two categories still work under juristic reasons; they have merely been turned around grammatically.

The fundamental question does not change in the move from reasons for restitution to juristic reasons, nor do the elements of the answer, although there may be differences in the structure of the inquiry and the placement of the burden of persuasion. I have suggested that every legal system can and does mix the two approaches. Under reasons for restitution, account must be taken of obligations and other juristic reasons; under juristic reasons, account must be taken of mistake, failure of basis and other reasons for restitution. One might almost be tempted to say that in the end, there is really only one approach. I do not think that is quite right. Montreal is famous for lacking clearly defined commuter arteries. There are many equally good ways to get from my house to McGill University. On any given day, one route might turn out to be better than another, but not reliably so over many days. There are several routes that are different, but equally good.

The juristic reasons approach is not inherently better than reasons for restitution, but nor is it worse. It answers the same fundamental question, using a different analytical sequence. The approach as set out in Garland will need a lot of fine-tuning; it is only a rough beginning. It can, however, be made to work just as well as reasons for restitution ever did. The result, though, will not be a civilian approach. If it is informed by comparative experience, it may turn out to be a transsystemic approach, taking lessons from everywhere but blazing an original trail.

REVIEW ESSAYS AND BOOK REVIEWS

THE ECONOMICS OF CONTRACT LAW

Victor Goldberg has published an interesting and useful collection of essays on contract law, all written from an economic perspective. Many of the essays had been previously published and are reprinted here with varying degrees of revision, and with some linking commentary. Goldberg says that “by putting these chapters together in one place, with some connective tissue, I believe the power of a transactionally sensitive economic approach to contract law will become apparent.” It is now 35 years since the first edition of Posner’s Economic Analysis of Law, and the publication of Goldberg’s book offers an opportunity to reflect not only on the book itself, but also on the impact that economic analysis has made on contract law since 1972.

Goldberg’s first chapter, entitled “The Net Profits Puzzle,” addresses the question of why movie producers, movie writers and movie actors often agree to accept payment based on “net profits.” The cause of the puzzle is that “net profits” are usually defined in such a way as to put almost entirely within the control of management what amount of money, if any, will be so designated. The chapter supplies a very detailed examination of the business background of the film industry, and suggests that remuneration based on net profits may serve the interests of the parties by sharpening their incentives, and by facilitating early contracting in the context of imperfect and asymmetric information. This is a useful study, and a plausible conclusion. It is, of course, very common for contracting parties in many other contexts to agree to remuneration the amount of which is partly in the control of the other contracting party, as, for example, an employee who agrees to be paid partly by an annual bonus based on net profits, or simply by a bonus as declared from time to time by the employer. No doubt it would be possible to draft contractual terms

1. I am very grateful to Tony Duggan for helpful comments on a draft of this essay.
3. Ibid., at p. 7.
that would, in the abstract, better protect the employee’s interest, but
the employee may judge (often correctly) that the employer would not
agree to such terms, that any serious attempt to bargain on such a
point would fail, and that the employee is better off with the chance
(even the small chance) of receiving a purely discretionary bonus than
without such a chance.

Goldberg devotes a chapter to the New York case of Wood v. Duff-
Gordon,\(^5\) in which Lady Duff-Gordon promised Wood the exclusive
right to market her fashion designs and endorsements. When Wood
complained of breach of this contract by Duff-Gordon, the
preliminary defence was that there was no consideration, and
therefore no valid contract, because Wood had given nothing in
exchange for Duff-Gordon’s promise. The majority of the New York
Court of Appeals, in an opinion by Justice Cardozo, held that an
obligation could be implied on the part of Wood “to use reasonable
efforts to place the defendant’s indorsements and market her
designs”.\(^6\) Consequently there was consideration, and the contract
was enforceable against Lady Duff-Gordon. Goldberg has carried
out some very interesting and useful historical research into the
background of this case, and has discovered that Wood, shortly
before the contract with Duff-Gordon, had entered into a somewhat
analogous contract with another person, named Rose O’Neill, in
which Wood had expressly undertaken to “use his best efforts and
devote so much of his time as shall be necessary diligently to promote
the parties’ joint interests.”\(^7\) As Goldberg persuasively argues, this
fact shows that the omission of such a clause from the contract with
Duff-Gordon was not likely to have been inadvertent, which leads
him to conclude that “if Cardozo had all this information available
to him . . . he would most likely have held that there was no
enforceable agreement.”\(^8\)

The historical background is valuable, and readers of the book
should be grateful for it, but it does not seem quite so clear that it
supports Goldberg’s conclusion. Even if, as Goldberg suggests,
Wood intended to assume no substantial obligation himself, it does
not follow that he would have been successful in persuading Justice
Cardozo that, as a matter of contract law, there was no such
obligation. The test of contract formation did not and does not
depend on the subjective intention of the person making a promise,
but on the reasonable expectation of the person to whom the promise
is made, and it seems very likely that Justice Cardozo, even if he had
known of Wood’s prior contract, would still have concluded that the
writing in the Duff-Gordon case was, as Cardozo put it, “instinct with
an obligation,”\(^9\) because the transaction would have been so
understood by a reasonable person in Duff-Gordon’s position.

It was comparatively easy in Wood v. Duff-Gordon to find an
implied obligation to use reasonable efforts, because the court did not
have to give precise content to the obligation. The question arose on
a preliminary objection to the validity of the contract, and the effect of
finding that Wood had assumed an obligation was not to enforce the
obligation against him, but, on the contrary, to conclude that the
counter-obligation assumed by Duff-Gordon was enforceable
because there was consideration for it. In other cases where the
courts have attempted to give content to obligations to use reasonable
efforts, or best efforts, or good faith, difficulties have arisen, and
Goldberg effectively points this out in the context of a detailed
examination of a number of different cases. His general conclusion is
that, in order “to constrain courts from engaging in free-wheeling
interpretation . . . the use of the implied duty of good faith . . . should
be tightly cabined.”\(^10\) This is a legitimate conclusion, in keeping with
his general view that courts “should not be allowed to undo clear
contractual language.”\(^11\)

In one chapter, rather differently structured from the rest,
Goldberg addresses the problem of conflicting unsigned printed
forms exchanged between buyer and seller (“the battle of the forms”).
Goldberg makes the interesting suggestion that the court should
impose on the parties the “better” of the two forms, taking into
account the merits of the business practices of each party in drafting
forms for use in other transactions where they occupy the opposite
position from that occupied in the current dispute. The underlying
problem, in Goldberg’s view, is that “when designing their forms, the
parties have insufficient incentive to take their counterparties’
interests into account”.\(^12\) In order to rectify this problem, he
suggests that a seller might lose the benefit of its form in one
transaction if evidence showed that it had drafted unreasonable
forms for its own use in other transactions when acting as buyer.
Goldberg bases this proposal on what he calls the “best shot” rule (in

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5. 222 N.Y. 88 (1917).
6. Ibid., at p. 90.
7. Goldberg, supra, footnote 2, at p. 53.
8. Ibid., at p. 44.
11. Ibid.
12. Ibid., at p. 189.
contrast to the "last shot" rule of the common law, and on the
Golden Rule (of treating others as one would wish to be treated by
them). This is not a common approach, as Goldberg recognizes; he
writes that "my proposed solution entails two notions seldom
associated with economists: fairness and the Golden Rule."

Goldberg also comments that the earlier publication of this
chapter had been "marked by a wave of indifference". Perhaps this
is not altogether surprising, because it is the kind of proposal that
tends to make even the friends of economic analysis of law a little
ersearched — I should say, rather, especially the friends of economic
analysis of law. Under this proposal the court would impose on a
party an obligation to which that party had clearly not assented (on
either a subjective or objective test), and on grounds that had nothing
to do with the relationship between the parties to the particular
dispute. The effect would be to cut the obligation loose from any
recognized or recognizable principle of contract law, and to cut the
economic analysis of contract law from its own roots, which lie in
the notion of voluntary agreement. An obligation would be imposed not
because the parties had agreed to it, or appeared to a reasonable
person in the position of the promisee to have agreed to it, but
because, in the opinion of the decision-maker, considerations of
fairness, of the Golden Rule, and of appropriate incentives justified
that result.

Standing alone, these seem insufficient reasons for the imposition
of contractual obligations in a private law system. On a theoretical
level, the proposal does not reflect the parties' actual or apparent
agreement. On a practical level, such a rule would open the door to
numerous disputable questions about the morality of the parties' general business practices, and about what factors should be taken
into account in identifying the "best" form, and in judging what incentives were appropriate.

The justification offered by Goldberg for his proposal is that, by
adopting it, "we obtain the benefits of mass production of boilerplate
terms while giving the parties the incentive to draft with the concerns
of their counterparties in mind". But (the reader might ask) who are
"we" in this context, and on what basis would we undertake to impose
this obligation? Whether or not the "mass production of boilerplate
terms" is a net social benefit is a question on which opinions may and
do differ. Even if it is a benefit, it is by no means clear how it should be
weighed against other considerations. Similarly it is not obvious that
it is desirable to create incentives on contracting parties "to draft with
the concerns of their counterparties in mind." Normally parties
negotiating a contract are free to put their own interests first, and
there would (to say the least) be considerable practical difficulties in
determining to what extent contractual terms had to be proposed
with the interests of the opposite party in mind. Reference to such
general moral ideas as "fairness" and the Golden Rule does nothing
to dispel these difficulties.

Curiously enough, as Goldberg himself hints in the passage earlier
quoted from page 189, this proposal tends in the very opposite
direction to that generally favoured by those commenting on contract
law from an economic point of view, and it departs from the approach
taken by Goldberg himself elsewhere in the book. Generally he
favours giving effect to the terms of contracts on the ground that the
parties have agreed to those terms, and benefit, in the long run, from
simple predictable and reliable enforcement of them.

One difficulty is that it is by no means clear what incentives such a
rule would in fact create. If the rule is that any form proposed by one
party can be imposed on the other, if judged subsequently by the court
to have been the "best shot," and if this result cannot be avoided even
by strenuous protest that the other party does not assent to the form,
the incentive will quite probably be for the party with stronger
bargaining power to refuse to deal at all with any party which uses
such a form. This might in turn lead to the demise of the use of printed
forms, at least by parties in a weaker bargaining position. Whether or
not this would in fact occur, and whether or not, if it did, it would be
a net social benefit might be debated, but it is certainly not the effect
predicted or favoured by Goldberg.

Sellers usually desire to exclude liability for consequential
damages, but if no such exclusion is agreed upon, the seller would
be exposed to potentially very large liability. A large seller, advised
that exclusion of consequential damages could not be guaranteed if
the buyer used any kind of printed form, might well refuse to sell to
any buyer using such a form, or might insist on the buyer's signature
to the seller's terms. If the creation of appropriate incentives were
really to be a determining consideration, there would be almost
unlimited scope, varying with the social and economic circumstances
of each case, for debate on what would in fact probably happen if a
particular rule were adopted, and whether, on balance, such results
would be socially beneficial.

13. Ibid.
14. Ibid., at p. 100.
15. Ibid., at p. 201.
16. Ibid.
The UCC provision on the battle of the forms (2-207) turned out to be one of the least successful of the Code provisions. It went through a succession of drafts, as representatives of buyers' and sellers' interests successively sought to influence the drafting process. In the end the provision lost its internal coherence, and, so far from putting an end to the battle of the forms, the section intensified it, as parties sought to redraft their forms to take account of the Code provisions. A case can certainly be made for reform of this section, but in that event would it not be a simpler solution to restore the pre-Code common law? It was always open, under the common law, and still is open to buyer or seller to insist on the other party's signature to a contractual document. Where business persons choose not to do so, and pin their hopes on the chance of enforcing a form not signed by the opposite party, they knowingly take a business and legal risk. Of course they are entitled to do this, and, from a business point of view, the risk might be fully justified. The chance of a dispute might be small, and the value of the business might quite legitimately be thought to outweigh the chance of liability. But the person who acts in this way has no valid complaint against the law if the risk materializes and its own form is found to be ineffective. From the point of view of efficiency and incentives, the old common law might be said to have been quite efficient in that it created a moderate incentive to the parties to clarify their intentions by agreeing to and signing a single document, while leaving them free not to do so if they wished to take the associated business and legal risks. But that would be to offer a commentary from an economic perspective on a rule that existed for independent reasons based on a legal principle (assent), not a reason for overriding that principle.

I have chosen to dwell at a little length on this particular chapter not because I wish to be critical of it, or because the subject is itself of great importance, but because the chapter supplies an illustration, more vivid than is usually available, of some of the inherent limits in what can usefully be achieved through economic analysis of contract law. It is one thing to say that, in the past, judicial decisions have been influenced by economic considerations. As a matter of history this proposition is demonstrably true, and pointing it out when it is in danger of being forgotten is very useful. But it is altogether another thing to say that economic considerations ought to have overriding force, or that, standing alone and detached from legal principle, they can themselves justify the imposition of contractual obligations.

In his chapter on frustration and impossibility Goldberg discusses some of the English cases arising out of the cancellation of the coronation procession of King Edward VII in 1902. It was held in Krell v. Henry that one who had agreed to rent rooms overlooking the anticipated route of the procession was excused from paying the price, but in Chandler v. Webster, where the price was payable before the cancellation was announced, and where part had been paid, it was held that the part payment was not recoverable, and that the payment of the unpaid price was due as a debt. The rule in Chandler v. Webster has been very widely criticized on the ground that it causes an unjust enrichment, or, in the older language, that the money was paid for a consideration that had failed: the owner of the rooms received a very large sum of money for something that was, in the event, practically worthless. Chandler v. Webster was overruled by the House of Lords in Fibrosa Spolka Akcyjna v. Fairbairn Lawson Coombe Barbour, Ltd. in 1943, on unjust enrichment grounds, and the case became the leading modern Commonwealth case on unjust enrichment. Goldberg defends Chandler v. Webster, however, saying of the Fibrosa case that "Anglo-American law appears to be moving in the wrong direction," on the ground that one who pays, or agrees to pay the price should take the risk of subsequent adverse events.

Goldberg does not mention the concept of unjust enrichment. Perhaps this is because he considers the concept to belong to restitution rather than to contract law, or perhaps it is because, as an economist, he is not concerned with transfers of wealth between the parties, but only with enhancement of net social welfare. Nevertheless, a discussion of this issue that wholly excludes such considerations seems to be lacking an important dimension. Contract and unjust enrichment are closely related in this area, as in others. In substance the reason for setting aside the contract in Krell v. Henry was that, if the contract were enforced, the owner of the room would receive a very large sum of money for something which, as Goldberg says, was "worth approximately zero". Justice, and enrichment, therefore, were relevant considerations, and cannot be satisfactorily excluded from a discussion of the merits of either Krell v. Henry or Chandler v. Webster. If an agreement to make advance payment can in fact, or by fair implication, be taken to allocate the risk of cancellation of the procession, Goldberg's conclusion would be justified, but this is itself a complex question that cannot be satisfactorily resolved by an irrebuttable presumption.

20. Goldberg, supra, footnote 2, at p. 345.
In introducing the topic of remedies, Goldberg states flatly that “contract remedies should be viewed as a subset of contract interpretation.” 22 This is a difficult proposition to support as a plaintiff to show that the defendant has actually (on a subjective or objective test) agreed to the payment of damages, or damages of any particular sort, or to submit to specific performance. If this were to be the test it would effect a drastic change in Anglo-American contract law, for rarely could it be shown that a defendant has agreed to pay expectation damages, reliance damages, restitution, consequential damages, damages for mental distress, punitive damages or to submit to an injunction or to specific performance. Goldberg goes on to say, however, that the test should be “What remedies would reasonable people have included in their contract?” 23 This is something rather different. It is not a test of contract interpretation in the ordinary sense, because any test dependent on what reasonable people would have agreed becomes, in effect, a test not of what the parties actually intended (either on a subjective or on an objective test), but of what the commentator considers appropriate. The reasonable person, it was said by a judge, is “after all no more than the anthropomorphic conception of justice” 24 because the court attributes to the hypothetical reasonable person just those characteristics, and just that degree of foresight that will lead to the result considered just. The intentions of the actual parties are irrelevant. Much the same can be said of hypothetical terms that would (in the opinion of a commentator) have been agreed upon by reasonable persons. Since the terms will always correspond with the result that the commentator considers appropriate, it is simpler to recognize this at the outset, and address directly the question of what result is considered appropriate, and why. When economists construct contractual terms upon which reasonable persons would have agreed, we can assume that we are in the presence of the anthropomorphic conception of efficiency.

In several chapters, Goldberg enters into a very detailed examination of the business background of particular cases, suggesting that, with better knowledge of the business and economic background, different conclusions might be supported. This is often very useful, and is a perfectly legitimate form of commentary, but it does have certain limitations. First, there is always a further layer of detail that might be revealed, and so it is always open to another commentator to say that Goldberg himself, even after a minute examination, has overlooked features of the business background that a later commentator considers crucial. This is inevitable, because there is no limit whatever to the facts that may be asserted of a sequence of human events. The courts will always have limited information. As Goldberg says of one case “so, what's a poor court to do?” 25 When courts do attempt to take account of the business and economic background they often (in the opinion of commentators) get it wrong, as Goldberg’s analysis of Columbia Nitrogen v. Royston 26 very effectively illustrates. Goldberg himself says at many points that he has changed his mind, or that his first impressions proved to be wrong. “It turns out that I was quite wrong;” 27 “however, I was wrong;” 28 “my initial instincts were wrong”. 29 These frank admissions reflect credit on their author, but they do suggest that, just as one observer may change his opinion from time to time, so another observer might well come to a different conclusion. Thus it is difficult to draw definite conclusions from this kind of analysis. Goldberg himself is evidently a little uneasy in his own mind about his approach, saying “I have taken a very micro approach, examining a small number of cases intensively. Analyses of particular cases are sometimes disparaged as mere case notes or dismissed as ‘contract stories’, sources of anecdotes to amuse our students.” 30 As though in answer to some such hypothetical critic, Goldberg adds, perhaps a little defensively, “I have tried to go beyond this, and to provide a framework for making this a more respectable and valuable form of scholarly endeavour.” 31

The unifying concept that Goldberg suggests in this passage is the metaphor of “framework”. The idea occurs also in the title to the book (Framing Contract Law), and elsewhere throughout the book. In the first paragraph of the introduction, he writes “Absent a framework for organizing the inquiry, the courts often fail to ask the relevant questions.” 32 He says that “the central conceit of the chapters comprising this book is that the theoretical framework of

22. Ibid., at p. 203.
23. Ibid.
Indeed it may be presumed from the fact of the defendant’s resistance that probably it will not do so. To explain or justify the enforcement of contracts by law, a wider concept is needed than the idea of mutual gains from trade.

Sometimes that wider concept is said to be that, since many exchanges cannot be effected simultaneously, contract law is needed to protect the interest of the party who first performs, and thereby to encourage trade in the long run:

Suppose I hire a contractor to build me a house. When the house is completed I refuse to pay him the agreed-upon price, solely in order to increase my wealth at his expense. To impose legal sanctions on such conduct is an appropriate method of facilitating voluntary exchange by protecting parties who perform in good faith against the bad faith of other contracting parties. Without such protection, exchanges would be more risky and therefore costlier undertakings. The provision of remedies for bad-faith breach of contract reduces transaction costs.

This line of argument is quite convincing, but it can no longer rest on the apparently simple and elegant proposition that voluntary exchanges increase social wealth. It now becomes necessary to introduce some such concepts as reliance and expectation. It may well be true that social welfare is enhanced by facilitating reliance on the promises of others. Very probably society does benefit from a contract law that enables persons effectively to give and to obtain credit. But these propositions are not self-evident, obvious or axiomatic, nor can they be deduced by strict logic from the proposition that there are mutual gains from voluntary trade.

The social benefits just suggested can, quite legitimately, be expressed in economic terms: it could be said, and said convincingly, that the protection of reliance and expectation on the promises of others tends to be efficient, and that it tends to enhance social and economic welfare. As Henry Sidgwick put it in 1879, at a time when economics was less sharply differentiated from political and social science:

In a summary view of the civil order of society, as constituted in accordance with the individualistic ideal, performance of contract presents itself as the chief positive element, protection of life and property being the chief negative element. Withdraw contract — suppose that no one can count on the fulfilment of any engagement — and the members of the human community are atoms that cannot effectively combine; the complex cooperation and division of employments that are the essential characteristics of modern industry cannot be introduced among such beings. Suppose contracts freely made and effectively sanctioned, and the most elaborate...
social organization becomes possible, at least in a society of such human beings as the individualistic theory contemplates — gifted with mature reason and governed by enlightened self-interest. Of such being it is prima facie plausible to say that, when once their respective relations to the surrounding material world have been determined so as to prevent mutual encroachment and to secure to each the fruits of his industry, the remainder of their positive rights and obligations ought to depend entirely on that coincidence of their free choices, which we call contract.37

Though this argument has an economic dimension, and could be expressed in purely economic terms, it also has political, social, ethical and philosophical dimensions. But even assuming that it is correct, it does not establish that the benefits secured to society from enforcing contracts are absolute goods, or that they override every other ethical political and social consideration. Sidgwick himself suggests some of the necessary limits when he restricts his argument to a society "constituted in accordance with the individualistic ideal", and consisting of "such human beings as the individualistic theory contemplates — gifted with mature reason and governed by enlightened self-interest."38

The economic idea of efficient breach, outlined by Posner in 1972,39 is that where the defendant finds a more remunerative use of her resources, it may enhance the welfare of the two contracting parties jointly for the contract to be broken on payment of damages: the promisee is no worse off (on receipt of full expectation damages), and the promisor, who puts her resources to better use, is better off.

Goldberg says that "those accustomed to seeing the economics of contract law as being permeated by the concept of efficient breach and the technique of formal mathematical modeling will be surprised to find very little of the former [in the book] and none of the latter."40 Nevertheless, Goldberg evidently favours the idea of efficient breach, since he says that a contracting party has a "right to breach and pay damages."41 Elsewhere he says that "it is useful to treat breach as the exercise of an option to terminate, with the appropriate damage remedy being the price of the option."42

Goldberg cites other writers who favour a general right to specific performance, saying that he himself remains "agnostic" on this point.43 But one who thinks of breach of contract as a "right" or an "option" can scarcely be wholly agnostic on the question of specific performance, because specific performance actually compels performance, and would remove any right or option to break the contract. Where the plaintiff's interest is purely monetary, the court has usually refused to decree specific performance, especially in cases where actual performance becomes burdensome to the defendant. The reluctance to order specific performance is not due to simple antiquarianism, but is necessary to protect the defendant's reasonable freedom of action. For example, a student who agrees personally to paint a house, but then breaks the contract in order to attend law school, is liable for money damages measured by the difference (if any) between the contract price and the market price of the services of a professional painter, but she cannot be compelled actually to perform the contract. Nor can she be restrained by injunction from attending law school. Nor of course would the house-owner be entitled to the profits derived from the student's legal career, nor to punitive damages. The points are interrelated, and tend to coincide with the idea of efficient breach. But in some other kinds of cases the law has decreed specific performance, and has granted an injunction to restrain breach, and has required the contract-breaker to account for profits, and, in some jurisdictions, punitive damages have been allowed.

These legal responses show that the idea of efficient breach is not an overriding or universal rule or principle of contract law. But they do not show that the idea of efficient breach is valueless. In the great majority of ordinary contracts — those contracts in which the promisee has no special interest in actual performance — it is true to say, as Holmes suggested,44 that the promisor has, in effect, an option to break the contract on payment of damages. Breach of an ordinary contract, in which the other party's interest is purely monetary, coupled with an offer to pay money compensation is not usually perceived as immoral, or as infringing any proprietary right of the other party, nor is such a breach usually considered to be contrary to the public interest, as the example of the student painter illustrates. The idea of efficient breach is a useful way of restating Holmes' insight that may be welcomed by lawyers, but it does not follow that all breaches of contract are efficient, or that the law has been or should be governed by economics.

The idea of efficient breach might be described as a parallel insight, which tends to support the legal conclusion in many cases, and which

38. Ibid.
40. Goldberg, supra, footnote 2, at p. 2.
41. Ibid., at p. 3.
42. Ibid., at p. 277.
43. Ibid., at p. 377.
probably rests on similar underlying values, including the avoidance of an unjust windfall to the plaintiff, and reasonable freedom of action on the part of the defendant. But the acceptance of such a parallel insight does not mean that the law has deferred or should defer to economics. If an ethicist, or a philosopher, or a civil lawyer should say that certain conclusions of the law had often conformed to principles of ethics, or to certain systems of philosophy, or to certain civil law systems, these comments might well be welcomed by lawyers (as tending in a general way to increase confidence in the legal conclusions) without however implying that ethics, or any particular system of philosophy, or any particular system of civil law, had in itself been, or should in the future become, the single, overriding or dominant reason for the legal conclusions.

Thus, the idea of efficient breach, though it may be said to correspond to the approach of the law in many cases, is not in itself a binding legal principle or rule. There are, as has been mentioned, cases in which supra-compensatory remedies have been available. These are usually cases in which the plaintiff has had more than a purely economic interest in prevention, where the breach deprives the plaintiff of an opportunity to bargain, where compensatory damages have been perceived as inadequate, where the plaintiff has something like a proprietary interest, where it is not in the public interest for the contract to be broken, and where the defendant would be unjustly enriched by gains derived from the breach. It is in these cases that specific performance is often available, where an injunction is often available to restrain breach, where exemplary damages might be appropriate, where breach of the contract is perceived as morally reprehensible, and where the defendant is required to account for gains. The various considerations are interlinked, for there is a complex interrelation between the ideas of property rights, specific enforcement and efficient breach: it is in just the kind of case where there is a right to specific enforcement that the plaintiff is perceived to have a proprietary right, or something like one, and it is in just such a case that the defendant is likely to be thought to be acting reprehensibly by taking something that belongs not to him, but to the plaintiff, and where retention of a gain so made is perceived as an unjust enrichment. *Attorney General v. Blake*45 (publication of memoirs by former secret service agent) may be given as an instance where an accounting was required. The reasons that tended to support the result in that case are cumulative: the government had more than a purely economic interest in preventing the publication; the information, in a sense, belonged to the government; publication of it was closely akin to a breach of fiduciary duty; an injunction might have been obtained to restrain publication at an earlier date when the information was still confidential; the government had a legitimate interest in preventing publication of such memoirs independent of its interest in receiving Blake's services; Blake's conduct was reprehensible and contrary to the public interest.

The features just mentioned do not accompany every contract, but they do, in whole or in part, accompany some contracts. Therefore, no simple rule is available that treats all breaches of contract alike, and the search for a simple or single rule on the point, so far from representing an advance in clarity or precision, is likely to obscure important distinctions that are necessary to the attainment of justice. The conflicting considerations might be expressed either in legal or in economic terms, but they must be present just the same in both forms of analysis, if the analysis is to be complete.

Much writing from an economic point of view has stressed the desirability of legal rules that create appropriate incentives. Undoubtedly, as a matter of history, courts in the past have been influenced by this consideration. But it does not follow that the creation of incentives is, standing alone, sufficient reason for the imposition of legal obligations. As the earlier discussion of the battle of the forms suggests, a legal conclusion cannot be divorced from what is recognizable as a legal principle. In the battle of the forms context, it was suggested that it cannot be satisfactory to impose a contractual obligation to which the defendant has not consented (on either a subjective or an objective test) simply on the ground that, in the judgment of the decision-maker, the imposition of such an obligation would create desirable incentives in the future behaviour of others. There will always be room for dispute as to what incentives a legal rule will in fact create in varying social economic and political circumstances and room also for debate about what incentives are, from the point of view of social policy, desirable. Even if economists were all agreed on such matters, which of course they are not, the court has no special insight into such questions, and no constitutional mandate, in private law adjudication, to impose obligations on one of the parties in the name of an economic conception of the public good. A legal decision, to be recognizable as such, must rest on a legal principle.

A difficulty arises here because of the indeterminacy of the word "principle": the word has been used in many different senses, the meaning varying according to what is implicitly contrasted with it.

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(principle and rule, principle and policy, principle and precedent, principle and authority, principle and pragmatism, principle and practice, principle and convenience, principle and utility, general principle and particular rule, general principle and particular case); on a controversial legal question two or more conflicting principles can usually — perhaps always — be identified; principles may be stated and restated at an infinite number of levels of generality, and commonly the word has been used to mean no more than a reason or rule framed at a higher level of generality than another; sometimes a principle has meant more than a rule — a rule that is absolutely stringent, but at other times the word has signified something less than a rule — an objective desirable in general terms but liable to be outweighed by countervailing considerations, and here the meaning of the word merges with the idea of “maxim”; very commonly also it has signified a legal rule, or a reason in support of a rule, that the writer considers persuasive, legitimate or satisfactory.

As an example, let us consider the parol evidence rule, the rule that extrinsic evidence is inadmissible to add to, vary, subtract from, or contradict a written contractual document. The rule may be defended from an economic point of view by saying that it creates an incentive for parties to ensure that contractual documents are complete and accurate. This was, no doubt, one of the reasons for the development of the rule. But it does not follow that this is the only reason for it, or that this reason overrides all other considerations. Consider the accidental misplacing of a decimal point, so that a signed document records a price one hundred times greater than that actually agreed. A strict adherence to the parol evidence rule would exclude evidence of the mistake. But the law in such a case will admit the evidence for the purpose of rectifying, or reforming, the document. This does not show that the parol evidence rule is worthless, or that it does not rest, in part, on the creation of incentives. But it shows that these are not overriding considerations. One might argue against rectification on the ground that exclusion of the evidence would create an incentive on contracting parties to take care to see that documents were accurate. People will be more careful in future (it might be argued) if they see that they can be ruined by the misplacing of a decimal point. But this argument cannot be conclusive, because against it must be set considerations of justice between the parties and of unjust enrichment. Desirable as it is for persons to take care when signing documents, a one-hundredfold accidental enrichment of one party at the other’s expense, even supposing that it would alter the behaviour of others, and supposing that it would alter it for the better (both of

which matters might be disputed) cannot be accepted by a court whose role it is to administer justice between the two parties.

Economists often assert that they are concerned only with net social welfare, and not with transfers of wealth between the parties. Thus in discussions of specific performance, economists will sometimes advocate that the plaintiff should have a right to a decree of specific performance. One objection to this is that, in cases where performance of the contract has become very burdensome to the defendant, but where actual performance would not be of great economic benefit to the plaintiff (for example a contract to restore land disturbed by mining), a right to specific performance would enable the plaintiff to extract (or, some might say, to extort) from the defendant, as the price of release from the obligation, a sum of money approaching the cost to the defendant of performance, and far exceeding the loss to the plaintiff. In reply, some economists have suggested that this consideration is irrelevant, because it simply causes a transfer of wealth from one party to the other, and does not diminish social welfare. If this is to say that the economist, as economist, has no special insight on this question, it is, of course, a very proper statement. But if it is taken to suggest that the court ought to ignore the question of the practical effect of granting a decree of specific performance, and ought to ignore the question of whether this would cause an undue enrichment of one party at the other’s expense, the suggestion cannot be accepted. The court, in adjudicating the rights of the parties, is almost always directly concerned with the very question of whether it is appropriate to cause a wealth transfer from one to the other. If the order of the court, whether taking the form of an award of damages or of a decree of specific performance, will cause a transfer of wealth, the court must be satisfied that the order is just.

One of the difficulties in assessing the relation between contract law and economics is, as has been mentioned, the uncertain meaning of principle; another is the uncertain meaning of economics. In its widest sense the word includes every prudential or utilitarian consideration that might have a bearing on the welfare of society. As a matter of history it is true that the courts have often been influenced by such considerations, and that rules based on those considerations, when established, have often been called principles of contract law. In this sense, economics can be shown to have been, and

46. As in Peeryhouse v. Garland Coal & Mining Co., 382 P. 2d 109 (Okla. S.C. 1963), where the cost of doing the work was more than 100 times the economic value that it would add to the land.
now to be, an important part of contract law. But the generality of this conclusion, depending as it does on an expansive definition of economics, necessarily detracts from precision when economic principles come to be applied to particular legal issues. It is significant that the mathematical precision offered in some economic analyses of law is entirely absent from Goldberg’s book, which contains no diagram, table, graph, curve, formula, figure or equation.

Very often economic arguments may be adduced to support opposite conclusions on difficult legal questions. Thus it may be argued that specific performance should be available to plaintiffs as of right because this remedy will give them, as nearly as possible, what they bargained for, and the parties should be allowed to negotiate on a price for relinquishing the right of specific performance; on the other hand it may be argued that specific performance should only be available where the contractual performance is unique, because this rule minimizes the costs to both parties and may be assumed to be what reasonable persons in the position of the parties would have agreed on. Damages for mental distress should be available because they tend to compensate the plaintiff for loss of the consumer surplus; on the other hand damages for mental distress should not be available because they compel buyers of goods and services to purchase indirectly unwanted, expensive and inefficient insurance, the true price of which they would not have been willing to pay directly. Disadvantageous facts known to one party should be disclosed to the other, because the knowledgeable party can avoid the error at least cost; on the other hand such facts should not have to be disclosed because a rule requiring disclosure would diminish the incentive on the opposite party to invest in the acquisition of valuable information. Penalty clauses should be enforced because the parties have agreed to them and are the best judges of their own interests, and penalty clauses enable them to set their own value on performance; on the other hand, penalty clauses should not be enforced because they create a perverse incentive in the party benefited by the clause to provoke breach by the other party, or, alternatively, because they tend to restrain efficient breach. These examples do not show that economic analysis is in any way false, misleading or useless. On the contrary, they show that economic considerations are pervasive. Lawyers are very well familiar with legal principles that “hunt in pairs”, i.e. that can be selectively deployed to support opposite conclusions. Since almost any legal argument can be cast into economic terms it is scarcely surprising that opposite conclusions can also be supported by economic considerations, and that these tend to reflect varying ethical, social and political views, and varying conceptions of justice. Economists, like any other set of persons, have varying opinions on ethical, social and political questions, and varying conceptions of justice. This is no cause for reproach. The examples just discussed do tend to suggest, however, that it is illusory to expect single agreed economic answers to difficult legal questions.

A related difficulty, of which lawyers are often themselves guilty, is a tendency to slip from the descriptive to the prescriptive. It is easy to adopt the following sequence of thought: economics has, as a matter of history, been influential in the past; many past legal decisions, though not using economic language, could and should be explained in economic terms; when the law is properly understood, economics can be seen to have been the dominant force in it; it is desirable to recognize for the future that economic considerations should be determinative. But this sequence of thought tends to marginalize the influence of factors other than economic, and involves a certain slippage from descriptive to prescriptive. As a matter of history it can be shown, certainly, that economic considerations have often been influential. But it does not follow that other considerations have not also been influential; nor that in the future it is inevitable or desirable to subordinate other considerations to economics. It is one thing to say that, in the past, contract law has been influenced by economics; it is quite another thing to say that, in the future, contract law should be governed solely by economics.

Courts, in adjudicating private disputes, have a dual role: they determine the rights of the parties in particular disputes, and they also (especially at the appellate level) establish legal rules for the future. In performing their rule-making task the courts have, in the past, often taken account of social, economic and political considerations. They are likely to continue to do so in the future. Economic considerations, therefore, have been and are relevant, and lawyers should readily, openly and gratefully welcome the insights offered by economic analysis, though this leaves unresolved the question of how they should be weighed against competing considerations. Those writers who would wish to exclude social political and economic considerations altogether from private law cannot derive support for their views from the past. But it does not follow that economic considerations have been or are the only relevant considerations, or that they have had, or should have, overriding force, nor does Goldberg say this. Contract law, like private law more generally, has
been and no doubt will be viewed from many perspectives, as indeed Goldberg's subtitle suggests (*An Economic Perspective*).

Stephen Waddams*