experimental evidence and provides the foundation for a new research agenda in this field.

Experimental researchers first observed the "sucker effect" in group interactions. They found that people became wary of contributing to group efforts when there was a possibility of their work being exploited by others.[72] Economic experimenters also noted that players were willing to punish exploiters, even if the punishers were only observers rather than victims, and even if punishment was costly to the players themselves.[73] However, not every moral transgression implicates the exploitation schema, which in turn makes people feel suckered.[74] In a review paper on the cognitive and emotional components of "feeling duped," psychological researchers have synthesized the research and identified three essential elements to feeling suckered.[75] The first is *betrayal*: a sucker must voluntarily participate in a transaction with the exploiter. Second, to be a sucker, a person has to perceive *inequity*, meaning the sucker gets either less than other people or less than she thinks she deserves. The final element is *intention*: a sucker must believe that the exploitative act was knowing and purposeful.

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71. Alan P. Fiske, *The Four Elementary Forms of Sociality: Framework For a Unified Theory of Social Relations*, 99 PSYCHOL. REV. 689, 706–08 (1992) (making distinctions between relationships based on market transactions as opposed to communal forms of exchange, among others).

72. *See* N.L. Kerr, *Motivation Losses in Small Groups: A Social Dilemma Analysis*, 45 J. PERSONALITY & SOC. PSYCHOL. 819, 821–23 (1983) (using small-group projects to study the effects of shirking by one participant on the effort levels of other participants).

73. Ernst Fehr & Simon Gachter, *Altruistic Punishment in Humans*, 415 NATURE 137, 137 (2002).

74. A schema is a mental representation of a concept.

75. Kathleen D. Vohs et al., *Feeling Duped: Emotional, Motivational, and Cognitive Aspects of Being Exploited by Others*, 11 REV. GEN. PSYCHOL. 127, 128–39 (2007).

Our proposal in this Article is that the elements of feeling suckered in group interactions are also predictive of moral outrage in response to breach of contract. When people feel suckered, they are morally outraged. Breach of contract cues an exploitation schema—people are familiar with this pattern of human transactions, and they are sensitive to it. When people feel suckered and morally outraged, they are particularly offended and in turn demand more compensation. To develop this proposal, we first review the behavioral results that define each of the constitutive elements of exploitation. We then use an experimental design to test each element individually in the contracts context. Our prediction is that most people will find breach of contract morally outrageous only when all three elements of the exploitation schema are present. In other words, we expect to see high damages and moral condemnation of breach when the breacher has profited from his intentional betrayal of the promisee.

1. Consent & Betrayal

In a recent social psychology review, researchers defined the cognitive construct of exploitation with explicit reference to a kind of contract-like situation: "Feeling duped is a reaction to an interpersonal event and presupposes some shared understanding of fair exchange."[76] The sucker must consent to the transaction, but the actual exchange must not be in line with the agreed-upon bargain. In many cases, of course, a person who has received a raw deal is just a victim, not a sucker. If someone steals your laptop out of your office, you are the victim of a crime, but you are not a sucker. A sucker must be somewhat *complicit* in his own victimization: he must either consent explicitly to some stage of the transaction or consent implicitly to the form of unwarranted trust. When a person is exploited, he is not only angry at the perpetrator, but he is also humiliated and self-conscious. A sucker feels some self-blame for having voluntarily engaged in a transaction with a scoundrel.

Cass Sunstein has offered a commonsense example of this principle.[77] Imagine that a pickpocket on the bus stole your wallet. Now imagine that your children's babysitter stole your wallet. The latter feels much worse because (among other differences) the babysitter is a trusted employee, someone you voluntarily have let into your home. This effect also has been explored experimentally. In

76. *Id.* at 128.

77. *See* Cass Sunstein, *Moral Heuristics*, 28 BEHAV. & BRAIN SCI. 531, 537–38 (2005) (discussing betrayal of trust as being perceived as an independent harm).

an economics game that compared punishments for defection in a public goods game between same-group defectors and other-group defectors, cooperative players were more likely to punish free-riders from their own group than similarly harmful defectors from other groups.[78] And in the most famous betrayal experiments, Koehler and Gershoff found that people preferred inferior, less-safe products to superior products that had a risk of "betrayal"—that is, products that were known to have a risk of a safety feature causing harm (e.g., an air bag that improves safety overall but causes death or injury in a small number of cases). When we put faith in a person or company, any harm caused by a violation of the trust is particularly painful.

In a recent economics experiment, Bohnet and Zeckhauser measured subjects' aversion to human betrayal.[79] Players in a gambling game were much more willing to risk losing when their fate was determined by a random number generator than when it was based on the decisionmaking of another player entrusted to decide their fate—even when the overall probability of winning was the same across conditions.[80] That is, participants minded losing more when they knew that their loss was the result of another player's betrayal rather than a random assignment determined by a computer.

In the context of these experiments, betrayal refers to a loss caused by a promisor rather than by an unrelated party. That is, the harm stems from the breach of an agreement. If people are more averse to this kind of harm, they should report a greater feeling of exploitation and demand higher damages when a contract is breached.

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78. Mizuho Shinada et al., *False Friends are Worse than Bitter Enemies: "Altruistic" Punishment of In-Group Members*, 25 EVOL. & HUM. BEHAV. 379, 388–91 (2004).

79. Iris Bohnet & Richard Zeckhauser, *Trust, Risk and Betrayal*, 55 J. ECON. BEHAV. & ORG. 467, 474–75 (2004).

80. The game was as follows: Players had to decide between two options, either accept a guaranteed medium reward or take a gamble that would yield either a high or a low payoff. The first player, the decisionmaker, was told to decide on a minimum acceptable probability of receiving the high payoff, such that he would prefer the gamble to the sure thing. Experimenters chose a random number from 1 to 100; that was the probability of high payoff for a given round. If the decisionmaker had chosen a higher threshold, he got the sure thing; if he had chosen a lower threshold, he got to play the gamble. This game included a second player, the recipient. If the decisionmaker got the sure thing, the recipient would receive an identical payoff. If the decisionmaker played the gamble, the recipient received more money when the decisionmaker got the low payoff and less when the decisionmaker got the high payoff. In the control condition, the recipient was passive. In the trust condition, the outcome of the gamble was determined by the recipients; the probability of success in the gamble was established by the proportion of recipients in a round who indicated that they would choose the high payoff for the decisionmaker. The average minimum probability of high payoff required by decisionmakers in the control condition was 30 percent; in the trust condition it was 50 percent. The researchers suggested that the difference was a kind of betrayal discount. *Id.* at 472–80.

2. Inequity

The second element of the sucker construct is distributional inequity. A sucker gets the short end of the stick either by giving more than he gets back or by getting less than he deserves. This might seem like an obvious point, but a few studies show that the framing of the distribution is crucial to the perception of exploitation. In one classic questionnaire study by Daniel Kahneman, Jack Knetsch, and Richard Thaler, subjects were shown one of two scenarios.[81] One scenario described a profitable company that cut its workers' wages in response to a local recession.[82] In the other scenario, the company decided to raise wages, but less than necessary to keep up with inflation.[83] Both cases resulted in a lower real salary for workers, so the only difference was how the cases were framed. Subjects said that they thought the wage-cut scenario was unfair but the failure to raise wages was acceptable. Kahneman, Knetsch, and Thaler argue that when people do not perceive an inequitable distribution of goods, they do not feel exploited and, in turn, do not need to retaliate.[84]

Another set of relevant experiments comes from economics games; the Ultimatum game presents a classic sucker situation. In that game, the Proposer gets $10 and offers some proportion of that money to the Responder.[85] The Proposer offers the Responder $3, and the Responder can choose either to take the money and permit the Proposer to make a chump of her, or to reject the game altogether, losing money herself in the process.[86] The Responder does not compare her payoff to her own starting point but rather to the Proposer's starting point.[87]

The results of the Ultimatum game are interesting because the outcomes change depending upon whether experimenters can offer the Responder some evidence that the unequal distribution is justified. In one experiment, researchers told participants that the Proposer and Responder roles were allocated based on the results of an earlier general knowledge challenge in which one player "earned" the right to

81. Daniel Kahneman et al., *Fairness as a Constraint on Profit-Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728, 731–32 (1986).

82. *Id.*

83. *Id.*

84. *Id.* at 739–40.

85. Daniel Kahneman et al., *Fairness and the Assumptions of Economics*, 59 J. BUS. S285, S288–89 (1986).

86. *Id.*

87. *Id.*

be the Proposer.[88] Responders were willing to accept lower offers when they had some credible reason to believe that the distribution was fair.[89] In another Ultimatum game experiment, researchers constrained the Proposers' possible offers. Out of a $10 endowment, Proposers could offer, in one condition, either $2 or $5. In this condition, most Responders rejected the $2. In the other condition, the Proposer could offer either $2 or $8. In this situation, in which there is no obvious equitable distribution, Responders were more likely to accept a $2 offer. When there is no clear sense of which solution is fair, it is more difficult for a Responder to construe the Proposer's choice in terms of exploitation.[90]

These experiments are somewhat similar to the earlier findings in contracts that people are more punitive when the motive for breach is profit.[91] A number of commentators have observed that when breaching is lucrative for the promisor, the doctrine of expectation damages permits the breacher to capture the entire surplus from breach.[92] When breaching is a last-ditch effort to avoid a loss, however, it is not clear that the breacher gains anything (using each party's expected benefit from the contract as a baseline) from breaching and paying damages. In the experiments below, we attempt to replicate this finding and also to include a new dependent variable: the subject's sense of exploitation. If the feeling of being exploited explains the higher damages in the breach-to-gain case, we should observe subjects self-reporting that they feel more suckered in that case.

3. Intention

As discussed, to feel like a sucker, a person both must be part of some consensual relationship or transaction (like a contract) and must perceive that he is receiving a disadvantageously inequitable payoff. However, it is not enough that a person feel that he is getting less than others; being a sucker is not the same as just being a loser. Instead, a person must feel that the breaching party intentionally chose to exploit the non-breaching party. Behavioral economists have

88. Elizabeth Hoffman et al., *Preferences, Property Rights, and Anonymity in Bargaining Games*, 7 GAMES & ECON. BEHAV. 346, 367–68 (1994).

89. *Id.* at 362.

90. Armin Falk et al., *On the Nature of Fair* Behavior, 41 ECON. INQUIRY 20 (2003).

91. Wilkinson-Ryan & Baron, *supra* note 2, at 405.

92. *E.g.*, Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1544 (1985) ("If the promisor breaches and pays perfect expectation damages and nothing more, then the promisee will get none of the surplus and the promisor will get all of it.").

described a model of fairness that they call "intention-based reciprocity,"[93] meaning that people are attentive to the distribution of resources as well as to the motives of the distributor.

In one Ultimatum game experiment, for example, subjects were assigned to one of three possible ultimatum games. [94] In the first game, both players were told that the offer from the Proposer was generated randomly by a computer; in the second, they were told the offer was determined by a third-party neutral person; in the third, they were told the Proposer could choose what to offer.[95] When subjects thought the computer was generating the offers randomly, most indicated that they would accept any distribution.[96] When they believed the offers were chosen intentionally by the Proposer, participants were more likely to reject at least some positive offers.[97] The same question of intentionality has been studied in the context of group projects. In a group setting, the sucker effect describes the phenomenon of a group member decreasing his own effort level as a response to shirking by other members of the group. One study found that this decrease in effort level does not occur when workers have reason to believe that the poor performance of other members is due to incapacity as opposed to laziness.[98]

We argue that the distinction between intentional and inadvertent harm is a fairly intuitive one for most people. Although the law of contracts generally does not inquire as to why a party chooses to breach a contract, most people feel better about a breach that results from a mistake than the same breach committed intentionally. Our explanation, which we test below, is that people feel exploited when a contract is breached on purpose but do not express these feeling of being "duped" if the same promisor makes an error.

III. EXPERIMENTAL METHOD AND RESULTS

Our experiments use basic questionnaire studies to elicit participants' reactions to breach of contract cases. We predicted that when people feel that they have been exploited, they will be motivated to punish breachers. Based on the background literature discussed

93. Ernst Fehr & Karl Schmidt, *Theories of Fairness and Reciprocity: Evidence and Economic Applications* 18–23 (Inst. for Empirical Res. in Econ., Working Paper No. 75, 2001)

94. Sally Blount, *When Social Outcomes Aren't Fair: The Effect of Causal Attributions on Preferences*, 63 ORG. BEHAV. & HUM. DECISION PROCESSES 131, 134 (1995).

95. *Id.*

96. *Id.* at 135, 136 fig.1.

97. *Id.*

98. Kerr, *supra* note 72, at 825.

above, we determined that all three elements of exploitation—betrayal, inequity, and intentionality—are necessary components of the sucker paradigm. Therefore, to test the role of feeling suckered in an intuitive approach to breach, we systematically tested each component. In each experiment, we had two conditions. One condition was the "sucker" condition, and the other was the control condition. The precise facts changed in each experiment to permit the closest possible resemblance between the two conditions, but the basic structure was the same. In the sucker case, a party to a contract intentionally breached the contract in order to capture a larger portion of the contractual surplus; thus, all three elements of betrayal, inequity, and intentionality were present. In the non-sucker cases, one of the three elements was missing.

To test betrayal, we compared a sucker case to a case in which the breaching party deliberately chose to risk harming a homeowner with whom the wrongdoer did *not* have a contractual relationship. To test inequity, we compared the sucker case to a case in which the promisor had a choice between losing money on the contract or losing less money by breaching. In this case, the promisor's choice was deliberate, but the promisor made less than he originally expected to make on the contract (rather than more, as in the sucker case), while the promisee still received expectation damages. Finally, to test intention, we compared the sucker case to cases in which the promisor made extra money on a contract by *accidentally* choosing cheaper, defective material.

We were interested in three primary variables. The first of these variables sought to confirm that, in each case, subjects would choose higher damages when the circumstances made them a sucker. The second and third of these variables sought to isolate the idea of exploitation. We asked subjects the extent to which the breach would make them feel like suckers. We also asked whether the breach was an indicator of disrespect. In addition to these primary variables, we tested a number of secondary variables, including the extent to which people thought the breach would be a hassle or would create other kinds of costs for the promisee. These variables were intended primarily to rule out the hypothesis that the real explanation for the differences between the cases was that material (rather than psychological) losses existed that differentiated the cases.

A. Experiment One: Betrayal

1. Method

In a previous study, Wilkinson-Ryan and Baron tested the psychological difference between identical harms committed in contracts and torts and found that people were more punitive when the harm-doer was the promisor rather than an unrelated third party.[99] This finding is interesting in light of its conflict with American contract law, but it leaves open a number of explanations addressed more specifically in this experiment. First, in the previous study, the level of intentionality differed as between the breacher and the tortfeasor because the breacher, a contractor, was described as making a choice that would result in a sure harm for the promisee, whereas the tortfeasor simply took a risk. Second, in the previous study it was unclear to what extent greedy motives could be ascribed to the breacher or the tortfeasor—the contractor's motive was profit, while the tortfeasor was described as a neighbor working on his home.

In the present experiment, we needed to ensure that, unlike in prior experiments, the cases differed only in one respect: the relationship of the harm-doer to the victim. In one case, the homeowner's contractor caused the harm; in the other case, a negligent contractor hired by the neighbor caused the harm. The cases were similar in all other respects. The contractor's motivation was identical in each case—he was offered money to try a new, risky product. Additionally, the probability of harm (10 percent) and the amount of monetary harm ($1,000) were identical in each case.

Subjects were first asked to read each case and indicate the appropriate level of damages.[100] The exact wording of the contract case scenario is as follows:

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99. Wilkinson-Ryan & Baron, *supra* note 2, at 417–20.

100. Subjects in all experiments in this Article were members of a panel recruited over a ten-year period, mostly through their own efforts at searching for ways to earn money by completing questionnaires. Approximately 90 percent of subjects were U.S. residents (with the rest mostly from Canada). The panel is roughly representative of the adult U.S. population in terms of income, age, and education, but not in terms of sex, because (for unknown reasons) women predominate in this respondent pool.

For each study, an email was sent to about five hundred members of the panel, saying how much the study paid and where to find it on the World Wide Web. Each study was a series of separate web pages, programmed in JavaScript. The first page provided brief instructions. Each of the others presented a case, until the last, which asked for (optional) comments and sometimes contained additional questions. Each case had a space for optional comments. Otherwise, the subjects had to answer all questions to proceed. The study was removed when about one hundred responses had been submitted in each case. In Experiment One, eighty-three subjects were paid

> Dave owns a small floor-refinishing business. He signs a contract to refinish the floors in your condominium. You have already moved into a new home, and you are getting your condo ready to sell. With refinished floors, you will make an extra $3,000 on your condo. It will cost Dave $1,000 in labor and materials. You settle on a price of $2,000, which means that you both expect a $1,000 profit from this arrangement.
>
> The finish that Dave is using for the floors usually costs about $500. While he is buying supplies, a local distributor of the finish approaches him and asks if he would like to try a new product called Quick-Dry. The distributor will pay Dave $2,000 to try the product out, in hopes that Dave will like it and use it in the future. Dave knows (and the distributor admits) that this is a new product and that there is a small but real risk (around 10%) that it will not work properly.
>
> Dave uses the Quick-Dry, and it looks terrible. He has no choice but to remove it immediately, leaving you with unfinished floors. Because of the tight schedule, you have to put the house on the market with unfinished floors, and you do not get the $1,000 you expected from the floor refinishing.

The exact wording of the tort case scenario is as follows:

> Dave owns a small floor-refinishing business. He signs a contract to refinish the floors for the Millers. You live in a twin house, sharing a party wall with the Millers. You are doing a renovation of your house in order to get ready to sell it. You have already moved into your new house, and you are getting the interior of your house repainted on the day after Dave is scheduled to refinish the Millers' floors. You expect to get a $1,000 profit from a fresh paint job when your house goes on the market.
>
> The finish that Dave is using for the floors at the Miller's house usually costs about $500. While he is buying supplies, a local distributor of the finish approaches him and asks if he would like to try a new product called Quick-Dry. He will pay Dave $2,000 to try the product out, in hopes that Dave will like it and use it in the future. Dave knows that this product can cause unpleasant fumes that take about 24 hours to dissipate. (The fumes smell really bad but they are not actually toxic or dangerous to the environment.) Dave plans to seal off the vents between the Millers' house and your house, but he estimates that there is about a 10% chance that the fumes will make it impossible under local labor laws for the painters to work in your home.
>
> Dave uses the Quick-Dry. The fumes leak into your house, and the painters cannot paint in your house. Because of the tight schedule, you have to put your house on the market unpainted, and you do not get the $1,000 you expected from the fresh paint job.

We first asked subjects how much they believed that the contractor ought to compensate them for the harm caused by the breach or tort. The cases were then shown again, followed by a series of "probe" questions. The point of the probes was to assess the cognitive and emotional implications of each case. We prompted the subjects with a series of statements intended to elicit (a particular) facet of the subject's explanation of the kind of harm they perceived in the breach. The statements (and the variable names associated with the subjects' responses) are as follows:

> I would be very embarrassed to have the contract fall through in this case. [Embarrass]

$1.50 to complete a five-minute study. 73.4 percent of subjects were female. Subjects ranged in age from twenty-three to sixty-five, with a median age of forty-three.

> Breaching a contract like this is a sign of disrespect, even when the breacher fully compensates the other party. [Disrespect]
>
> This breach of contract could make it difficult for me to conduct business with other people. [Others]
>
> The compensation would not cover the non-monetary benefits of this service, like sentimental value or personal satisfaction. [Uncompensated]
>
> I would be angry in this situation. [Angry]
>
> I would be sad about the breached contract. [Sad]
>
> This breach would pose a big hassle. [Hassle]
>
> I would feel like a sucker in this situation. [Sucker]

Before answering the probe questions, subjects were also given additional information about the damages: in each case subjects read that "[a] small claims court orders [the contractor] to pay you $1,000 in compensation, and he complies." Two of the questions reprinted above—Sucker and Disrespect—directly addressed subjects' cognitive construal of the interpersonal dynamics in the situation. Four additional questions assessed the extent to which the breach would cause a hassle, make it difficult to do business with others, or implicate sentimental or idiosyncratic value. Three questions—Embarrass, Angry, and Sad—asked about negative emotions associated with the breach. Half of the subjects saw the contracts case first and half saw the torts case first.

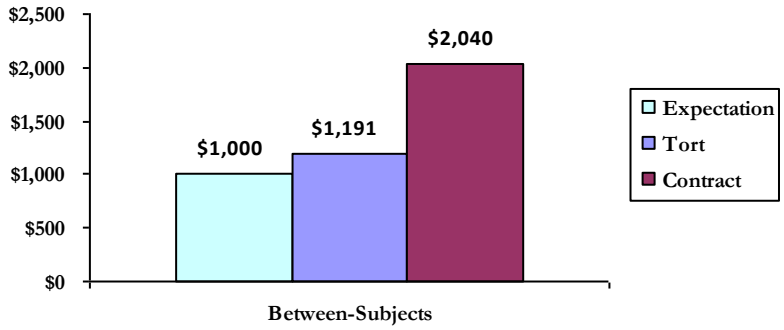
2. Results

The first and most important result is that subjects imposed significantly higher damages for the contract breacher than the tortfeasor, as assessed both within and between subjects. The group of subjects who read the contracts scenario first chose an average damages award of $2,040.43; subjects who read the torts scenario first chose average damages of $1,191.67. The difference between these cases also appears in the within-subjects analysis; on average, each subject awarded $469.28 more in the contract case. This analysis suggests that even when the experimental manipulation was transparent, subjects were still inclined to report that the breach victim deserved more compensation than the tort victim.

In this experiment, and in the experiments that follow, the variables associated with reputation damage and sentimental value—Others and Uncompensated, respectively—did not differ significantly across conditions. Of the three emotion variables, subjects in the Contract condition reported that they would be significantly more embarrassed than subjects in the Tort condition: on a ten-point scale,

they rated embarrassment as a 6.09 on the Contract item and only 3.81 in the Tort condition.[101] There was also a marginally significant difference in the reported level of anger, from 7.83 in the Contract condition to 6.89 in the Tort condition.[102]

FIGURE 1: DAMAGES IN BETRAYAL MANIPULATION



Our hypothesis was that this manipulation would directly test the difference between being a sucker and being a random victim. We tested the role of betrayal in subjects' responses by looking at how their answers to the main probe variables differed by condition while holding the other variables constant. We constrained the analysis to three variables: Sucker, Disrespect, and Hassle. We were most interested in the first two variables, but we also wanted to eliminate the possibility that subjects perceived a real difference in the logistical hassle caused by the breaches. To conduct this analysis, we regressed a binary variable (meaning that the Tort version was coded 0 and the Contract version was coded 1) on Sucker, Disrespect, and Hassle. (We also included a dummy variable for subject fixed-effects.) As Table 1 demonstrates, the Sucker variable was highly significant, with a regression coefficient of 0.619 on an outcome bounded between 0 and 1. Neither Disrespect nor Hassle was significant.[103]

101. The t-statistic was 3.465 with 77.42 degrees of freedom, $p < 0.001$.

102. The t-statistic was 1.899 with 70.26 degrees of freedom, $p = 0.062$.

103. We also wanted to know how each variable affected the damages responses. We regressed the damages question each of the eight variables, including a variable for subject fixed effects. Of the eight variables, the only reliable predictor of damages, holding all other variables constant, was the Sucker variable (coefficient = 188.49, $t = 1.959$, $p = 0.054$). This regression is not reported for Experiments Two and Three.

TABLE 1: RESULTS OF A LOGISTIC REGRESSION OF THE VARIABLE CONDITION (CONTRACT VS. TORT)

Variable	Regression Coefficient	t-statistic
Sucker	0.619	2.997*
Disrespect	-0.167	0.627
Hassle	-0.259	0.358

*$p < 0.01$

B. Experiment Two: Inequity

1. Method

As in Experiment One, subjects were asked first to read scenarios (described below) and then to report the appropriate level of damages. They then re-read each scenario and a series of probe questions following the information about breach.[104]

This experiment addressed the second element of the exploitation schema—inequity. To feel exploited, a person must perceive some inequity in the distribution of goods or rewards. We operationalized this hypothesis by comparing two cases of breach of contract with different economic results for the breacher but identical outcomes for the promisee. In one case, Loss, the breacher breached the contract because he faced a loss caused by a rise in the price of materials. In the other case, Gain, the breacher was motivated to breach by a better offer. Our hypothesis was that this manipulation would tap into the inequity element of exploitation—in the Loss case, the breacher did not make money by exploiting the promisee, which is arguably what happen in the Gain case.

The basic set-up of Experiment Two was to contrast two different scenarios: a breach motivated by greed for gain and a breach motivated by fear of loss. All subjects were first told:

> Please imagine that you own a home, and you are going to sell it to Mr. and Mrs. Baker. The Bakers would like to move in with minimum hassle, and they have offered you a $10,000 bonus on the sale price if you will have new floors put in. You call a local contractor, Todd, who agrees to do the job for $6,000. Todd will do the work the week

104. Subjects were paid $2 to complete a five-minute questionnaire about contracts cases. 100 subjects participated in Experiment Two, thirty-four of whom were male. Ages ranged from twenty-one to seventy with a median age of forty.

between your move-out date and the Bakers' move-in date. You and Todd sign a contract specifying the date, the time, and the price.

Half of the subjects then read a breach condition motivated by gain; the other half read a breach condition motivated by loss. In the Gain condition, subjects read that Todd has been offered more money if he will accept a job from a local real estate developer. In the Loss condition, Todd faces an unexpected rise in the price of the flooring. In both cases, subjects read that he "decides to break his contract to accept other, more profitable work." In each case subjects were asked to answer the question, "How much compensation should Todd be legally required to pay you?" On subsequent pages, subjects read the scenarios again, along with additional information that "Todd pays you $4,000 as compensation," before answering a series of probe questions, as in the previous experiment.

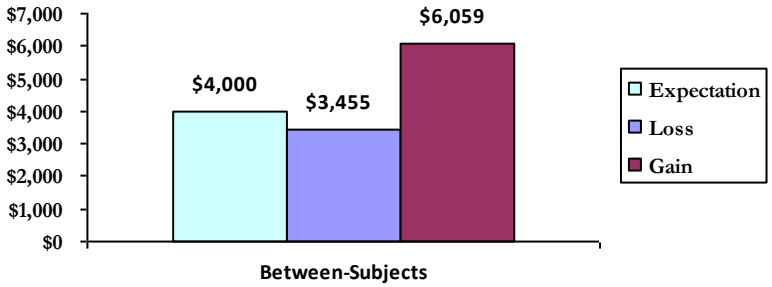
2. Results

As we predicted, subjects thought that the flooring installer, Todd, should pay significantly higher damages in the Gain case. Subjects reading the Loss case thought Todd should pay an average of $3,455.10, but in the Gain case they wanted him to pay $6,058.82. The between-subjects difference—an amount of $2,603.72—was statistically significant.[105] Subjects reported that they would be significantly angrier and more embarrassed in the Gain case than the Loss case.[106]

105. The t-statistic was 3.865, with 96.83 degrees of freedom. $p < 0.001$.

106. The mean response to the Angry variable was 6.06 in the Loss case and 7.31 in the Gain case. The t-statistic was 2.607 with 94.66 degrees of freedom, $p = 0.011$. The mean response to the Embarrass variable was 4.80 in the Loss condition and 5.73 in the Gain condition. The t-statistic was 2.051 with 97.48 degrees of freedom, $p = 0.043$.

FIGURE 2: DAMAGES IN INEQUITY MANIPULATION



We again tested the effects of Sucker, Disrespect, and Hassle by regressing the Inequity condition variable (Gain vs. Loss) on Sucker, Disrespect, and Hassle. In this case, all three variables were significant. In other words, the Sucker, Disrespect, and Hassle variables were all implicated in the perceived difference between a breach motivated by fear of loss and one motivated by the promise of a bigger profit.

TABLE 2: LOGISTIC REGRESSION OF VARIABLE CONDITION (GAIN VS. LOSS)

Variable	Regression Coefficient	t-statistic
Sucker	0.428	2.724*
Disrespect	0.380	2.479*
Hassle	0.655	3.106*

*$p < 0.01$

C. Experiment Three: Intention

1. Method

To identify the role of intention, we provided cases that compared a promisor who accidentally used a cheap material to one who deliberately chose the cheaper material to save money.[107] Subjects were first told:

107. Subjects were paid $6 to complete a thirty-minute questionnaire about contracts cases. 199 subjects participated in Experiment Three, 26.1 percent of whom were male. Ages ranged

> Please imagine that you are a homeowner and you are getting ready to put your home on the market, having already moved out. You are looking to fix the plumbing in two bathrooms in your old house before you sell it. You contact a local plumber, who suggests that he can do the job for $5,000. Your house is old and requires certain kinds of pipes, which the plumber agrees to use. You sign a contract agreeing to the date, price, and nature of the service. Your payment is due on installation. You are getting the plumbing work done just before your first open house.

Subjects in the Intention condition read: "When purchasing materials for the job, the plumber decides to save money with cheap silicone piping rather than the costly copper pipe that your house needs." Subjects in the Accident condition read: "When purchasing materials for the job, the plumber accidentally chooses silicone piping instead of the copper pipe that your house needs." Finally, all subjects read:

> On the morning before the open house, you turn on the sink in one of the bathrooms. Water sputters out at first, but then begins to leak out of the vanity. You cannot reach your plumber so you call a local contractor. He is able to fix the problem, but it costs $8,000 because of the damage and the short notice. You have not yet paid the original plumber his fee.

The primary dependent variable was the compensation: subjects were asked how much they thought that the promisor should be legally required to pay. Before answering the probe questions, subjects re-read the scenario and also read that "[a] small claims court judge orders the original plumber to pay you $3,000 as compensation."

2. Results

Subjects reported that they thought the legal rule should result in significantly higher damages in the Intention case. The mean response was $6,376.13 in the Intention condition and $5,831.16 in the Accident condition. (Note that both amounts exceed the expectation award of $3,000.) The average within-subjects difference of $544.97 is statistically significant.[108] Subjects in the Intention condition reported that they would be marginally angrier than subjects in the Accident condition.[109]

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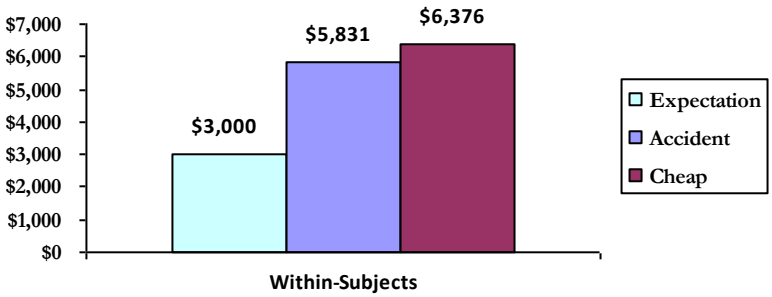
from twenty-four to seventy-five with a median age of forty-five. (Some items on that questionnaire are not reported here, and were used as pilot data for other research).

108. $t = 2.632$, $df = 198$, $p = 0.0092$. Note that this study used an entirely within-subjects design, so we are comparing a given subject's responses to the two conditions.

109. $t = 1.774$, $df = 196.60$, $p = 0.078$.

FIGURE 3: DAMAGES IN INTENTION MANIPULATION



We then tested the three probe variables, again regressing a binary variable (equal to 1 in the Intention condition) that coded condition on Sucker, Disrespect, and Hassle. Sucker and Disrespect were both independently, and significantly, related to the manipulation.

TABLE 3: LOGISTIC REGRESSION OF VARIABLE CONDITION (INTENTION VS. ACCIDENT)

Variable	Regression Coefficient	t-statistic
Sucker	0.398	3.604*
Disrespect	0.586	4.914*
Hassle	0.112	0.695

*$p < 0.01$

IV. DISCUSSION

Our goal is to explain why individuals dislike breach and demand damages above expectation level as the remedy. We have hypothesized that people see breach as a form of interpersonal exploitation: it makes the non-breaching party feel taken advantage of, like a sucker. People are very sensitive to this form of interpersonal conflict.

We tested our intuitions by examining the constitutive aspects of being a sucker in various contract scenarios. With respect to *betrayal*, we found that harm in contract, as opposed to tort, is experienced as a betrayal, and that the subsequent damages are motivated by the anger and embarrassment of feeling suckered.

Unlike tort injury, contractual harm produces inward-facing discontent, a particularly unpleasant form of harm. To avoid or compensate that harm, individuals demand more in damages.

With respect to *inequity*, our findings explain previous work that differentiated breaches to avoid loss from breaches to create gain. Subjects are somewhat sympathetic to the breachers who seek to avoid loss, but they demand greater-than-expectation damages from breachers who breached for their own gain. Subjects felt that breaching to avoid a loss was understandable, but breaching to make a profit was disrespectful to the promisee.

With respect to *intention*, we found that whether a breach was intentional does in fact significantly affect the amount of damages demanded by the promisee.[110] As Holmes put it, "[e]ven a dog distinguishes between being stumbled over and being kicked."[111] Subjects reported greater feelings of being suckered and disrespected in the intentional breach case.

Taken together, these findings are important for two reasons. First, they help to define the harm of breach. The observed aversion to breach is explained by the broader phenomenon of aversion to exploitation. When people feel taken advantage of, they are angry, embarrassed, and regretful. Because the experience is so aversive, and because it causes a certain amount of self-blame, people will work very hard to avoid repeating the experience.

Second, the findings tell us not only *how* disappointed promisees feel but also *when* they will feel this way. Subjects were not outraged by breach when they thought that the breacher had made a mistake or that the breacher himself was losing out on the deal as well. Although the law does not always distinguish between an intentional and a negligent breach, the promisee's experiences of those breaches are different. As explained below, these findings have implications for both legal decisionmaking and contract law in general.

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110. Interestingly, in both conditions, the amount demanded was greater than the expectation award. However, we used only a single set of cases, so it is unclear if subjects found both accidental and unintentional breach objectionable, or if they objected to something particular about the facts of the plumbing contract in question.

111. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 7 (Mark DeWolfe Howe ed., Harvard University Press 1963) (1881). *See generally* Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1, 63–65 (2004) (explaining attribution theory in legal settings).

A. Behavioral Implications of Breach-as-Exploitation Findings

1. Barriers to Settlement

The clearest implication of these findings is for the ability of parties to efficiently reach settlement in breach of contract cases.[112] When people feel suckered, they want to impose punishment, even if that punishment is costly and does not maximize the subject's economic gains. A number of researchers have shown that moral outrage drives punishment[113] and that feeling exploited leads to a feeling of outrage.[114] When people experience moral outrage and have the opportunity to punish, they will do so even when the punishment is costly to themselves.[115] Classic economic studies of a phenomenon termed "altruistic punishment" have shown that players in a public goods game will punish free riders, even when the punishment costs the punisher money and has no effect on the punisher's future dealings with the free-rider.[116] In the contracts context, demanding excess damages is costly insofar as it will lead to litigation.

Furthermore, it is not simply a matter of one party perceiving a moral harm and seeking expression of the social norms via supracompensatory damages—feeling duped is a highly aversive emotional state. The promisee in the breach feels personally affronted and upset, and these emotions may constrain or distort the ability of the parties to reach a mutually satisfactory settlement, whether before or after the beginning of litigation. In other words, feeling exploited causes a very intense desire to retaliate, even when retaliation yields few gains and risks serious losses.

2. "Sugrophobic" Behavior in Future Contracting

Many scholars from the fields of economics, psychology, and law have argued that transactions are more efficient in an atmosphere

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112. For an interesting case-study approach that analyzed the rarity of post-decision bargaining, see Ward Farnsworth, *Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral*, 66 U. CHI. L. REV. 373 (1999).

113. *See, e.g.*, Daniel Kahneman et al., *Shared Outrage and Erratic Awards: The Psychology of Punitive Damages*, 16 J. RISK & UNCERTAINTY 49, 51–53 (1998) (summarizing a theoretical model in which outrage is a driving factor in punitive impulses).

114. *See* Vohs et al., *supra* note 75, at 134 (describing anger and a possibility of retaliatory attack as likely responses to being duped).

115. *See* Kahan, *supra* note 5, at 71 ("When . . . [people] perceive that others are shirking or otherwise taking advantage of them, individuals are moved by resentment and pride to withhold their own cooperation and even to engage in personally costly forms of retaliation.")

116. *See* Fehr & Gachter, *supra* note 73, at 137–39.

of mutual trust.[117] The data we have presented suggest that when a contract is unilaterally terminated, the non-breaching party feels exploited even if fully compensatory damages are available. The single most robust finding in the psychological literature on exploitation is that when people are taken advantage of, they experience deep regret and become sensitive to the prospect of being suckered again.[118] That is, they become less trusting. "Sugrophobia"—the fear of being suckered—is the somewhat tongue-in-cheek term of art that psychologists have assigned to the exaggerated fear of being duped.[119]

The possibility that people experience breach as exploitation could have serious consequences for subsequent contracts—they may prefer not to enter into contracts at all, and when they do make contracts, they may take costly precautions to protect themselves against breach. Evidence from prisoner's dilemma experiments shows that players who are tricked into cooperating while their partners defect become unusually self-protective.[120] They prefer to defect even when the strategy leads to an overall minimization of gains. We might make an analogy here to the contracts context: when people feel that they have been burned by contracts in the past, they may be reluctant to enter new, potentially profitable contracts in the future. Insofar as contracts are an important tool for economic and social welfare, aversion to contracts will have negative consequences.

Equally worrisome is the prospect of people taking costly precautionary measures when developing and executing a contract. These kinds of measures include excessive drafting of terms when an incomplete contract would actually serve the parties better, failure to invest in a contract for fear of future breach, and undue monitoring of the other party's performance. As many economists have observed, drafting complicated contract terms takes time and money.[121] Parties may also forgo economic opportunities if they are unwilling to rely on a contract in advance of the other party's performance. And, of course, anyone who has ever hired a contractor for home renovations knows that it takes a lot of effort to consistently monitor work. Worse, though, is that these kinds of self-protective behaviors may also send

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117. *See supra* text accompanying notes 76–80.

118. Vohs et al., *supra* note 75, at 134 (describing anger and frustration with the self as well as shame and guilt as among the prime aversive emotions likely evoked by feeling duped).

119. *Id.* at 134–36.

120. ANDREW M. COLMAN, GAME THEORY AND ITS APPLICATIONS IN THE SOCIAL AND BIOLOGICAL SCIENCES 137 (2d ed. 1995) (describing a "sobering" period where participants become less willing to work together to maximize gain).

121. *See, e.g.*, Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1583–84 (2005) (describing the costs incurred at the time of drafting a contract).

signals to the other party that hinder the contractual relationship. For example, psychologists have found that increased monitoring decreases work effort by employees.[122]

Such phenomena have been observed in the legal context as well. Dan Kahan has drawn on behavioral findings and argued that "individuals who lack faith in their peers can be expected to resist contributing to public goods, thereby inducing still others to withhold their cooperation as a means of retaliating."[123] Lee Anne Fennell has observed a kind of sucker effect in the tax context and in the area of local government services—that is, people are more likely to free-ride if they observe other free-riders in the system.[124] When transactors believe that they are not operating in a context of mutual trust, they are less likely to behave cooperatively, whether because they feel insulted or because they believe that the relationship does not fall within the bounds of reciprocity norms. This is not good for productivity or for contracts.

B. Relationship to Contract Doctrine

We now consider the extent to which this sucker theory helps to explain and inform the operation of actual contract doctrine. Because our psychological theory of breach is both exploratory and preliminary, this Article merely sketches the implications of our work for contract doctrine and theory. We focus on three particular areas for which understanding the importance of sucker psychology might illuminate current debates: the desirability of liquidated damages clauses, the roots of the controversy about promissory estoppel, and the difference between willful and accidental breaches. We aim to illustrate that a more realistic theory of how people account for breach (and contracting generally) may significantly clarify existing scholarship and doctrine.

1. Liquidated Damages

Jurists have offered mixed views on whether courts should enforce liquidated damages clauses. Autonomy theorists insist that

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122. Bruno S. Frey, *Does Monitoring Increase Work Effort? The Rivalry with Trust and Loyalty*, 31 ECON. INQUIRY 663, 665 (1993).

123. Kahan, *supra* note 5, at 72.

124. Lee Anne Fennell, *Beyond Exit and Voice: User Participation in the Production of Local Public Goods*, 80 TEX. L. REV. 1, 26–29 (2001); Christopher C. Fennel & Lee Anne Fennell, *Fear and Greed in Tax Policy: A Qualitative Research Agenda*, 13 WASH. U. J.L. & POL'Y 75, 99–100 (2006).

such clauses—like all expressions of the parties' respective agreements—ought to be enforced to promote human flourishing.[125] Others, concerned that such clauses may become punitive, demand that the courts alone be responsible for delivering sanctions.[126] Efficiency-minded theorists, who agree that the purpose of contract doctrine is to motivate optimal levels of breach and contracting behavior, disagree about liquidated damages too. Some believe that parties will be unlikely to bargain out of particular damages clauses, resulting in inefficient or coerced performance. Others suggest that such clauses generally ought to be enforced because bargaining is relatively frictionless and parties are likely to know more about their actual harms than courts.[127]

This mix of empirical and normative inquiry has only recently begun to elicit controlled study. In another work, one of us explored the interaction of liquidated damages clauses and decisions to breach.[128] Studies showed that subjects in experiments were more willing to breach contracts that contained liquidated damages clauses than contracts that did not provide for breach.[129] They believed that such breaches were less wrongful, less immoral, and less harmful to the breacher's reputation.[130] Several explanations were suggested for this phenomenon, including crowding out moral anti-breach norms, debiasing a moral heuristic, and reconciling contrasting norms of performance and wealth maximization.[131]

The anti-exploitation theory described in this Article supports this last explanation of how liquidated damages work. Individuals who agree to a contract with a damages clause are not "blindsided" by breach;[132] rather, the possibility of breach is embedded into the parties' agreement. Disappointed promisees in a contract with a liquidated damages clause do not feel suckered because they have not been betrayed. Recall that in the initial definition of betrayal offered in Part II of this Article, we posited that the promisor's actions must

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125. *See, e.g.*, Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 317 (1986) (criticizing court's refusal to enforce liquidated damages clauses on consent grounds).

126. *See* Shiffrin, *supra* note 30, at 734–35 (explaining and critiquing this argument).

127. *See* Tess Wilkinson-Ryan, *Do Liquidated Damages Encourage Efficient Breach? A Psychological Experiment*, 108 MICH. L. REV. (forthcoming Mar. 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1299817 (manuscript at 11–15) (summarizing and commenting upon various efficiency and rationality analyses of liquidated damages clauses specifically with respect to the concept of efficient breach).

128. *Id.*

129. *Id.* at 33.

130. *Id.* at 31–32.

131. *Id.* at 34–38.

132. *Id.* at 38.

be in contravention of the agreed-upon exchange to constitute a betrayal. When damages are stipulated, the possibility and terms of breach are incorporated into the agreement. Promisees do not feel taken advantage of when the promisor's behavior was contemplated by both parties.

The ultimate normative implications of this understanding of the psychology of liquidated damages are complex. On the one hand, it suggests that courts should view freely negotiated liquidated damages clauses with less skepticism since their breach will not entail the extra uncompensated harm that comes when promisees are made suckers and merely paid expectation damages. Notably, in liquidated contracts, the parties do not have to negotiate around the extra (and subjective) "sucker" item of damages following a breach, and they instead can split the monetary surplus or loss. It is possible that this extra item of damages, which involves the destruction of feelings of reciprocity and trust between the parties, is especially hard to bargain around after a breach has occurred. It creates an unpleasant contest between the parties (unexpressed in doctrine) about the morality of their conduct. We might then expect to see that disputes involving liquidated damages clauses are less likely to be litigated, and more likely to settle. Such a result would save private and public resources alike. To the extent that parties either believe that liquidated damages clauses are unlikely to be enforced or must pay a negotiation tax to account for the uncertainty of enforcement, the current state of doctrine may (1) induce insufficient numbers of breaches, (2) encourage litigation, and (3) discourage settlement.

But with respect to liquidated damages clauses that are not freely negotiated, the case is significantly less clear. There is an irony here. When such clauses are permitted into evidence, *juries* may view them as reducing the harm of breach, making recovery (at either the liability or the damages phase) less likely. But *promisees*, who rarely will have read their own contracts with any care before the breach, will continue to expect performance. Thus, they will be unhappy with the liquidated damages offered at breach and will refuse to settle, though their actual chances of winning at trial may be reduced. This unfairness suggests at least the possibility that courts should be more skeptical of such clauses in consumer contexts so as to avoid a form of sucker false consciousness.[133]

133. This analysis depends, of course, on subsequent work on the relationship between liquidated damage clauses and pre- and post-breach behavior.

2. Promissory Estoppel

Promissory estoppel doctrine suffers from severe and continued attacks on its legitimacy and desirability.[134] In the ten years since Professor Bob Hillman published his tremendously influential empirical piece on the doctrine,[135] scholars have debated his conclusions that promissory estoppel causes of action almost always are losers[136] and that courts focus on the promisee's reasonable reliance rather than the nature of the promise itself.[137] Determining how promissory estoppel cases are actually litigated is beyond the scope of this—and perhaps any—Article.[138] But sucker theory might provide an answer to an entirely different question: *Why* does promissory estoppel continue to provoke such controversy?

Scholars have traditionally answered that question by noting the doctrine's uneasy relationship with bargain theory. How can the formal rules of contract—which limit recovery for promises unless channeled into highly formal, legalized relationships—coexist with a liberal, tort-like remedy such as promissory estoppel? Indeed, as Grant Gilmore vividly stated, promissory estoppel threatens to "swallow[] up" contract law.[139] The resulting digestive process might unsettle dominant commercial expectations, and it certainly would destabilize existing boundaries that define the first-year law school curriculum.[140] Thus, most commentators have seen promissory

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134. *See, e.g.*, Charles L. Knapp, *Reliance in the Revised* Restatement*: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52, 53 (1981) ("[PE] has become perhaps the most radical and expansive development of this century in the law of promissory liability."); *cf.* Joel M. Ngugi, *Promissory Estoppel: The Life History of an Ideal Legal Transplant*, 41 U. RICH. L. REV. 425 (2007) (providing an intellectual history of the doctrine).

135. Robert A. Hillman, *Questioning the "New Consensus" on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580, 588–96 (1998) (empirically demonstrating the low win rate on PE claims).

136. *See, e.g.*, Juliet P. Kostritsky, *The Rise and Fall of Promissory Estoppel or is Promissory Estoppel Really as Unsuccessful as Scholars Say It Is: A New Look at the Data*, 37 WAKE FOREST L. REV. 531, 543–85 (2002) (examining different data and finding a higher win rate).

137. *Cf.* Sidney W. DeLong, *Placid, Clear-Seeming Words: Some Realism About the New Formalism (With Particular Reference to Promissory Estoppel)*, 38 SAN DIEGO L. REV. 13, 44 (2001) (arguing that, in evaluating reliance, "courts employ implicit normative standards in the guise of purely causal reasoning").

138. Studies relying on opinions to determine success rates of claims are subject to well-known selection biases. *See* Christina L. Boyd & David A. Hoffman, *Disputing Limited Liability*, 104 NW. U. L. REV. ___ (forthcoming 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1483278.

139. GRANT GILMORE, THE DEATH OF CONTRACT 79 (1974).

140. The late 1970s to early 1980s were marked by boundary insecurity between other first year courses. *See* Thomas Grey, *The Disintegration of Property*, *in* NOMOS XXII: PROPERTY 69, 71–72 (J. Roland Pennock & John W. Chapman eds., 1980) (listing different usages of the term

estoppel as controversial because it threatens the formal legal order and might permit plaintiffs to arbitrage around a carefully calibrated default-rule regime.[141]

Sucker theory offers a distinct explanation. The *Restatement (Second) of Contracts* lists the following requirements for a claim of promissory estoppel: the plaintiff must prove (1) the existence of a promise, (2) that the promisor reasonably expected to induce (and indeed did induce) action or forbearance, and (3) the presence of injustice in the absence of enforcement.[142] Beyond these requirements, courts are encouraged to limit recoveries—that is, perhaps to provide reliance rather than expectation damages.[143] As this definition makes clear, promissory estoppel actions may proceed in the absence of a moral betrayal: they focus on the promisor's state of mind (that she reasonably believed that her promise would lead to reliance), and not the promisee's state of mind. Though the promisor has failed to follow through on a promise, she has not betrayed a legal agreement that inspired trust.[144] Thus, promissory estoppel cases seem less likely to contain plaintiffs who expected the psychological feeling of being suckered.

This missing element suggests that individuals will be less angered by breaches of promises than of contracts. Therefore, juries' views of the merits of a promissory estoppel claim will turn on the promisee's *subjective belief the promise was legally enforceable*, not the objective expectations of the promisor. Indeed, Sidney DeLong has observed just this pattern in some promissory estoppel cases.[145] Perhaps, then, the lack of traction for promissory estoppel in courts may be related not merely to its formal tension with contract law but also to its tension with how people think about the harm incident to promising. Because promissory estoppel doctrine is not attentive to whether the promisee believed that a particular promise was legally

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"property," including by law students and law professors, and concluding that "discourse about property has fragmented into a set of discontinuous usages").

141. For some, that's the point. *See* Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake*,*"* 52 U. CHI. L. REV. 903, 906 (1985).

142. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

143. *Cf.* Hillman, *supra* note 135, at 601–02 (finding reliance to be a common measure of damages).

144. *Cf.* John J. Chung, *Promissory Estoppel and the Protection of Interpersonal Trust*, 56 CLEV. ST. L. REV. 37, 50–51 (2008) (discussing the differences between trust and reliance).

145. *See* Sidney W. DeLong, *The New Requirement of Enforcement Reliance in Commercial Promissory Estoppel: Section 90 as Catch-22*, 1997 WIS. L. REV. 943, 959 (noting that some courts suggest that promisees must demonstrate that they believed a promise legally enforceable in order to obtain relief under section 90).

enforceable, both jurors and judges are led to believe that the cause of action defends a less-important terrain. This creates a confused and confusing set of cases and verdicts and, ultimately, a lack of any consensus about the power and normative desirability of the promissory estoppel cause of action.

3. Willful Breach

When does *fault* matter to contract law? That question recently provoked an important symposium in the *Michigan Law Review*, in which scholars advanced distinct answers on both descriptive and normative fronts.[146] A particular topic of concern was willful breach, which, as explained above, poses particularly puzzling doctrinal problems.

Specifically, the authors in the symposium struggled to explain when intentional breach gives rise to supracompensatory damages.[147] Many rested their explanations for differences in the doctrine on the parties' *incentives* regarding optimal deterrence. With several variants, commentators argued that when some aspect of the promisor's conduct suggests that expectation damages may promote inefficient breach, the law provides an extra helping of remedy.[148]

Such incentive-based explanations are powerful, but our theory suggests that they are missing behavioral nuance. We believe the results outlined in this Article demonstrate that individuals' views of breach are manipulable in multiple dimensions, but they generally may be explained as a function of *perceived exploitation*. Where one party feels particularly exploited, that party will demand higher damages to compensate breach. Importantly, this anti-exploitation preference is bilateral: promisors do not wish to make suckers of others. Our research suggests that willfulness might be best seen as a denial of a shared expectation of reciprocal trust: a willful breacher deliberately makes a sucker of his counterparty. Our theory offers a way to evaluate the doctrine of willful breach on a new ground by questioning whether the doctrine protects against the extra psychological harm that accompanies a sucker's breach.

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146. *See* Omri Ben-Shahar & Ariel Porat, *Foreword: Fault in American Contract Law*, 107 MICH. L. REV. 1341, 1342–43 (2009) (summarizing participants' accounts).

147. *See generally* Oren Bar-Gill & Omri Ben-Shahar, *An Information Theory of Willful Breach*, 107 MICH. L. REV. 1479 (2009); Craswell, *supra* note 44; Steve Thel & Peter Siegelman, *Willfulness Versus Expectation: A Promisor-Based Defense of Willful Breach Doctrine*, 107 MICH. L. REV. 1517 (2009).

148. *E.g.*, Bar-Gill & Ben-Shahar, *supra* note 147, at 1494 (arguing that, where the likelihood of breach detection is lower, supracompensatory damages may be the only way to prevent inefficient breach).

Our psychologically based perspective would help to distinguish two famous cases that continue to puzzle theorists of willful breach: *Jacob & Youngs, Inc. v. Kent*[149] and *Peevyhouse v. Garland Coal & Mining Co.*[150] In *Jacob & Youngs*, a building contractor failed to perform on his promise to install a particular brand of pipe; he mistakenly installed a materially indistinct brand.[151] Although the contract contained a clause requiring perfect compliance, Judge Cardozo refused to enforce it, instead holding that the proper remedy was not removal of the old pipe but instead the nominal difference in value.[152] Similarly in *Peevyhouse*, a coal company reneged on its promise to repair the damage its mining caused to a farming family.[153] The Oklahoma Supreme Court refused to enforce the contract with supracompensatory damages, instead providing merely the normal expectation award.[154]

An economic incentive theory of contract, which focuses on the promisor's intention, finds it hard to distinguish between *Jacob & Youngs* and *Peevyhouse* because the "intentionality" of the respective promisors' breach must be situated in time: in both cases, the promisors chose to breach in one way or another.[155] However, sucker theory provides a different lens—inequity. Lay respondents clearly would see the breach in *Peevyhouse* to be significantly more harmful than the breach in *Jacob & Youngs*. Inequity asks whether one party has wrongfully seized the gains created by a shared agreement. That factor was present in the coal's company decision to profit by failing to remediate in *Peevyhouse*. But was not clearly present in *Jacob & Youngs*, as the builder did not benefit from his mistake regarding the brand of pipes. Thus, Cardozo's opinion in *Jacob & Youngs*, by denying extra relief, implicitly (and correctly) concluded that the builder had not imposed extra harm meriting a supracompensatory award. The court in *Peevyhouse*, although similarly limiting damages for a willful breach, undermined lay intuitions of harm.

This psychological perspective is not necessarily in tension with economic theory. Rather, our perspective complements economic

149. 129 N.E. 889 (N.Y. 1921).

150. 382 P.2d 109 (Okla. 1962).

151. 129 N.E. at 890.

152. *Id.* at 891.

153. 382 P.2d at 111.

154. *Id.* at 113.

155. *See* Craswell, *supra* note 44, at 1502–04. In *Jacobs & Young*, the contractor could have invested more care in preventing the "accidental" breach, and could have freely decided to remediate the harm without the plaintiff seeking legal intervention, while in *Peevyhouse*, the mining company refused to make the promised repairs because it decided they would cost too much.

theory in at least one instance, as we agree with Thel and Siegelman that *Jacobs & Youngs* would be a different case were the builder to have deliberately chosen a cheaper good with the intent of pocketing the difference.[156] Our explanation, however, does not rely merely on deterrence calibration, but on acknowledging an *actual additional psychological harm* suffered by the promisee.

As Richard Craswell has argued, it is probably still too early to know whether this psychological perspective on willfulness ought to affect the decisions of courts.[157] The precise contours of intentionality, inequity, and betrayal require further specification. Moreover, individuals' preferences might not promote doctrine that is either efficient or desirable along another normative dimension. However, doctrine that *ignores* lay intuitions about attribution and blame risks creating some sort of social deficit to which scholars ought to be attentive.[158] Therefore, the interaction of lay intuitions about breach with attributions of blame and feelings of loss appears to be an area where further study would be especially rewarding.

C. Future Research Directions

1. Remedies

The theory of breach that we have described in this paper raises some additional interesting questions for future research. One question is whether the extent to which promisees feel exploited helps to predict the kind of remedy they seek. Our results suggest that, at a minimum, the experience of being suckered makes people more likely to seek punitive or supracompensatory damages. However, when people feel insulted by breach of contract, they instead may pursue different categories of legal remedies altogether. The first remedy that comes to mind, of course, is specific performance. One of us has found evidence in prior studies that people think that performance is morally required even when it imposes burdens on the promisor.[159] The suckered promisee, who feels that the contract is devalued when its obligations are monetized, in particular may have this desire.

People may also seek forms of self-help remedies. Relational contracts studies frequently have noted that in many long-term contractual relationships, the remedy for nonperformance is either renegotiation or (if the contract is not salvageable) termination of the

156. Thel & Siegelman, *supra* note 147, at 1527.

157. Craswell, *supra* note 44, at 1506.

158. *See* Shiffrin, *supra* note 30, at 740–49.

159. Wilkinson-Ryan & Baron, *supra* note 2, at 405.

relationship.[160] Ending the contractual relationship and not seeking damages may seem like leaving money on the table. But parties may see termination as a form of relational retaliation, particularly when the costs of litigation are high. Psychological research on exploitation suggests that in some cases victims of exploitation prefer to forget about the tainted dealings altogether rather than to rehash them publicly, especially when they feel some kind of self-blame.[161] Experimental research into the relationship between the nature of the breach and the form of remedy sought could help to map the psychological terrain of remedies in contract.

2. Other Contractual Suckers

Our research in this Article considers contractual suckering through the lens of actual breach—that is, real nonperformance of mutually agreed upon obligations. But there are at least two other ways in which people feel exploited by contracts, and those areas would be fertile ground for more study. The first involves hidden contractual terms. In fact, the lead psychology paper on exploitation begins with an anecdote of a Best Buy promotional offer that promised a free trial of a popular magazine but in fact included a clause in fine print that patrons would be charged if they failed to cancel the subscription promptly.[162] Consumers do not have legal recourse to sue for damages in most cases involving fine print. But the hidden terms might cause customers not to engage with such exploitative businesses.

Second, people may feel exploited when they understand a contract to contain either some implicit promise that does not bear out in reality or some explicit bad advice introduced by the seller of the contract. One example is subprime mortgage loans. People selling mortgages seem to be savvy about financial issues, and many borrowers—even sophisticated, educated borrowers—find the quality and amount of information in a typical mortgage contract overwhelming. When borrowers realize later that they made a poor choice, they may feel taken advantage of by lenders who preyed on their financial naiveté.

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160. *See* Macaulay, *supra* note 35, at 778 ("In a [long-term] relational contract, often it is hard to say when the contract is formed. Moreover, it is not likely to be formed once and for all. Rather than a scene frozen in a still photograph, a relational contract is more like an ongoing motion picture.").

161. *See* Vohs et al., *supra* note 75, at 132 ("[P]eople are reluctant to admit having been duped (because they blame themselves) . . . .").

162. *Id.* at 127.

V. CONCLUSION

Not every contract creates a sucker's bet. Indeed, the promise of contract law is that performed deals offer positive returns for *both* parties. Thus, we are not proposing that the expectation interest be reformed to account for psychology, nor are we proposing that specific performance is always a more compensatory kind of remedy than damages. Indeed, even if we have accurately modeled how citizens react to breach, we offer no view here on the harder problem of when and whether courts ought to care about these lay judgments.

Much more work is needed into the nature of reciprocity and the purposes of contract law before any doctrinal reforms should begin. The purpose of this Article is more preliminary: to describe a theory of the psychology of breach. We hypothesized that breach sometimes turns promisees into psychological suckers. Our findings are simple yet significant. Breach creates an injury distinct from the economic loss created in tort-like cases. Breaches for gain are perceived as worse than breaches to avoid loss. And the degree of control and intention exhibited by the promisor matters to perceptions of harm. As a result, we now can predict not just *how* individuals will feel in response to breach, but also *when* they will feel that way. In the future, we hope to show that the exploitation scheme will help to explain plaintiffs' choices of remedy, parties' pre- and post-breach negotiation behavior, and the likelihood of performance given particularly exploitative terms.

This Article's more general goal is to illustrate how the neglect of a descriptive theory of breach in contract law has led it astray. Although the field of contract sociology is rich and informative, it has ignored the psychological dimensions of the simple contracts that ordinary citizens face daily. We have shown that even in the absence of reputational or relational concerns, individuals experience breach of contract in consistent and predictable ways, reflecting norms of reciprocity and interpersonal trust that have been largely missing from the law's Holmesian perspective.