

## IS AS OUGHT: THE CASE OF CONTRACTS

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IT would be impossible to do justice to all of the points Professor Markovits has raised in his rich and provocative essay. I therefore want to confine most of my comments to his critique of economic approaches to contract law (roughly, those that hold that contract rules are good insofar as they promote the efficient allocation of resources in society).

Let me start by restating what I take to be Professor Markovits's two basic arguments with respect to all three of the theories he critiques (economic, harm-based, and will-based theories of contracting):

1. A successful normative theory of contract law (and, I take it, by extension, of other bodies of law as well) must be able to "explain" existing moral and legal norms. Exactly what Professor Markovits means by "explain" is ambiguous. The strong reading would be: contract law must be consistent with such norms. A weaker reading would be: contract law must take account of existing norms, and, at a minimum, justify any departures from them. For the most part, Professor Markovits seems to adopt the strong reading of "explain," and I will follow suit in the comments that follow. (I will return at the end to what difference, if any, adopting the weaker reading would make.)

In the case of contracts, Professor Markovits takes two norms to be basic: that it is good to make promises; and that, once they are made, it is good to keep them. Hence, on a strong reading of "explain," any theory that does not lead to both of these conclusions, in his view, fails as a theory.<sup>1</sup>

2. A successful normative theory of contract law cannot tell us why we should make promises except by reference to the reasons

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<sup>1</sup> Daniel Markovits, Making and Keeping Contracts, 92 Va. L. Rev. 1325, 1327 (2006).

for keeping them, and vice versa.<sup>2</sup> Thus, a successful theory cannot explain one of these two obligations without explaining both. All three theories under consideration, Professor Markovits argues, have flunked that requirement. The economic approach tells us why to make contracts, but not why to keep them. The other two tell us why to keep them, but not why to make them. Without such an “integrated theor[y] of making and keeping contracts,” Professor Markovits suggests, we have no viable theory at all.<sup>3</sup>

I am skeptical about claim (2) as a freestanding principle. It seems an apt concern regarding some of these approaches, but less so for others.<sup>4</sup> But in the end, it seems to have little relevance to the economic approach, as I think Professor Markovits implicitly acknowledges. There are many failures one can lay at the feet of efficiency analyses of contract law, but not having an integrated theory to evaluate all aspects of contract law—or for that matter, all aspects of human endeavor—would not seem to be one of them. Economists may not yet have produced any clear answers to the question of when and how promises should be enforced. But they are not indifferent to the question, and (as Professor Markovits himself acknowledges) they would have us resolve that question by the same criterion that they would have us use to resolve the question of whether (and when) to make contracts in the first instance: contracts should be made and enforced only “insofar as [doing so] serves efficiency.”<sup>5</sup> In the end, it is this fact—that economists have

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<sup>2</sup> Id. at 1327–28.

<sup>3</sup> Id. at 1373.

<sup>4</sup> Thus, as Professor Markovits suggests, the will theory for enforcing contracts seems to need something more to get off the ground than just the notion that whatever we will should come to pass, and perhaps what it needs is a theory as to why willing contracts in particular into existence is a good that ought to be protected by enforcement. Id. at 1367–69. In contrast, I am not clear on why it is not perfectly open to proponents of the harm theory to say: we are, for the most part, indifferent as to whether people make promises or why, or indeed what the content of those promises are; we are simply saying that if they choose to make them, there are powerful reasons (sounding in our desire to prevent harm to the promisee) to enforce them.

<sup>5</sup> Id. at 1335. I am uncertain how far Professor Markovits wants to press the opposite conclusion. He states that economic

theory’s inability to explain the independent force of the obligation to keep contracts renders the economic approach unable to provide a satisfactory account even of the practices concerning making contracts that form its core subject. The economic view, that is, cannot satisfactorily account for contract law’s

only a contingent commitment to the institution of contracts, both in the making and the keeping of them—and not inattention to one half of the problem, that seems to be Professor Markovits’s real concern here.

Economists would, of course, happily demur to the charge that their commitment to the institution of contracts (or any other legal regime) is merely contingent on the institution’s capacity to enhance welfare. So, we have no disagreement about how to characterize the enterprise. The question is: why is this a problem? Professor Markovits’s answer is contained in claim (1) above: any successful theory of contracts must explain existing practice, as reflected in both contract doctrine and the “pre-theoretical attitudes of the participants in contractual practice.”<sup>6</sup> The two key features of existing practice to be explained are our commitment to “agreement-making as a form of social coordination,”<sup>7</sup> and to the sanctity of keeping promises once made. In short, because laypeople and the law treat agreements as sacrosanct, any successful normative account of contracts must do so as well. Since the economic approach to contracts manifestly does not do so—because it explicitly repudiates any categorical commitment to the sanctity of agreement-making or agreement-keeping—it fails as a normative account of contracts.

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emphasis on promoting coordination and securing efficient reliance by means specifically of agreements rather than in some other way.

*Id.* at 1336 (emphasis removed). The first sentence seems consistent with the premise of claim (2), suggesting that without a satisfactory theory of enforcing promises, the economic approach cannot provide a satisfactory theory of why and when to make them. But in fact, the argument shifts gears in the second sentence, gesturing towards a very different point: that the substantive position that efficiency analysis has taken on enforcement, which denies any categorical obligation to compel performance or its monetary equivalent, is “hostile to” the traditional view of contract law as rooted in agreements, and—if followed—would require us to “abandon the connection that the law currently draws between contract and the promissory *form*.” *Id.* at 1338. “[A]n efficient law of contract (which recognized no freestanding duty of agreement-keeping) would cease specifically to encourage agreement-making.” *Id.* This seems to me, finally, to boil down to claim (1): that economic theory must be able to accommodate our existing legal and moral norms with respect to agreement making and keeping.

<sup>6</sup> *Id.* at 1349. (“Although the economic approach powerfully illuminates conduct that is characteristically governed by the law of contract, it is less successful at providing a general account of the law’s broader emphasis on agreement-making as a form of social coordination.”).

<sup>7</sup> *Id.*

This argument presupposes three things: (a) that, as a matter of fact, law and common-sense morality have both evinced a categorical preference for the making and keeping of contracts; (b) that economic theory does not; and (c) that the failure of economic theory to accommodate existing practice in this regard means that it fails as a normative principle for judging the goodness or badness of contract rules. All three of these assertions raise difficulties, which I will touch on briefly here.

I. AGREEMENT-MAKING AND AGREEMENT-KEEPING OCCUPY A PRIVILEGED POSITION IN LAW AND COMMON-SENSE MORALITY

As a threshold matter, I am uncertain what Professor Markovits means in citing to “contract law’s support for agreement-making,” as distinct from agreement-keeping.<sup>8</sup> He does not seem to mean that law (or morality) *forces* parties into agreements, or even necessarily that it *encourages* them to enter into agreements. What I think he means is that the law (like common-sense morality) is much more likely to hold that parties have created a binding duty to do *X* when they have promised to do *X* than in other circumstances.<sup>9</sup> If so, “support for agreement-making” seems to blur into support for agreement-keeping. Perhaps the difference is this: the sanctity of agreement-making contemplates that agreements are a uniquely privileged source of *some* binding obligation to others, while the sanctity of agreement-keeping contemplates that the content of what you are obliged to do will be dictated by the content of the agreement itself.

It is true that *contract* law places special emphasis, in both senses, on agreements. But that, in itself, does not establish that agreements have a special status in *law* as a whole. That emphasis may reflect nothing more than the doctrinal balkanization of law, in which agreements are taken to be the province of contract law, and other forms of social coordination are relegated to other areas of law. If one looks at all the areas of law that abut contracts and

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<sup>8</sup> Id. at 1348.

<sup>9</sup> The predilection of the law to hold people to what they promise may or may not lead to more promise-making, and may or may not reflect an intention to encourage promise-making as a preferred form of social coordination. Neither question seems to me answerable a priori from the fact of our finding that agreements more readily give rise to obligation than other forms of relationships.

that impose affirmative duties on others that they have not explicitly assented to (tort law, agency law, the law of restitution, family law, etc.), the privileged status of agreements within law looks less clear.

Even within contract law itself, it is easy to overstate the importance of the agreement relation, both as the source of obligation in any form, and as the source of the *content* of whatever obligation the law will enforce. As to the first, Professor Markovits points to one obvious area in which contract doctrine has blurred the boundaries between promissory and non-promissory conduct: the relatively recent “tortification” of contracts<sup>10</sup> through a host of doctrines that impose contract-like liability in the absence of a promise, where a pattern of conduct would lead a reasonable person to rely on an expected course of conduct.<sup>11</sup> But even within traditional contract doctrine, a host of doctrines undercut the significance of promises. Some do so by imposing liability in the absence of an explicit promise (for example, implied-in-fact and implied-in-law contracts). Others do so by permitting the promisor to escape liability for doing what he promised to do (for example, implied preconditions and the host of excuses and defenses to promised performance). Some of these doctrines can be understood as rules of interpretation—as ways of getting at the parties’ “true” intent in promising. But this recharacterization does not argue against the blurring of the boundaries between promissory and other conduct, so much as it relocates the source of the problem. It in effect assumes that the parties themselves may not mean what they apparently agreed to, in the sense that they would not have agreed to it if they had understood its full implications. The best understanding of their intent, in other words, is that they meant to commit to more, or quite a bit less, than what they apparently agreed to. None of this is to deny that the presence of a promise carries significant weight within contract law. Of course it does. It is simply to suggest that the deference to promissory conduct, which Professor Markovits takes it as his task to explain, may be quite a bit less categorical than he suggests.

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<sup>10</sup> Id. at 1326.

<sup>11</sup> For example, liability for pre-contract reliance under sections 87 and 90 of the Restatement.

As to the second question—the sanctity of keeping promises once made—Professor Markovits argues that contract law’s support for “contract-keeping” is evidenced by its “*categorical* commitment to the expectation remedy.”<sup>12</sup> By “expectation remedy,” Professor Markovits apparently does not mean “expectation damages” in the conventional doctrinal sense (that is, a remedy that secures for the non-breacher the value of performance). He is using “expectation” in an idiosyncratic sense, to mean “what the other side has promised to do,” provided that we read every contractual promise (a la Holmes) as a promise in the alternative: to perform (meaning, deliver goods or services) as promised, or to provide whatever remedy the parties have agreed to in the event of nonperformance. To put it another way, Professor Markovits is reading every contract as in effect containing a “take or pay” clause, where the court’s enforcing either alternative (take or pay) amounts to a form of specific performance.<sup>13</sup> Where the parties have failed to stipulate a remedy, contracts will be read to incorporate whatever set of default remedies the law provides. But Professor Markovits’s version of “expectation” takes no position on the content of the de-

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<sup>12</sup> Id. at 1344.

<sup>13</sup> In interpreting what Professor Markovits means by “expectation” here, I am relying on extended discussions with Professor Markovits (July 2006). The text of his article, as I read it, is ambiguous between the two meanings of “expectation.” That ambiguity is unfortunately replicated in his statement equating the expectation remedy with giving a “promisee the benefit of her bargain.” Id. at 1344. “Benefit of the bargain” could be read to refer to the value of performance (expectation in the doctrinal sense), or to the value of the lower of performance or stipulated damages (expectation in Professor Markovits’s idiosyncratic sense). Some comments in the text support his nonstandard use of the word “expectation.” See, for example, the statement that “contract law returns to the agreement form to fix the contours of the liability that it imposes.” Id. at 1343. But Markovits most often seems to be using “expectation” in the conventional, doctrinal sense. See, for example, his discussions, id. at 1343–46, of the theory of efficient breach, the economic case for covering expectation in excess of reliance, the rule striking down “supracompensatory” liquidated damages, and the more general insistence on “expectation” as a formal category, all of which make sense only if “expectation” is interpreted in the standard doctrinal sense. To the extent Professor Markovits does mean “expectation” in the conventional doctrinal sense, the claim that the positive law has a categorical commitment to the expectation remedy still seems to me to run into serious problems, but the problems are different (roughly, the complement of the problems, discussed below, with his idiosyncratic reading of “expectation” as giving parties what was promised in the alternative). That is to say, because existing law is a messy hybrid between deference to liquidated damages, where supplied, and mandatory rules tilting towards expectation damages, the law doesn’t conform neatly to either version of “expectation” here.

fault regime, and in particular on the law's current preference for expectation damages in the doctrinal sense.

Here, we immediately encounter a problem. Professor Markovits's version of the "expectation remedy," on its face, seems to dictate that the law enforce the parties' preferred remedy for non-performance. But our existing regime of contract law in fact shows no such categorical deference to contract terms. While parties have broad latitude to liquidate damages at any amount below "expectation" (in the doctrinal sense), both the common law and the UCC have traditionally taken expectation (in the doctrinal sense) to set an upward bound on permissible remedies, striking down any amount in excess of expectation as a penalty clause. Thus, Professor Markovits's version of "expectation" seems to do no better a job than efficiency analysis at "explaining" existing practice.<sup>14</sup>

All of this is to say that the positive law of contracts may reflect only a "degenerate ideal of agreement [making and] keeping,"<sup>15</sup> compared to the idealized model Professor Markovits has in mind. What is true of law, I would suggest, is even more true of common-sense morality. People's sense that promises are a uniquely privileged source of obligation seems to me highly dependent on the context (personal vs. commercial) and content of the promise, as well as on the consequences of not keeping it. Lawyers and philosophers put a lot of weight on promissory language. But the layperson, I think, is much more likely to view promises as continuous with other forms of conduct (conscious coordination, representations about one's own expectations, and likely future events) that

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<sup>14</sup> Indeed, Professor Markovits would seem to have an unexpected ally here in efficiency analyses. Law and economics scholars have generally been skeptical of legal limits on enforcing liquidated damages, as they have been skeptical of any bars on enforcing stipulated terms in a contract. In both cases, that skepticism is consistent with economists' strong presumption that consumer sovereignty will lead to efficient outcomes. To that extent, efficiency analysis seems closer than existing law to realizing Professor Markovits's idiosyncratic reading of "expectation" as requiring that we enforce the parties' stipulated remedies. Professor Markovits, I assume, would argue that law and economics scholars' ex post deference to the terms of a contract is not foundational, but rather empirically contingent on the presumption that giving parties what they say they want will on the whole promote welfare. Hence, Professor Markovits would argue that such scholars are false allies for his purposes. Fair enough. But existing law would seem to be an even worse ally, as it is at odds with Professor Markovits's professed view of promissory obligation in both practice and theory.

<sup>15</sup> Markovits, *supra* note 1, at 1334.

have the effect of leading others to expect you will do *X* even if you never explicitly promised you would. They are likely to view them as continuous as well with status relationships that are (to borrow Cardozo's famous phrase) "instinct with an obligation" to take others' well-being seriously.<sup>16</sup> Professor Markovits's example of marriage vows seems instructive here.<sup>17</sup> Perhaps he is right that most people invest such vows with a moral significance not bestowed by nonverbal conduct, such that they might think to themselves, as they resist temptation, "No, I can't do that. I promised I wouldn't," or, as they rebuke their partner for succumbing to temptation, "How could you do that? You promised me on our wedding day that you wouldn't." My own strong sense, however, is to the contrary. Most people do have strong expectations of sexual fidelity in close relationships, and feel guilt if they are unfaithful, or betrayal if their partner is unfaithful. But those feelings, I think, come from the nature of the relationship—the intimacy, trust, and conscious coordination over a long period of time that such relationships entail—rather than any explicit promise on one's wedding day to be faithful. They are, in short, obligations that arise from status and conduct far more than contract. That seems even more clear in other close relationships (for example, parent and child) that Professor Markovits has elsewhere cited as examples of the duties entailed by promise-making.<sup>18</sup> While such relationships carry with them strong duties of care (both legal and moral), those duties arise from status, not promise. I am skeptical that many people will share Professor Markovits's view that a parent "will often come under a [moral] duty not just to offer his frightened children comfort and protection but to *promise* to do so."<sup>19</sup> What most of us feel the parent owes the frightened child is not a promise, but performance. I suspect I am not completely alone in thinking that a promise in this circumstance would be worse than superfluous to the child—that it would demean, rather than consecrate, the child's natural expectation of care, by making the parent's duty to provide it seem to hang on nothing more than mere verbalisms. Some things *should* go without saying, in the sense that saying them is a

<sup>16</sup> *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214 (N.Y. 1917).

<sup>17</sup> Markovits, *supra* note 1, at 1326.

<sup>18</sup> Daniel Markovits, *Contract and Collaboration*, 113 *Yale L.J.* 1417, 1437 (2004).

<sup>19</sup> *Id.*



morally distancing act that introduces doubt about the emotional inevitability of performance where none previously existed.<sup>20</sup>

II. AGREEMENT-MAKING AND AGREEMENT-KEEPING DO NOT  
OCCUPY THE SAME PRIVILEGED POSITION IN ECONOMIC THEORY  
AS THEY DO IN LAW AND COMMON-SENSE MORALITY

Professor Markovits's argument here is straightforward. Efficiency considerations would, to a considerable extent, support explicit contracting as a preferred form of social coordination, and they would support as well the state's enforcement of contracts, once made, in accordance with the contract's terms. But that support is purely contingent on empirical assumptions about when and how much making and enforcing contracts will further the goals of efficiency. As a consequence, Professor Markovits suggests, one of two things must be true: the good utilitarian state will either apply efficiency criteria at the retail level, leading it to enforce promises only when, in the particular case or class of cases, it is efficient to do so (the act utilitarian solution); or it will apply those criteria at the wholesale level, leading it to enforce promises across the board because that is the optimal categorical rule from a welfarist point of view (the rule utilitarian solution).<sup>21</sup>

The first (act utilitarian) approach, Professor Markovits suggests, will under-enforce promises relative to what law and common-sense morality demand. While I think Professor Markovits may overstate the deference accorded promises in law and common-sense morality and understate the deference prescribed by efficiency criteria, he is undoubtedly right that an efficiency-driven set of rules applied at the retail level will diverge from what law and morality require in a number of respects. He also may be right that it is likely to diverge in the direction of laxer enforcement. If one thinks that a successful principle for evaluating contract law

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<sup>20</sup> It is possible that Professor Markovits means "promise" in all these examples to refer not to an explicit promise, but to an implicit one that is immanent in the relationship. That would take care of some of the concerns raised above, but at the cost of blurring any distinction between contract and status. If we infer a promise to do *X* from the existence of a relationship, it is that relationship that is doing all the work, not the inference.

<sup>21</sup> Markovits, *supra* note 1, at 1334 & n.20.

must validate what is—a premise I take up in Section II.C below—this divergence would obviously count against efficiency criteria.

The second (rule utilitarian) approach—enforcing all agreements because such a rule will on the whole promote efficiency best—is internally incoherent, Professor Markovits suggests, for reasons that rule utilitarianism in general is incoherent. It requires practitioners either to abandon utilitarianism or abandon the rule.<sup>22</sup> This claim seems to me less persuasive. Professor Markovits's dismissal of rule utilitarianism as incoherent seems misplaced, for reasons others have ably argued.<sup>23</sup> But I want to sidestep that broader question here, and instead point out that the principal reason that Professor Markovits judges rule utilitarianism a failure—because it must produce outcomes in at least some cases that are inconsistent with the reasons for which the rule was adopted<sup>24</sup>—imposes a standard that virtually no legal rule (or indeed any moral rule meant to guide conduct) can meet. Legal rules do not generally mandate a desired end. They mandate a set of behaviors that are thought, in the aggregate, to be an effective means to an end. Generally, the fit between means and end is imprecise, with the consequence that even the best-designed rules will be over- and under-inclusive of the interests they are intended to protect. That is self-evidently true of rule utilitarianism, as Professor Markovits correctly notes. But it is equally true of all other rules adopted in any institutional context in order to realize a set of underlying values. This is equally true, whether those values are autonomy, freedom, avoidance of harm to others, or, to borrow from Professor Markovits's "collaborative" theory of contracts, "the moral worth of the agreement relation."<sup>25</sup> If promoting the "moral worth of the agreement relation" were the desired end, one might well conclude that the best means,

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<sup>22</sup> *Id.*

<sup>23</sup> Richard Brandt, *A Theory of the Good and the Right* 214–23 (1979); Conrad D. Johnson, *The Authority of the Moral Agent*, in *Consequentialism and its Critics* 261 (Samuel Scheffler ed., 1988); Thomas Scanlon, *Rights, Goals and Fairness*, in *Public and Private Morality* 93 (Stuart Hampshire ed., 1978).

<sup>24</sup> *Cf.* Markovits, *supra* note 1, at 1334.

<sup>25</sup> *Id.* at 1369. For the sake of argument, I treat preserving the "moral worth of the agreement relation" as the ultimate end—the thing, in Professor Markovits's terms, with "intrinsic value." *Id.* I suspect, however, that promoting the "agreement relation" is in itself just a means to a different end—preserving the intrinsic value of collaboration—and hence is itself an imperfect proxy for that end.

all things considered, to achieve that end is with a rule that requires people to perform as they promised, or pay the damages they stipulated would be owed in the event of nonperformance. But it is implausible that such a rule will optimize the moral worth of agreement relations in every case. Viewed from the vantage point of that desired end (or indeed any other), some promises are probably best broken, and others, once broken, are probably best left unrepaired. This is surely the case for many promises in intimate relationships, where the spirit of performance may matter more than the letter, and the spirit by its nature cannot be legally compelled. There is a reason we do not order specific performance of marriage contracts or marriage vows.

It is tempting to think one could avoid the problem of over- or under-inclusiveness of rules by articulating a rule that is an end in itself. But such rules are usually either tautological, deriving whatever moral appeal they have from some unarticulated premise that is the true end (for example, promises must be kept because promise-keeping has intrinsic value), or articulated at such a high level of abstraction (for example, act towards your contracting partner in a fashion that preserves the moral worth of your agreement relation) that they can be operationalized as legal or moral constraints on conduct only by developing interpretative rules of thumb that reintroduce the same problem of imperfect fit between rules and the reasons for rules.<sup>26</sup>

### III. EFFICIENCY ANALYSIS FAILS AS A NORMATIVE THEORY OF CONTRACTING BECAUSE IT CANNOT ACCOMMODATE EXISTING PRACTICE

Let me start by saying that I am skeptical that *any* overarching principle—welfarism, harm theory, autonomy theory, or Pro-

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<sup>26</sup> Remarks like the following suggest that Professor Markovits is worried not that efficiency analysis reaches the wrong prescription (i.e., a set of rules that diverge from existing practice), but that it reaches the right one for the wrong reasons (i.e., reasons that diverge from the philosophical intuitions immanent in existing practices): “[T]hese arguments cannot capture the way in which principles of agreement-keeping figure in our practical deliberations . . . as stating *freestanding* reasons.” Id. at 1334. This argument, it seems to me, collapses into the larger argument taken up in Part III: that the view, immanent in common-sense morality and the law, that promise-keeping is intrinsically valuable deserves to be heeded because it is right.

essor Markovits's collaborative theory alike—can explain existing legal practice in the area, or provide “an internal account of how [those] practices are valued by those who participate in them.”<sup>27</sup> Common-law contract law seems to me to reflect a hodge-podge of often inconsistent intuitions, drawn from all of the normative principles that Professor Markovits critiques here, and then some. Perhaps one can defend existing practice as a morally attractive compromise among these different normative principles (I take no view on this question). But if the inability of any one theory to “explain” existing practice means it has failed as a normative theory of contracts, then all normative theories of contracts—Professor Markovits's collaborative theory as much as welfarism—are likely to fail.

For present purposes, however, let us assume that the goal of maximizing efficiency does do a worse job of “explaining” our existing practices and intuitions in the realm of promise-making and promise-keeping than other contenders. Why is this a problem for efficiency analysis? Why is it not open to efficiency proponents to argue that intuitions in favor of the sanctity of promising, insofar as they are suboptimal from a welfarist perspective, are wrong, with the obvious implication that law should conform itself to the dictates of efficiency, rather than the other way around?

This returns us to claim (1), with which we began. The answer Professor Markovits gives is that, rather than “bend[ing] contract in unnatural ways, according to the inclinations of the principles from which they begin,”<sup>28</sup> normative theories of contract law are obliged to “sympathetic[ally] reconstruct[] . . . our moral and legal practices surrounding agreements.”<sup>29</sup> That is, they should proceed from the internal rather than the external point of view, “seek[ing] to divine the values that are, distinctively, immanent in our practices—to develop philosophical reconstructions of these practices by elaborating their genetic code.”<sup>30</sup> Professor Markovits is hardly alone in being drawn to an immanent critique of law. Doctrinal scholarship in law has long implicitly stated its ground on such an internalist point of view, seeking to rationalize (meaning, give coherent shape to and the best defense of) existing doctrine. More

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<sup>27</sup> *Id.* at 1327.

<sup>28</sup> *Id.* at 1374.

<sup>29</sup> *Id.* at 1327.

<sup>30</sup> *Id.* at 1374.

explicit efforts along those lines have been mounted in torts, among other areas of the law, in recent years.<sup>31</sup> But what exactly is the case for the internal approach?

It seems to me there are two defenses one could give here. The first is that law deserves to be taken seriously on its own terms because its value inheres in its properties as a freestanding cultural artifact, the success or failure of which should be judged by internal criteria of coherence. While this aesthetic, or “craft,” view of law has clearly animated much of traditional doctrinal scholarship, it is hard to defend as a normative project.<sup>32</sup> The value of law to human endeavors is (at least to my mind) not ultimately aesthetic but instrumental: to further ends (welfarist and nonwelfarist alike) that are external to the law. Given that fact, one would think that the natural way to judge the success or failure of a body of law would be from the external point of view—that is, by reference to the ends we are trying to achieve by it. Decoding its internal structure might be an important precursor to evaluating its success from the external point of view, but it would not seem to be a substitute for it. To put the point another way, Professor Markovits may be right to describe efficiency analysis, like other applications of the external point of view, as “exercises in casuistry,” in the technical sense of the word (“the application of general, and antecedent, moral principles to the special case of contract in order to govern contractual practice”).<sup>33</sup> But why exactly is that an insult?

A more promising defense of the internal point of view, I think, can be drawn by analogy to the case for reflective equilibrium as a method for deriving plausible moral principles. The argument would be that we should start with what *is*—meaning “an internal account of how the practices are valued by those who participate in them”<sup>34</sup>—because existing moral intuitions, if recalcitrant enough,

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<sup>31</sup> See, e.g., Jules L. Coleman, *Risks and Wrongs* (1992); Ernest Weinrib, *The Idea of Private Law* (1995).

<sup>32</sup> Of course, much of doctrinal scholarship is merely trying to get the law “right” in the descriptive sense—a project that sensibly proceeds much of the time from the internal point of view. My comments here are directed at the normative strains of doctrinal scholarship, which presuppose that the law has “worked itself pure” in some normative sense, with “purity” judged largely by aesthetic criteria of logical coherence.

<sup>33</sup> Markovits, *supra* note 1, at 1374.

<sup>34</sup> *Id.* at 1327.

are very likely to *be* right in some important sense. The strong version of that argument (my strong reading of what Professor Markovits means by “explain”) takes it to be an irrebuttable presumption that whatever is, is right. The weaker version (my weak reading of “explain”) presumes that whatever is, is *likely* to be right. That it is likely to be right might be thought to have two procedural implications for those trying to figure out what *is* right. First, in the interests of economy, we should start with existing practice, since it is more likely to lead us to what is right than any other approach. Second, and more importantly, wherever we end up, we must “account” for existing practice, meaning we must either develop a normative theory that accommodates it, or justify our decision not to do so.

Here, we just find ourselves in the ancient argument between welfarists and nonwelfarists: nonwelfarists demand that welfarists acknowledge the stubborn instincts we all have (rehearsed in the usual parade of horrors) that there are some constraints on aggregation. Welfarists respond, “Okay, we acknowledge them. But we think many of those instincts are just good rule-utilitarian practices unwittingly transmitted from generation to generation as moral rules of thumb, and to the extent they are not, we say to hell with them.”

Some version of reflective equilibrium may well be the best justification for developing “an internal account of how the practices are valued by those who participate in them.”<sup>35</sup> I suspect this is the one that Professor Markovits has in mind, in insisting that we attend to “the way in which principles of agreement-keeping figure in our practical deliberations . . . as stating *freestanding* reasons.”<sup>36</sup> The importance of testing our moral principles against our moral intuitions may also justify the pejorative connotation that Professor Markovits is trafficking in, in dismissing efficiency analyses as mere “casuistry.” The danger of feeding the “special case of contract” into the efficiency mill, or any other “general, and antecedent, moral principles,”<sup>37</sup> is that we will lose sight of distinctive features of contracts as a lived institution. As a result, what gets spit out the

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 1334.

<sup>37</sup> *Id.* at 1374.

other end is likely to be far removed not just from what people do care about in this world, but perhaps what they are right to care about.

Fair enough. But all of this, as I read it, is not an argument for the internal point of view over the external one. It is an argument for treating *what is* as an important datum in figuring out *what ought to be*. That still leaves us with the task of saying what ought to be. If the answer is not ultimately to be found in criteria of goodness that are external to practice—even if informed by practice, and redeployed to endorse the philosophical underpinnings of existing practice—where is it to be found? Professor Markovits’s “collaborative” theory of contracts provides one external criterion of goodness; welfarism, the harm theory, and the will theory provide others. His may be right, and the others may be wrong. But that fight, it seems to me, cannot finally be resolved by a sympathetic reconstruction of what is. It has to be resolved by an affirmative argument that what is, is right, and is right for a particular set of external reasons.