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THE PLAUSIBILITY OF LEGALLY PROTECTING REASONABLE EXPECTATIONS

BAILEY H. KUKLIN*

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I. INTRODUCTION

According to numerous courts and commentators, expectations, particularly reasonable expectations, are at the heart of many legal doctrines. Contract, property and tort claims are often justified on the grounds that they protect reasonable expectations.¹ Indeed, though historically the legal profession was

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1. *See, e.g.*, P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 105-07, 138, 576-77, 761-63 (1979) (as perceived by Hume, property rests on expectations, and this spilled over to contract and tort); 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS 2 (Joseph M. Perillo rev. ed. 1993) ("[T]he law of contracts attempts the realization of reasonable expectations that have been induced by the making of a promise."); JOHN E. MURRAY, JR., MURRAY ON CONTRACTS 671 (3d

slow to recognize their centrality,² perhaps the norm of protecting reasonable expectations generates all legal rules,³ at least under a broad conception of the notion.⁴

ed. 1990) ("The purpose of contract law is often stated as the fulfillment of those expectations which have been induced by the making of a promise."); ADAM SMITH, LECTURES ON JURISPRUDENCE 472 (R.L. Meek et al. eds., 1978) (1896) ("The obligation to performance which arises from contract is founded on the reasonable expectation produced by a promise, which considerably differs from a mere declaration of intention."); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1715 (1976) ("The rationale for contract is derivative from that of property. The law creates a property in expectations."). Goodin grounds compensatory justice in general on the protection of reasonable expectations. See generally Robert E. Goodin, *Compensation and Redistribution*, in COMPENSATORY JUSTICE 143 (John W. Chapman ed., 1991). "The ethical defense of compensation was always couched in terms of stabilizing expectations, and only purely pragmatic considerations ever stopped us from going the whole way toward that ideal." *Id.* at 155. See also ATIYAH, *supra*, at 763 ("[Some] [c]ourts have treated expectations as the foundations of liabilities without pausing to inquire whether they are contractual or other expectations."); T. Nicolaus Tideman, *Takings, Moral Evolution, and Justice*, 88 COLUM. L. REV. 1714, 1715 (1988) ("To the extent that it is accessible to human understanding, 'justice' can be defined as the consensus that people reach about who should be disappointed when expectations are incompatible."). To emphasize the "reasonable" end of "reasonable expectations," "[w]e cannot even begin to argue about most issues of responsibility and liability without first asking what a hypothetical reasonable person would do under the circumstances." George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 949 (1985).

2. Bentham was critical of this neglect: "It is a proof of great confusion in the ideas of lawyers, that they have never given any particular attention to a sentiment which exercises so powerful an influence upon human life. The word *expectation* is scarcely found in their vocabulary." JEREMY BENTHAM, THE THEORY OF LEGISLATION 111 (Richard Kildreth trans., C.K. Ogden ed., 1931).

3. Pound argues for their broad reach: "Looking back over the whole subject, shall we not explain more phenomena and explain them better by saying that the law enforces the reasonable expectations arising out of conduct, relations and situations . . . ?" ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 189 (1922). See also ROSCOE POUND, SOCIAL CONTROL THROUGH LAW 81 (1942). See Frank I. Michelman, *Politics and Values or What's Really Wrong with Rationality Review?*, 13 CREIGHTON L. REV. 487, 496 (1979) ("[I]n an economic vision, the ultimate aim for society's institutional arrangements, including its political constitution, must be *universal* enhancement of *each* individual's expectations, not *collective* enhancement of the *sum* of all individual expectations.") (emphasis in original). Eisenberg declines to go this far with the observation that the "law is not a scientific institution whose principles and theories are descriptive and predictive, but a purposive institution whose principles and theories are normative and prescriptive." Melvin A. Eisenberg, *The Responsive Model of Contract Law*, 36 STAN. L. REV. 1107, 1109 (1984). The law has "too many rooms to unlock with one key." *Id.*

4. Eisenberg's refusal to place reasonable expectations as the sole foundation of the law, see *supra* note 3, appears to turn on a narrow conception of them. Broad conceptions are possible. Karl Llewellyn embraced such a one with normative underpinnings. For Llewellyn, there is "the expectation, which [he] attributes to laymen and judges alike, that law will play a need-serving integrative function in society." William C. Heffernan, Comment, *The Dual Problems of Legal Justification: A Key to the Unity of Karl Llewellyn's Jurisprudence*, 45 U. CHI. L. REV. 654, 687 (1978). "Because both laymen and judges expect the law to perform this function, judges who do not resolve cases in this need-serving manner will become subject to internal pressure—and to pressure from society and other judges—to do so." *Id.* In sum, it can be reasonably expected that justice, at least

Other commentators, however, have denied the plausibility of the principle of legally protecting reasonable expectations largely on the grounds that the notion is circular, because reasonable expectations are aroused by the existing law. In this Article, I argue that these critics are incorrect, that the principle of legally protecting reasonable expectations is not simply tautological, but that the relationship between reasonable expectations and the law should be seen as a mutual feedback mechanism, like Watt's steam valve, in which reasonable expectations inform the law and the law informs reasonable expectations. But, for another reason, I do agree with the critics that the principle cannot be usefully invoked to resolve difficult cases; even in the absence of disagreement over the facts, in close cases, society will not reach a consensus on a characterization of the notion of reasonable expectations with sufficient refinement to make the necessary legal distinctions. The notion, as Connolly expresses it, is an "essentially contested concept."⁵

In the following, I examine the nature of reasonable expectations. As much as possible, I find the common meaning of the term and highlight its salient features. Reasonable expectations are inextricably embedded in the legal culture of society. To sustain this interrelationship between the law and reasonable expectations, the normative and probabilistic nature of expectations are emphasized. Not all law-based expectations are to be protected—only those that not only surpass a threshold of likelihood, a particular level of probable realization, but also those that meet a socially recognized normative standard.

of Llewellyn's utilitarian sort, will be done. Nevertheless, in accord with Eisenberg's view, concepts other than expectations have been held out as the main organizing principle of areas of the law. See, e.g., JULES L. COLEMAN, RISKS AND WRONGS 361-63, 373-74 (1992) (arguing that tort law is generally grounded on corrective justice, which is separable from expectations); Dennis M. Patterson, *The Value of a Promise*, 11 LAW & PHIL. 385 (1992) (noting that the ability of promises to bind traditionally has been ascribed to the principle of protecting reasonable expectations or to the principle of protecting reliance, the two theories being incommensurable).

5. Connolly's definition is:

When the concept involved is *appraisive* in that the state of affairs it describes is a valued achievement, when the practice described is *internally complex* in that its characterization involves reference to several dimensions, and when the agreed and contested rules of application are relatively *open*, enabling parties to interpret even those shared rules differently as new and unforeseen situations arise, then the concept in question is an "essentially contested concept."

WILLIAM E. CONNOLLY, THE TERMS OF POLITICAL DISCOURSE 10 (3d ed. 1993) (emphasis in original). For the term and underlying idea, Connolly points to Gallie. See W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 167 (1955-56), reprinted in THE IMPORTANCE OF LANGUAGE 121 (Max Black ed., 1962). Tony Sebok brought Connolly's discussion to my attention.

They are to be distinguished from conative inclinations such as desire, hope, want and wish. The failure to keep in mind these features has caused even acute jurists, such as H.L.A. Hart and P.S. Atiyah, to misstep.

As noted in the first part of this exposition, reasonable expectations, those worthy of legal protection, must pass a threshold of likelihood. I consider the degree of this probability. If it is pegged high, then, among other things, the principle of protecting reasonable expectations becomes superfluous as a decisionmaking justification; since to meet this standard the controlling legal rule must be fairly clear-cut, well-established, well-known and entrenched. Instead, to be useful, the threshold probability must be lowered, perhaps down to the usual evidentiary standard of being more likely than not (0.5+). This leads to one of the irremediable weaknesses in the resolving power of the principle. Since the standard, akin to that of the reasonable person, is partially objectified by looking to a placeholder in the shoes of the expecter, and expectant antagonists wear different shoes, it is possible for disputants to have conflicting expectations, all of which surpass the threshold probability.

Thereafter, I confront some conundrums in the principle of protecting reasonable expectations. First, I discuss the repercussions of the observation that the reasonable person expects the unexpected and, for that matter, expects injustice. Then, I address a difficulty with the concept of reasonable expectations which I believe to be its ultimate, irremediable weakness: there is no principled way to specify which expectations are reasonable with sufficient, accepted exactitude to resolve cases near the margin, wherever the margin is set. However strong the expectations must be for them to be declared reasonable, the quantification is far from a mathematical algorithm and more kindred to a rule of thumb with limited deciphering power, especially since the decisionmakers have different thumbs. The observant reader will notice how I use this weakness, this essential contestability, to score points when confronting conceptual difficulties and contending against some of the critics of the principle. For example, I may dispute the characterization of expectations under particular circumstances with the rebuttal that "No, the ordinary person would not expect such and such in this situation, but rather would expect this and that, and therefore the principle is serviceable." In the end, however, this gambit is unsatisfactory. Though I believe at these junctures that I do aptly characterize the particular expectations, I cannot prove this since it is an empirical and normative question that is largely influenced by the terms in which the question is framed. The relevant expectations can be characterized broadly (e.g., at its broadest, perhaps even self-destructing level, "the reasonable person expects the unexpected"), which might lead to one conclusion, or narrowly (e.g., "when this and that happens, the reasonable person expects such and such"), which might lead to another conclusion, and there is no agreed-upon, principled way to establish a refined standard that clearly delineates the specificity by which the

expectations are properly characterized. Therefore, while the principle of protecting reasonable expectations may be a guiding light on high, for this paramount reason, as well as some others that are discussed, it is too unfocused to resolve cases near the borders, which is largely where it would be of greatest use.

II. THE NATURE OF REASONABLE EXPECTATIONS

This section examines the notion of reasonable expectations. Before deciding whether, when, or in what sense, they might be protected, the relevant conception of them must be amplified.

A. Definition

Let us begin with the everyday notion of “expectation” as gleaned from the dictionary. Sense 2.b. as defined in the Oxford English Dictionary (OED) comes close to the legal usage: “The looking for something as one’s due . . . ; in *pl.* what one looks for or requires[;] one’s (mental) demands.”⁶ The final sense also warrants emphasis for the light it sheds on court usage: “8. The degree of probability of the occurrence of any contingent event. . . .”⁷ Two of the features of these definitions, including the ones in the last footnote, that relate to the analysis of juristic “reasonable expectations” need highlighting. First, in the relevant senses, expectations refer to a person’s mental state regarding a future, contingent event relating to “one’s due” or entitlement. Second, the person implicitly has sufficient information about the contingency to forecast its likelihood, and thereby probabilistically “foresee” it to some extent.⁸

6. 1 THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 928 (1971).

7. *Id.* Other definitions and senses of “expectation” also elucidate the analysis:

1. The action of waiting; the action or state of waiting for or awaiting (something). Now only with mixture of sense 2: Expectant waiting

2.[a.] The action of mentally looking for some one to come, forecasting something to happen, or anticipating something to be received; anticipation; a preconceived idea or opinion with regard to what will take place

[2.]c. Supposition with regard to what is present or past

3. The state or condition of expecting or mentally looking for something; the mental attitude of one who expects; expectancy

4. Ground or warrant for expecting; the condition of being likely, or entitled, to receive or experience something in the future

Id.

8. In another context, Kleinig notes that “[t]he ‘reasonable expectations’ condition . . . may refer to either a statistical or normative expectation.” John Kleinig, *Criminal Liability for Failure to Act*, 49 LAW & CONTEMP. PROBS. 161, 167 (Summer 1986).

But this definition of expectations does not include the modifier “reasonable” which is usually part of the concept espoused as worthy of legal protection. In what follows, I suggest that the word “expectations” normally denotes a subjective and probabilistic aspect of the overall concept, and the word “reasonable” denotes an objective and normative aspect. That is, the person must subjectively anticipate the future event with a sufficient degree of likelihood, and the anticipation must be objectively supported and normatively acceptable.

An initial question is whether reasonable expectations are determined by the same standard throughout all areas of the law. At first glance, from a bird’s eye viewpoint, it seems not. In contract law, for example, “expectations” appear to be emphasized, not “reasonable,” since this topic relates to consensual matters between individuals in which the state’s interest is primarily to implement private preferences. If the private preferences are considered unreasonable by outside observers, to a large degree, so be it. Individuals are allowed a wide range of liberty to be unreasonable as long as their actions do not improperly impinge on nonconsenting third parties. Social acceptability of conduct is broadened by the consent of the persons affected. To the contrary, in tort law, “reasonable” seems to be emphasized, not “expectations,” because this area relates mainly to a publicly dictated matter of corrective justice independent of consent.⁹ The rights and duties of the parties being imposed by the state irrespective of their consent, the objective and normative aspect denoted by the “reasonable” part of “reasonable expectations” evidently predominates the subjective and probabilistic aspect of the conception denoted by “expectations.”¹⁰

This reasoning appears to apply more broadly to the common distinctions between private and public law, the private law generally emphasizing more the subjective aspect of the individual parties’ expectations and the public law emphasizing more the objective expectations of society at large. But even in the arena of public law, an abstractly objectified bird’s eye viewpoint is rejected here as the determinant of reasonable expectations. Instead, as will be seen in what follows, the standard in all areas of the law adopts the viewpoint of the particular parties. To be sure, the parties are held to what they have reason to know as well as what they actually know, so to this extent the standard is objectified, but what they have reason to know is grounded on the particularities of their actual situations. The parties are

9. See generally ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995) (finding corrective justice to be the foundation of private law, including contract and tort).

10. Hart and Honore rely on similar reasoning to distinguish the rules limiting recoveries in contract and tort law. See H.L.A. HART & TONY HONORE, *CAUSATION IN THE LAW* 320-21 (2d ed. 1985).

aware that differing policies and principles govern various areas of the law, and they accommodate these differences accordingly in forming their expectations, but the normative and practical merits of the principle of protecting reasonable expectations diminish if the standard is divorced from the circumstances of the particular parties. They are making claims because of their expectations. The different congeries of considerations embedded in diverse areas of the law are internalized in the standard of reasonable expectations. The principle insists on looking through the eyes of the actual parties, though lenses to correct undue myopia may be provided.

This, then, is the usual meaning of "reasonable expectations" that can be garnered from legal materials. Expectations are reasonable when a person, passably acquainted with the state of the law and the legal process (which includes the currently accepted morals, mores, customs and usages, and, in sum, the general social milieu), foresees that the occurrence of a particular contingency is likely to receive proper legal protection.¹¹

B. Salient Features

For the conception of reasonable expectations to be useful, there are several features that must be maintained or distinguished from related ideas. First, to focus on the "expectations" of "reasonable expectations" in the relevant sense, we refer to those expectations aroused by society's legal culture, and not solely by the law narrowly conceived, that is, statutes and caselaw alone. Second, again focusing on the "expectations" part of the equation, it is critically important to the juristic meaning of "reasonable expectations" that it is a probabilistic notion. Third, still keeping our focus on "expectations," reasonable expectations must be kept separate from conative inclinations such as desire, hope, want and wish. One's reasonable expectations, being based on the legal culture, may not track one's preferences. Fourth, shifting to the "reasonable" part of the notion, there is a certain circularity in the declaration that the (or a) purpose of the law is to protect reasonable expectations, these expectations in turn being those aroused as a consequence of the law. This circularity is partially broken, and hence, loses its vicious bite, when one recalls that the relevant background setting

11. By way of aside, it may be noted that the "person" described in this definition, owing to her state of knowledge and attributed reasoning ability, has the basic characteristics of the law's "reasonable person." I refrain from calling her a "reasonable person" to avoid the tautological overtones that would reverberate in this definition of "reasonable expectations."

Notice how Rawls skirts tautology in his explication. According to him, a reasonable expectation (regarding limits to liberty of conscience) "must be based on evidence and ways of reasoning acceptable to all. It must be supported by ordinary observation and modes of thought (including the methods of rational scientific inquiry where these are not controversial) which are generally recognized as correct." JOHN RAWLS, *A THEORY OF JUSTICE* 213 (1971).

for the expectations is the broader legal culture, and not simply the law on the books. To emphasize the point, the term “reasonable” in “reasonable expectations” indicates that the general notion has two particular attributes: objective (somewhat), and normative (i.e., based on the imperatives of the legal culture). The following discussion elaborates on these four features. I conclude with examples of misleading remarks by commentators stemming from their failure to attend to the emphasized distinctions and features.

1. The Legal Culture

In the relevant sense, “reasonable expectations,” as the definition specifies, are those expectations aroused by society’s legal culture. In stemming from the “expectations” part of the equation, they refer to the getting of one’s legal due. There are other expectations which are clearly reasonable in some sense even though they fall outside the domain of the law. For example, at one extreme, a person reasonably expects the sun to rise each morning, but this is based on regularity and the laws of nature. These need not, and cannot, be protected by the positive law. For another example, when one bets on a horse that is highly favored, but which loses, no reasonable person believes that this disappointment justifies legal attention.¹² People do not believe that judicial neglect is improper, nor does the legal culture counsel that it is. In both of these examples, the expectations are reasonable in solely a probabilistic sense, not a legal one.

A third example moves closer to the relevant meaning. Suppose that, for ten years, at the end of every workday one’s spouse has brought home the newspaper. On a typical day, then, even if there had never been an express agreement (would it be tacit by now?), one reasonably expects her to bring home the paper. One day, she forgets to do it. Would a reasonable person believe that this dashed expectation is, or should be, legally protected? That he has, or should have, a legal claim against her? Seemingly not. Even here

12. This example comes from RONALD DWORKIN, *LAW’S EMPIRE* 141 (1986). “Surprise occurs when people’s predictions are defeated, but this is not in general unfair, even when the defeated predictions are reasonable, that is, well supported by the antecedent balance of probabilities.” *Id.* Dworkin here uses “reasonable” in a purely probabilistic sense without the normative implications. He implies that, while hopes may be infinite, they also may be grounded on probabilistic calculations. To use another example, one may expect that an obviously unenforceable promise of a gift from a promisor known to be a highly honorable “woman of her word” will be performed with near certainty (0.99). Nevertheless, the knowledge of the legal unenforceability of the promise prevents the expectation from being “reasonable” within the broader, normative sense meant here. Otherwise, with the exclusion of the normative sense from the conception of reasonable expectations, the peculiar state would exist in which the gratuitous promise of an honorable person would be enforceable (though unnecessary), while a similar promise from a dishonorable person would not be (though morally necessary?).

his expectation is aroused by predictive regularity, not by society's legal culture. (But we could conjure up facts that might alter this conclusion, for example, that they agreed to a division of labor and her tasks include the purchase of the newspaper.)

In a nutshell, expectations stemming from circumstances divorced from the legal culture are not within the relevant meaning.¹³ Some commentators use "legitimate expectations" to distinguish the conception under consideration from expectations grounded elsewhere.¹⁴ While most courts and commentators do not adopt special terminology, when the distinction between lawbacked and nonlawbacked expectations is important, I will refer to them as "legal" and "nonlegal" expectations.¹⁵

The discussion above reins in "reasonable expectations" to the ones aroused by the legal culture. However, one must be careful not to rein in the notion too much.¹⁶ As specified in the proffered definition, the legal culture does not simply mean the law on the books, that is, statutes and caselaw. A person's passing knowledge of the law on the books certainly does affect her

13. Compare Dworkin's rights thesis in which "institutional history acts not as a constraint on the political judgment of judges but as an ingredient of that judgment, because institutional history is part of the background that any plausible judgment about the rights of an individual must accommodate. Political rights are creatures of both history and morality . . ." RONALD DWORKIN, *Hard Cases, in TAKING RIGHTS SERIOUSLY* 81, 87 (1977).

14. Rawls may be one of them. In explicating "the notion of desert," he states that those who prosper when following the rules of a just society "have a claim to their better situation; their claims are legitimate expectations established by social institutions, and the community is obligated to meet them." RAWLS, *supra* note 11, at 103; see also John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 551 (1980). Lyons contends that one does not wrong another for frustrating her "ordinary" expectations, but does for frustrating her "legitimate" expectations which are those backed by a commitment to behave in a certain way, for example, a commitment to follow legal precedent. See DAVID LYONS, *Formal Justice and Judicial Precedent, in MORAL ASPECTS OF LEGAL THEORY* 102, 117 (1993). See also 1 FRIEDRICH A. HAYEK, *LAW, LEGISLATION AND LIBERTY* 115 (1973) (quoted *infra* note 69).

15. Though the term "legitimate" may better denote the underlying ideas, the distinguishing label "nonlegitimate" has unfortunate connotations of "illegitimate." "Nonlegal" is more neutral.

16. Munzer rejects the proposition that the law protects "legal" expectations because this conception is too narrow. He advances instead the proposition that the law protects the wider conception of "rational and legitimate" expectations. See Stephen R. Munzer, *A Theory of Retroactive Legislation*, 61 TEX. L. REV. 425, 428-29 (1982). Yet he concludes that "even these expectations can be overridden by utility and by various principles of justice." *Id.* at 429. I contend that legal expectations as aroused by the legal culture would encompass considerations of utility and principles of justice. Elster also advances a notion of expectations, or perhaps of social change, which seems narrow: "[S]ocial change is the nonfulfillment of expectations. Subjective surprise, not objective novelty, is the hallmark of social change. In equilibrium, there are no surprises; therefore, social change is an out-of-equilibrium phenomenon." JON ELSTER, *NUTS AND BOLTS FOR THE SOCIAL SCIENCES* 160 (1989).

attitude,¹⁷ as well as her behavior.¹⁸ Still, the legal culture extends beyond the law library. It also encompasses those factors which are known to affect the legal process: "currently accepted morals, mores, customs and usages, and, in sum, the general social milieu."¹⁹

The hoary scholar poring over black letter law in the library may generate an excellent X-ray of the existing law, but this alone does not reveal the law as the living, changing creature that it is.²⁰ To perceive this aspect

17. See Thomas Morawetz, *Understanding Disagreement, the Root Issue of Jurisprudence: Applying Wittgenstein to Positivism, Critical Theory, and Judging*, 141 U. PA. L. REV. 371, 389 (1992) ("Critical theory is surely correct in its claim that law is not just a product of our decisions but is constitutive of consciousness."); John Rawls, *A Well-Ordered Society*, in PHILOSOPHY, POLITICS AND SOCIETY 6, 9 (Peter Laslett & James S. Fishkin eds., 5th series 1979) (stating that "the social system shapes the desires and aspirations of its members"); Cass R. Sunstein, *Disrupting Voluntary Transactions*, in MARKETS AND JUSTICE 279, 282-83 (John W. Chapman & J. Roland Pennock eds., 1989) (arguing that preferences are "endogenous to, or a function of, consumption patterns, legal rules, and social pressures most generally").

18. See ROBERT S. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 203-04 (1982). Yet it is difficult to evaluate the law's effect on behavior. See *id.* at 240-50. One commentator builds a strong case for the proposition that the courts alone have not effected significant social reform. See GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991). Moreover, "U.S. courts can *almost never* be effective producers of significant social reform. At best, they can second the social reform acts of the other branches of government." *Id.* at 338. See David L. Bazelon, *Introduction to Symposium on Mental Health*, 45 LAW & CONTEMP. PROBS. 3, 6 (Summer 1982) ("The law, after all, is seldom the spearhead of social revolution; it merely conforms to and ratifies changes in society and social perceptions.").

19. In other words, "[d]ecisions are not the only source of expectations—far from it. Changing the law to bring it into closer harmony with lay intuitions of justice and fair dealing may protect rather than defeat the parties' expectations." RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 260 (1990). Though "Law itself is a main source of natural expectations," HENRY SIDGWICK, THE METHODS OF ETHICS 271 (Dover Pubs. 1966) (7th ed. 1907), "[p]erhaps we may say that there are natural expectations which grow up from other elements of the social order, independent of and so possibly conflicting with laws: and that we call rules unjust which go counter to these," *id.* at 272. See also ROBERT E. GOODIN, UTILITARIANISM AS A PUBLIC PHILOSOPHY 215-17 (1995) (arguing that reasonable expectations must be well founded morally, not just statistically); Thomas D. Perry, *Dworkin's Transcendental Idea*, in VII MIDWEST STUDIES IN PHILOSOPHY: SOCIAL AND POLITICAL PHILOSOPHY 255, 266 (Peter A. French et al. eds., 1982) ("[L]egally difficult cases often cannot be decided intelligently without having recourse to contemporary ideas of what is practical, fair, morally sensible; and this is so much a part of the texture of legal reasoning that it seems artificial to say that such ideas are not 'part of the law.'").

20. The gap-filling inherent to the administration of the law also engenders reasonable expectations. "Fidelity to the Rule of Law demands not only that a government abide by its verbalized and publicized rules, but also that it respect the justified expectations created by its treatment of situations not controlled by explicitly announced rules." LON L. FULLER, THE MORALITY OF LAW 234 (rev. ed. 1969). Even the explicitly announced rules must contend with background expectations arising from the "invisible discourse" of the law. "Behind the words [of the law] . . . are expectations about the ways in which they will be used, expectations that do

of the law, a person must stand back from the rules themselves and appreciate the social forces that energize legal evolution. Such is the stuff of reasonable expectations.

2. Probability

Of fundamental importance to the juristic meaning of "reasonable expectations" is its probabilistic quality. The dictionary definition of "expectations" conveys this aspect. In the proffered definition of "reasonable expectations," the expected contingency is "substantially likely to receive proper legal protection." Beyond this explicitly probabilistic element are others in the definition that are implicitly probabilistic.²¹ The definition looks to the expectations of "a person" in general, not a particular person, thereby suggesting a range of possible perspectives, none of which is uniquely correct. That this person must be "passably acquainted" with the law, et cetera, similarly suggests a range of possible knowledge. Finally, even that the person must "foresee" the contingency hints of a range of possible mental states regarding the foresight. But for the analysis here, it will suffice to merge the probabilistic dimensions into the explicitly probabilistic first element. In the standard mathematical notation, the expectations must fall between 0.0 (certain not to receive legal protection) and 1.0 (certain to receive legal protection).²² The idea that expectations can be infinite is foreign to this notation. When an individual makes such a claim, she is saying in effect, for example, "I am certain that my expectations will be met because the contingency will definitely be assured by legal remedy." Thus, in the standard notation, her expectations are at 1.0.

3. Distinction from Conation

The probabilistic and legal aspects of the "expectations" part of "reasonable expectations" distinguish the notion from allied ones that

not find explicit expression anywhere but are part of the legal culture that the surface language simply assumes." JAMES BOYD WHITE, *The Invisible Discourse of the Law: Reflections on Legal Literacy and General Education*, in HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 60, 63 (1985).

21. Clark Remington brought this to my attention.

22. There is no obvious place for profound uncertainty on this scale. Profound uncertainty exists when a person has no idea of whether the contingency is likely to receive judicial protection. Cf. ROBERT E. GOODIN, *POLITICAL THEORY AND PUBLIC POLICY* 177-79 (1982) (discussing a means of coping with profound uncertainty regarding expected utility calculus). In asking the person to estimate the particular likelihood between 0.0 and 1.0, we disallow "none of the above." For that matter, it will be seen that, because the probability must be at least 0.5+, we also disallow some uncertainties somewhat less profound, such as, "somewhere between 0.4 and 0.6," though we will tolerate "somewhere between 0.7 and 0.9."

sometimes overlap, and therefore are easily confused, such as simple "desire," "hope," "want" and "wish." A commentator as astute as P.S. Atiyah may have overlooked this distinction.²³ Some senses of "expectation" do point with a shadowy finger toward these conative concepts,²⁴ and some senses of one of these concepts, "hope," point brightly back,²⁵ but confusion may follow from the fact that these terms have both probabilistic and nonprobabilistic senses and connotations. The differing meanings of the casual quantifications of expectations and conative concepts must be kept clear.

Let us take a closer look at the differences in the casual quantifications of expectations and conative concepts. On the one hand, in a nonprobabilistic sense, it is quite explicable to quantify one's desires, hopes or wishes by saying, for instance, they are infinite, and not, by this usage, to mean they are "certain to be satisfied." Instead, infinite desires are ones that are felt as strongly as possible, independently of the likelihood of their being met. To put it another way, it is quite understandable to say that one has a strong desire for a future contingency that definitely will not occur. We might object that this desire is unrealistic and that one should not invest much in it, but we would not argue that the desire is nonsense. For example, virtually everyone desires a heavenly world, even though many people believe that it is certain not to come to pass. Similarly, the probabilistic overtones to "hope" must be segregated from legal expectations.²⁶ For example, when

23. See discussion *infra* accompanying notes 53-59.

24. The first relevant sense of "expectation" appearing in the OED, definition 2.b., hints of conation: "The looking for something as one's due" See also OED definition 3, *supra* note 7 ("The state or condition of expecting or mentally looking for something . . .").

25. The word "hope" has several probabilistic senses. The OED begins its definitions of the noun: "1. Expectation of something desired; desire combined with expectation." 1 THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 1329 (1971). On the other hand, there are also nonprobabilistic senses, for example: "[4.]b. A person or thing that gives hope or promise for the future, or in which hopes are centered . . . c. An object of hope; that which is hoped for." *Id.* Another dictionary elaborates on the difference in the probabilistic meanings: "EXPECT implies a high degree of certainty and usu. involves the idea of preparing or envisioning; HOPE implies little certainty but suggests confidence or assurance in the possibility that what one desires or longs for will happen" WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 436 (1984). Probabilistic senses are absent from "desire," see 1 THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY, *supra*, at 699, "want," see 2 *id.* at 3680-81, and "wish," see 2 *id.* at 3795. None of these four conative concepts has, by itself, a normative definiens.

26. Courts are sensitive to this. For example, one court noticed this distinction when discussing whether executors acted with ordinary business judgment with respect to the real estate assets of an estate. "The only substantial chance of getting anything for the buildings was to find some school or institution that could use them. That was a hope rather than a reasonable expectation, and one that might be deferred for many years and very likely forever." *Turner v. Morson*, 57 N.E.2d 18, 23 (Mass. 1944). Similarly, whether a deficiency in a testator's

one purchases a lottery ticket, one certainly hopes to win the grand prize, and one, as I have done, may even "psych" oneself into "expecting" to win and later feel surprise by the loss, but this clearly is not a reasonable expectation, either in a realistic, a normative, or a legal sense. Millions of ticketholders may have the same, mutually incompatible, hope-driven "expectations." The protection of legal, proper, reasonable expectations is a principle which mediates the divergent and conflicting hopes of individuals.²⁷

While the distinction between reasonable expectations and conative concepts is important, it is not total. Nor are these expectations to be identified simply with objective prediction or foreseeability, to say nothing of

personality warrants a charge against the residuary realty turns on "a showing that the testator was unconscious of the inadequacy or that he had a reasonable expectation, as distinguished from a mere hope, of repairing the difficulty within a reasonable time in the future." *In re Lillienthal's Estate*, 246 N.Y.S. 459, 473 (N.Y. Sur. Ct. 1930).

27. When dashed hopes are perceived as disappointed reasonable expectations, social unrest or perverse reactions may follow. To make this out, let us begin with Epicurus. For certain types of expectations, he offered a utilitarian formula: degree of satisfaction = attainment / expectation. From this it is seen why the rich may be miserable while the poor may be blissful. "It is all a matter of how high one reaches in terms of one's expectations and aspirations." NICHOLAS RESCHER, *Technological Progress and Human Happiness*, in UNPOPULAR ESSAYS ON TECHNOLOGICAL PROGRESS 3, 12 (1980); Nicholas Rescher, *The Environmental Crisis and the Quality of Life*, in PHILOSOPHY AND ENVIRONMENTAL CRISIS 90, 96 (William T. Blackstone ed., 1974); cf. ARTHUR SCHOPENHAUER, *ESSAYS AND APHORISMS* 168 (R.J. Hollingdale trans., Penguin Books 1970) (1851) (explaining that "happiness and unhappiness is no more than the ratio between what we demand and what we receive"). This formula also captures why disruption springs not from social inequality alone, but rather from the disappointment of the heightened expectations of the outs. See JAMES Q. WILSON & RICHARD J. HERRNSTEIN, *CRIME AND HUMAN NATURE* 330 (1985) (referring to "[m]any observers, notably Alexis de Tocqueville"). For evidence supporting Epicurus' formula, see James C. Davies, *The J-Curve of Rising and Declining Satisfactions as a Cause of Some Great Revolutions and a Contained Rebellion*, in VIOLENCE IN AMERICA 690 (Hugh D. Graham & Ted R. Gurr eds., 1969); W.G. Runciman, *Sociological Evidence and Political Theory*, in PHILOSOPHY, POLITICS AND SOCIETY 34, 44 (Peter Laslett & W.G. Runciman eds., 2d series 1962). This use here of the term "expectation" strongly resonates with its reference to "hope" along with its meaning as probabilistic anticipation. To the point, notice these related observations in which "expectations," which are hardly reasonable, smack of "hopes": "There is reason to expect, moreover, that expectations grossly exceed any plausible prospects of fulfilling them." William H. Rodgers, Jr., *Bringing People Back: Toward a Comprehensive Theory of Taking in Natural Resources Law*, 10 *ECOLOGICAL L.Q.* 205, 231 (1982). Since it appears that "people measure success in relative terms," comparing their success to that of others, "[t]he sum of individual expectations far surpasses the available stock of status and resources, especially as we now approach a zero-sum world where gains to one person are losses to another." *Id.* at 231-32. Similarly, since modern technological progress has raised expectations at a rate that cannot be maintained, "[t]hings may get 'better,' objectively speaking, but they don't get better fast enough to meet our subjective expectations." RESCHER, *supra*, at 13. To avoid these pitfalls, first, one must not confuse expectations and pure hope, and second, Schopenhauer suggests, one must be clear about the realism of hope: "Hope is the confusion of the desire for a thing with its probability." SCHOPENHAUER, *supra*, at 168.

normativity. There are overlapping features which make the distinctions shadowy.²⁸ Though, I believe, shadows are cast by the essence of the notion itself, care must be taken to prevent confusion.

4. Circularity

To turn to the "reasonable" part of "reasonable expectations," the reasonable person must know more than merely the current law on the books. Thank goodness, for otherwise the legal principle amounts to this: "The (an) aim of the law is to protect reasonable expectations which are determined by the existing rules." Need I point out that this does not get us very far? It goes far enough for most cases, but not far enough for those of interest. It is because of this circular, tautological or question begging appearance that several commentators reject as superfluous the legal principle of protecting reasonable expectations, or, similarly, protecting reasonable reliance.²⁹ Some reject the principle even while implicitly acknowledging that the

28. Munzer does an excellent job of distinguishing, as much as possible, expectations from predictions, hopes, and simply expecting. See STEPHEN R. MUNZER, *A THEORY OF PROPERTY* 28-29 (1990). The overlapping features appear in Feinberg's characterization of the relationship between expectation and right: "Without awareness, expectation, belief, desire, aim, and purpose, a being can have no interests; without interests, he cannot be benefited; without the capacity to be a beneficiary, he can have no rights." JOEL FEINBERG, *The Rights of Animals and Unborn Generations*, in *RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY* 159, 177 (1980). Kenny elaborates another overlap:

Cognitive states of mind are those which involve a person's possession of a piece of information (true or, as the case may be, false): such things as belief, awareness, expectation, certainty, knowledge. Affective states of mind are neither true nor false but consist in an attitude of pursuit or avoidance: such things as purpose, intention, desire, volition. Some mental states, of course, are both affective and cognitive: hope and fear, for instance, involve both an expectation of a prospective state of affairs and a judgment of the state of affairs as good or evil.

ANTHONY KENNY, *FREEWILL AND RESPONSIBILITY* 46 (1978).

29. See, e.g., RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 322 (1981) (with further citations); P.S. Atiyah, *Contracts, Promises and the Law of Obligations*, 94 *LAW. Q. REV.* 193, 214 (1978) (quoted *infra* text accompanying note 51); Randy Barnett, *A Consent Theory of Contract*, 86 *COLUM. L. REV.* 269, 275 (1986); Lon L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: Part 1*, 46 *YALE L.J.* 52, 59-60 (1936); C. Robert Morris, *Some Notes on "Reliance"*, 75 *MINN. L. REV.* 815, 815 (1991) (also contending that the circularity occurs as a matter of fact since the courts "assume reliance because they perceive that the result is just and assume the actor who is expecting justice has the same perception"). I have advanced this view myself, though in a way that leaves open the theses of this article. See Bailey Kuklin, *Self-Paternalism in the Marketplace*, 60 *U. CIN. L. REV.* 649, 703-04 (1992). For criticism of the circularity found in utilitarian arguments for protecting expectations aroused by promises, see P.S. ATIYAH, *PROMISES, MORALS, AND LAW* 63-69 (1981); Michael H. Robins, *The Primacy of Promising*, 85 *MIND* 321, 323-28 (1976).

circularity is not complete.³⁰ But it is this break in the circle that provides the opening needed to maintain the viability of the principle.

The circularity of this grounding of the law on the principle of protecting reasonable expectations cannot, I believe, be eliminated altogether. But it is not a vicious circularity.³¹ The circle is sufficiently broken to justify retention of the principle as feasible, though not definitive. To switch metaphors, the principle provides a signpost that points down the right road, but it does not provide a map to the end.

Rather than perceiving the principle as circular, I urge instead that it be looked at differently. The law and expectations are related by a mutual feedback mechanism. Reasonable expectations affect the state of the law, and

30. For one example, see the quote from Morris, *infra* note 87. Barnett, in rejecting the reliance theory of contract, provides another example, presumably equally applicable to the expectation theory of contract. Reasonable reliance on a promise, he observes, "depends on what most people would (or ought to) do." Barnett, *supra* note 29, at 275. The assessment of whether the reliance is "reasonable" cannot be made "independently of the legal rule in effect in the relevant community, because what many people would do in reliance on a promise is crucially affected by their perception of whether or not the promise is enforceable." *Id.* Therefore, he concludes, the reliance theory simply "pose[s] the crucial question that it is supposed to answer: is this a promise that should be enforced?" *Id.* In rebuttal, Barnett notices that the reliance of "many people" turns on their perception (probabilistic expectation?) "of the legal rule in effect." But this perception may not simply align with the law on the books. For example, people may know that the particular rule is on precarious ground. If so, they may believe that the enforceability of the promise may not be determined by the legal rule currently on the books. This is where the principle becomes interesting. Only in these types of cases is the principle likely to be invoked in the first place. Otherwise, when the rule on the books and expectations align, the court most likely would simply refer to the rule without reference to engendered expectations.

31. In discussing Tocqueville's psychology, Elster "consider[s] the type of contradiction that arises from the conjunction of two propositions: 'A is the cause of B. B is also the cause of A.'" The most important (and most complex) example concerns the relationship between the social state of equality, laws, and mores." JON ELSTER, *POLITICAL PSYCHOLOGY* 121 (1993) (footnote omitted). Elster examines Tocqueville's apparently muddled assertions of: "(1) the priority of mores over all other causes, (2) the priority of mores over laws, (3) the priority of the social state over laws and mores, (4) the priority of laws over mores, and (5) the priority of laws over the social state." *Id.* at 123. Elster interprets these assertions as "statement[s] about mutual causality." *Id.* He then concludes: "In equilibrium, social conditions, legal institutions, and customs support each other mutually. However, it then becomes pointless to discuss which is the more important." *Id.* For another legal analysis that is circular without being vicious, see Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 *IOWA L. REV.* 449, 510 (1992). Clark Remington suggested to me that the difference between nonvicious and vicious circularity is like the distinction in recursive programming languages between recursion that works and recursion that equals an infinite loop.

the state of the law affects reasonable expectations.³² Where the law is static, because the legal rule in a mature legal system is clear-cut, well-established, well-known and entrenched, the law on the books is enough to determine reasonable expectations. The reasonable person expects the existing rule to endure and determine prospective issues, and need not consider anything other than the law on the books. But where the law in a just legal system is under the stress of significant discontent, the expectations that are aroused, despite the known law on the books, pressure reform. The influences on the expectations are the broad factors of change: those events and states of affairs referred to in the definition which take place outside the law proper, or the law narrowly conceived. When these forces reach a

32. See ATIYAH, *supra* note 1, at 109; C.B. Macpherson, *The Meaning of Property: Mainstream and Critical Positions*, in PROPERTY 1, 1 (C.B. Macpherson ed., 1978) ("How people see the thing—that is, what concept they have of it—is both effect and cause of what it is at any time."). Two social scientists state it this way: "The structures and rules that are part of law have an impact on behavior, which in turn creates new norms and rules." Margaret Gruter & Paul Bohannon, *The Foundations in Law and Morality*, in LAW, BIOLOGY AND CULTURE 1, 1 (Margaret Gruter & Paul Bohannon eds., 1983). A recurring debate centers on whether expectations and law are independent, or how they relate. In the late nineteenth century, Jhering countered a current view with the maxim: "It is not the sense of justice which created law, but rather, it is law which created the sense of justice." Manfred Rehbinder, *Questions of the Legal Scholar Concerning the So-Called Sense of Justice*, in LAW, BIOLOGY AND CULTURE, *supra*, at 34, 34. Felix Cohen emphasizes the effect of law on morality: "The rules of positive morality by which men guide their conduct are often approximations of positive law, built up out of the dramatic passages in spectacular law suits and the persuasive dribbles of legal doctrine that trickle into the lay consciousness in the form of moral-legal maxims." FELIX S. COHEN, ETHICAL SYSTEMS AND LEGAL IDEALS: AN ESSAY ON THE FOUNDATIONS OF LEGAL CRITICISM 257 (1933). Pound argues that expectations drive legal rights. See *supra* note 3; see also Paul A. Freund, *Social Justice and the Law*, in SOCIAL JUSTICE 93, 96 (Richard B. Brandt ed., 1962) ("[R]easonable expectations are more generally the ground rather than the product of law, as well as a basis for a critique of positive law and thus a ground of law in the process of becoming."). While Llewellyn emphasizes the centrality of expectations to the law, see *supra* note 4, he also recognizes the interrelationship of expectations and law. With respect to contract, "[l]aw draws life, throughout, from the attitude of laymen toward changing types of bargain—or of simple promise. On the other hand, to some extent the shaping of agreements-in-fact turns on the type and extent of enforceability currently available at law." Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 708 (1931). Epstein may go somewhat further: "Rules determine expectations as much as expectations determine rules." RICHARD A. EPSTEIN, A THEORY OF STRICT LIABILITY 120 (1980).

To explain the force of expectations, one psychologist proposes "[a] hypothetical model of brain function . . . in which endogenous catecholamine and/or opiate rewards are released by behavior that matches a memory or 'rule' of prior behavior. Thus complying with internalized laws or expectations is in itself rewarding." Bartley G. Hoebel, *The Neural and Chemical Basis of Reward: New Discoveries and Theories in Brain Control of Feeding, Mating, Aggression, Self-Stimulation and Self-Injection*, in LAW, BIOLOGY AND CULTURE, *supra*, at 111, 112. Predictability of behavior occurs in many species other than humans, from both hard-wiring and learning. See Margaret Gruter & Paul Bohannon, *Epilog*, in LAW, BIOLOGY AND CULTURE, *supra*, at 191, 191. "Regularity and predictability are the foundations of society." *Id.*

certain level, the system often vents the pressure for legal change by modifying the rule accordingly.³³ Thereafter, perhaps after a period of overreaction and counteraction, the rule may settle down to a static state in which it placidly conforms to the expectations stemming from the outside factors, and these expectations placidly conform to the law now on the books. Perhaps the expectations have evolved toward conformity with the rule as the rule has evolved toward conformity with the expectations.

To reemphasize the point, since it addresses the most common objection to the main principle of protecting reasonable expectations, once we stand back to encompass the entire social system, we see the legal regime, not as undergirded by an elliptical principle revolving around the two foci (merged according to some) of law and reasonable expectations, but rather as regulated by a feedback mechanism with input from many factors. "Accepted morals, mores, custom and usages, and, in sum, the general social milieu" all mutually affect one another and animate the interplay between the reasonable expectations and the law, which in turn, influence the morals, mores, et cetera. None, perhaps, may be elevated to the dominant position.³⁴ Altogether, they work in a coarse manner that defies exact

33. Weber provides an unintended illustration when discussing why layperson's expectations are often disappointed because their reasoning does not conform to "professional legal logic." "For example, the layman will never understand why it should be impossible under the traditional definition of larceny to commit a larceny of electric power." MAX WEBER, *ON LAW IN ECONOMY AND SOCIETY* 307 (Max Rheinstein ed., 1954). Weber's example reveals how expectations drive the law to conform. Now it is a crime, though not traditional larceny, to convert electric power. See, e.g., N.Y. PENAL LAW § 165.15 (McKinney 1988) (Theft of Services). Llewellyn provides another example of how expectations contrary to legal principle can propel the law. He discusses the basic contract rule that knowledge of an offer is required for acceptance in the context of "the case of a reward which had been 'earned' in ignorance." KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 350 (1960). Despite the wide acceptance of this rule by late nineteenth century scholars, "[t]he books indicated indeed that the performer could recover, despite his ignorance of the public announcement. Folk-understanding and folk moral judgment still see that as right, they still see the contrary as somehow indecent." *Id.* The cases subverted the general rule by *sub silentio* exception and discreet nonconfrontation. See *id.* at 350 n.317a. As one commentator concludes, "[g]iven Llewellyn's linkage of justice with need-satisfaction, it can be said that he saw those 'subverting' judges as responding covertly to the expectations of justice." Heffernan, *supra* note 4, at 691. Despite Weber's separation of law and expectations, he notices an interrelationship when he defines "the existence of a right as being no more than an increase of the probability that a certain expectation of the one to whom the law grants the right will not be disappointed." WEBER, *supra*, at 98.

34. For example, Karl Llewellyn has been read as pushing custom and usage off center stage in favor of reasonable expectations. See Heffernan, *supra* note 4, at 681-82. Cardozo, quoting Pound and Gray, posits that, today, judicial decisions generate custom, not vice versa. See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 59-62 (1921). For a discussion of Cardozo's vision of the interrelationship between the common law and expectations, custom, social norms and morals, see John C.P. Goldberg, Note, *Community and the*

prediction of outcomes. The issue, at this point, is not whether the principle of protecting reasonable expectations is actually descriptive or feasibly normative, but rather, whether it is useful.³⁵

While addressing the question of circularity, attention should be directed to a related issue, which may be called the chicken-and-egg problem.³⁶ Sometimes, seemingly, expectations precede the legal rule,³⁷ as where rational custom develops into a common law rule,³⁸ or where, perhaps, unchallenged possession ripened into the common law doctrine of adverse

Common Law Judge: Reconstructing Cardozo's Theoretical Writings, 65 N.Y.U. L. REV. 1324, 1330-34 (1990).

In general, society may simply equate to "the currently accepted morals, mores, custom and usages, and the general social milieu." See ROBERT P. WOLFF, UNDERSTANDING RAWLS 123-24 (1977) ("Society is the sum total of the sentiments, expectations, habits, patterns of interactions, and beliefs of the men and women who make it up."). Society's law, too, has a place in the equation.

35. Jules Coleman, advancing the circularity thesis, questions the usefulness of the principle. See COLEMAN, *supra* note 4, at 279-81. Because reasonable people expect actions by others contrary to law, see *infra* note 102 (quoting Coleman), "[t]he concept of legitimate expectations is ambiguous." *Id.* at 280. Coleman therefore distinguishes *epistemic* expectations, based on anticipated actual actions, from *normative* expectations, based on anticipated proper actions. See *id.* Normative expectations stem from underlying social norms. "But once we have a set of underlying norms, the concept of normative expectations becomes otiose" *Id.* at 281. He concludes that the concept is, at best, "only partly helpful," and, at worst, it "play[s] no role . . . whatsoever." *Id.* As my text reveals, I favor the former stance. Moreover, seeing the glass as half full, I would omit Coleman's "only."

36. Correspondingly, two commentators, in discussing the law's educative effects, raise "the jurisprudential chicken-and-egg problem. Which came first, changes in community attitudes or changes in the law?" Gary B. Melton & Michael J. Saks, *The Law as an Instrument of Socialization and Social Structure*, in THE LAW AS A BEHAVIORAL INSTRUMENT 235, 258 (Gary B. Melton ed., 1986). The answer to the question would seem to be *empirical*, not *jurisprudential* in a technical sense.

Perhaps the circularity and the chicken-and-egg problems refer to the same thing. For example, Goodin addresses "the 'chicken and egg' problem that arises if we say that 'X ought to keep his promise because Y is relying on it' and that 'Y is relying upon it because X ought to do it.'" ROBERT E. GOODIN, PROTECTING THE VULNERABLE 47 (1985). For how he dissolves the problem, see *id.* at 46-48.

37. According to Bentham, "[t]here are two sorts of expectations, those which exist prior to law or naturally, and those which are the creation of the law." ALAN RYAN, PROPERTY AND POLITICAL THEORY 98 (1984). "In general, Bentham's position is to require the legislator to reinforce natural expectations." *Id.* at 99.

38. Holmes supposes this scenario: "The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains." OLIVER WENDELL HOLMES, THE COMMON LAW 8 (Mark DeWolfe Howe ed., 1963). Coleman sees custom giving rise to both *epistemic* and *normative* expectations. See COLEMAN, *supra* note 4, at 471 n.11. But his view is that *epistemic* expectations alone "do not play a role in deriving *normative* expectations." *Id.* Yet one might suppose that *epistemic* expectations bottom custom, at least partially, and thereby lead to *normative* expectations. See *infra* note 77 (regarding convention).

possession.³⁹ Sometimes, seemingly, the legal rule precedes expectations, as where a right originates in an esoteric law, such as a tax code provision,⁴⁰ or where it stems from the need to coordinate social behavior, such as the driving regulations that specify driving on the right rather than the left,⁴¹ or limit highway speed to 55 m.p.h. rather than 60.⁴² On second thought, perhaps in these cases it is often more accurate to state that the legal rule precedes *specific* expectations, in that there is little reason to expect that a particular law will be enacted, but there is abundant reason to expect some regulation will be enacted. This is particularly the case when the law responds to the need to coordinate social behavior. Everyone knows that some rule must be established about which side of the road to drive on, and there are only two plausible possibilities. Everyone also knows, though to a lesser extent, that some speed limit is needed, even though one might not know where within the range of plausible limits the rule might be drawn.⁴³ Certainly one could confidently say that the enactment of a speed limit is unlikely to substantially surprise anyone. Could we say, then, that even in these cases where the legal rule precedes specific expectations, that general expectations precede the legal rule?⁴⁴ It seems, anyway, that where either a legal rule or reasonable expectations exist, the other often makes an appearance. They play off one another in mutually supporting roles. Indeed,

39. Holmes proclaims the expectations aroused by possession to be among "the deepest instincts of man": "A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it." Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897). "More broadly, the existence of expectations serves as the foundation of prescriptive claims, the argument being that when a status or a practice has persisted for some time, people have been led to expect that it will continue and have acquired a right to its continuance." SCOTT GORDON, WELFARE, JUSTICE, AND FREEDOM 92 (1980).

40. Perhaps not just for esoteric law: "In sum, the task of the positive law is to establish a web of mutual expectancies in the political community." Juha-Pekka Rentto, *Between Clarence Thomas and Saint Thomas: Beginnings of a Moral Argument for Judicial Jusnaturalism*, 26 U.C. DAVIS L. REV. 727, 745 (1993).

41. This may not be a good example of where the legal rule precedes expectations. As an historical fact, it may be that driving on the right (or the left) ripened into a custom, which gave rise to expectations before being codified, or perhaps, that once the expectations arose from the practice, it became a custom. See *infra* note 77 (regarding conventions).

42. Sometimes the legal rule and expectations may develop together, as, conceivably, in the early unrecorded history of some common law crimes, such as conversion or battery.

43. One court addressed the issue of knowledge of speed limits: "A motorist may be presumed to know . . . the general speed limit through the state . . . , but it would not be possible or reasonable to expect that the millions of motorists should be aware, without specific notice, of the various and special speeds in the sixty cities and five hundred sixty-six villages in this state." *People v. Wadsworth*, 108 N.Y.S.2d 224, 226 (Nassau Co. Ct. 1950).

44. Cf. discussion *infra* Part III.B.

they help to clarify one another. An analysis which divorces one from the other is inadequate.

5. Examples of Failures to Maintain Analytical Distinctions

It should be apparent by now that the notion of reasonable expectations is complex and somewhat nebulous. Despite this, an edifying analysis is possible, though it requires the juggling of many balls, some of which are almost unmanageable. The failure to keep all of them clearly in sight has led a few of our most renowned jurists to drop one. Their temporary myopia is instructive.

Recall that two of the features of reasonable expectations are that they are law-backed (broadly speaking, legal, which includes normativity) and probabilistic. It appears that H.L.A. Hart momentarily lost sight of this first feature.⁴⁵ In his analysis of "right," he dissociates "right" from "expectations": "Though one who has a right usually has some expectation or power, the expression 'a right' is not synonymous with words like 'expectation' or 'power' even if we add 'based on law' or 'guaranteed by law'."⁴⁶ True, it is not synonymous, but Hart's contention runs up against the second (2.b.) dictionary sense of "expectation": "The looking for something as one's due." While one's perceived "due" may be based on society's morals or on convention, not law (i.e., a legal right), or one's perception of her "due" may not meet the test of objectivity (i.e., it is not reasonable), or one may live in a corrupt community where might trumps right, so that synonymy is precluded, strong dissociation goes too far.⁴⁷ When Hart exemplifies his position, he employs the final (8.) dictionary sense of "expectation": "The degree of probability of the occurrence of any contingent event." He writes: "A paralysed man watching the thief's hand close over his gold watch is properly said to have a right to retain it as against the thief, though he has neither expectation nor power in any ordinary sense of these words."⁴⁸ This is wrong, at least in one ordinary sense, though not in another. Under the second (2.b.) dictionary sense, the

45. Because Hart is famous for his positivistic rejection of a natural law, a moral standard that circumscribes the law, it may appear that he would object to my contention that reasonable expectations are those kindled by the law, broadly speaking (the legal culture), which includes normativity. But my claim is that the legal culture is informed by "currently accepted morals, mores, etc." Though accepted by a society, the morals may not be correct.

46. H.L.A. HART, *Definition and Theory in Jurisprudence*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 21, 23 (1983).

47. One of the several dictionary definitions of "due" supports this: "2. That which is due or owed to anyone; that to which one has a right legal or moral; with possessive of the person to whom owed." *THE OXFORD ENGLISH DICTIONARY* 704 (1969).

48. HART, *supra* note 46, at 28.

paralyzed man would still look to the watch as his due, while in the final (8.) sense he may not expect (predict) that recovery is likely. This former sense cannot be omitted from the juristic meaning of reasonable expectations. The paralyzed man does have "reasonable expectations" that the law will recognize his claim to the watch as superior to the thief's. The virtue, according to Hart, of dissociating "right" from "any psychological or physical fact . . . [is that it] leaves us free to treat men's expectations or powers as what in general men will have if there is a system of rights, and as part of what a system of rights is generally intended to secure."⁴⁹ Perhaps, but the price seems too high in light of the ordinary juristic uses of the terms. If one desires to reconstruct these key terms for analytical convenience, perhaps neologisms are needed to avoid confusion with the common understandings. To conclude, it is indeed overstating the case to claim that "right" is synonymous with "expectation," "even if we add 'based on law,'" though I do not think it overstates it much, but surely Hart goes too far in downplaying the commonly recognized relationship between "right" and "expectations."⁵⁰

The failure to make the two distinctions between, first, legal and nonlegal expectations and, second, the nonprobabilistic conative concepts and the probabilistic aspect of expectations leads P.S. Atiyah astray. At one point, like some other commentators, he attacks the principle of protecting reasonable expectations aroused by promises and executory contracts on grounds of circularity: "We all have a large number of expectations, many of which are perfectly reasonable, but only a few of them are protected by the law. Besides, the reasonableness of an expectation is itself something which turns largely upon whether it is in fact protected."⁵¹ Yet these comments misfire. First, they characterize the principle of protecting reasonable expectations as generating a circle rather than a feedback mechanism. Second, even before getting to an analysis of the principle, the two sentences are, on the surface, difficult to reconcile. If the reasonableness of an expectation "turns largely upon whether it is in fact protected," then one would not have proportionally "many" expectations "which are perfectly

49. *Id.* at 35.

50. Hart's later opinion may deflect my criticism. In the introduction to his collection of essays, he retreats from some of his analysis in this article first published in 1954. See H.L.A. HART, *Introduction*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY*, *supra* note 46, at 1, 2-6. Believing he misdeploys, in this earlier essay, some of the lessons of modern linguistic philosophy, he observes: "I fail to allow for the important distinction between the relatively constant meaning or sense of a sentence fixed by the conventions of language and the varying 'force' or way in which it is put forward by the writer or speaker on different occasions." *Id.* at 4-5. Perhaps he makes excessive concessions.

51. Atiyah, *supra* note 29, at 214. The contention in the second sentence, that the standard is circular, is addressed above. See discussion *supra* Part II.B.4.

reasonable” that are unprotected.

There are two ways, it seems to me, to reconcile Atiyah’s statement. Most obviously, he takes notice of, but fails to follow through on, the distinction between legal and nonlegal expectations. In the first sentence, he refers to both legal and nonlegal expectations; in the second one, he seemingly refers to, or emphasizes, legal expectations only. Therefore, “expectations,” or more particularly, “reasonable expectations” takes on different meanings in the two sentences. Atiyah’s failure to be clear on this probably stems from the fact that courts generally do not articulate the distinction when speaking broadly of protecting expectations. Yet it strikes me as ungenerous of him to take the courts at their literal word (as I am taking Atiyah?). Of course, their language notwithstanding, courts do not protect all “reasonable” expectations, such as those based on social niceties (e.g., “I’ll see you for lunch at one”), but whether they protect expectations alone (even when not backed, say, by reliance) when such expectations are attributable to the legal culture is, despite the overly broad language, an interesting question that deserves serious attention, which, in fact, Atiyah later gives it.⁵²

The second, more problematic, reconciliation of Atiyah’s statement turns on the distinction between nonprobabilistic conation and probabilistic expectations. In the first sentence, he may be using the term “expectations” to refer to the sense of “hope” that, according to the dictionary, “implies little certainty but suggests confidence or assurance in the possibility that what one desires or longs for will happen.”⁵³ In this regard, the expectation is reasonable in the sense that it is not irrational. It is possible for the desire to be satisfied, but it is improbable. On the other hand, the hope, to the extent that it springs from the legal culture, may not be reasonable in the sense that “reasonable” means moderate or realistic.⁵⁴ In this sense, the expectation (hope) is “unreasonable” or “unrealistic” insofar as the individual has little reason to believe it will be legally protected. Thus, Atiyah’s

52. Though he does not follow through on the distinction between legal and nonlegal expectations, Atiyah does address whether expectations should be protected in the absence of reliance. See Atiyah, *supra* note 29, at 215-16 (“a very weak ground for the enforcement of executory contracts”); see also ATIYAH, *supra* note 29, at 44-86 (criticizing the utilitarian justification for protecting bare expectations). He points out that the law in fact often does not protect expectations alone, e.g., in simple fraud and other nonpecuniary, nonphysical loss cases, and that the disappointment of bare expectations may generate meager losses. See generally Atiyah, *supra* note 29.

53. For a comparison of “expect” and “hope,” see *supra* Part II.B.3.

54. One of the OED’s definitions of “reasonable” shows its relationship to “realistic”: “5. Not going beyond the limit assigned by reason; not extravagant or excessive; moderate.” 8 THE OXFORD ENGLISH DICTIONARY 214 (1970).

statement seems more consistent when rephrased: "We all have a large number of *hopes* [~~expectations~~], many of which are perfectly reasonable, but only a few of them are protected by the law. *Furthermore*, [~~Besides,~~] the reasonableness of a[] *law-based* expectation is itself something which turns largely upon whether it is in fact protected."

Atiyah provides another example of the temporary failure to focus on the distinction between legal and nonlegal expectations, and the differing quantifications of expectations and conation. During the course of one of his arguments that contract law properly protects reliance, not expectations, Atiyah fails to make the distinctions in his attack on the utilitarian case for protecting expectations. When writing of the situation in which X borrows money from Y, he observes that the utilitarian philosophers base the moral obligation to repay on the expectations aroused in Y by the promise of repayment by X. "That argument would, of course, apply with the same force, no more and no less, where X promises to give Y a present of £100; yet it is hard to believe that the moral obligation has the same weight in the two cases."⁵⁵ Indeed, it is hard to believe, since it does not have the same weight, at least under utilitarian reasoning, if not Kantian reasoning.⁵⁶ As a practical matter, how could Y have the same expectation from the promise of a gift as from the promise in conjunction with a loan? Does Y have no awareness of gift and contract law? She may have equal hopes and desires for the money in the two cases, but even a passing knowledge of the law cools her expectation in the one case.⁵⁷ As an economist would put it, Y would discount the value of the promise by the probability of it being broken, knowing that the broken promise would be without legal redress.⁵⁸

55. ATIYAH, *supra* note 29, at 34.

56. For the Kantian position, see, e.g., CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTED OBLIGATION* 37 (1981); GORDON, *supra* note 39, at 91-92.

57. Another example from Atiyah of this mistake appears when he observes that, though an express promise alone would seem to justify the promisee's expectations or reliance, there are instances in which "for one reason or another, it is accepted, morally or legally, or both, that even an express promise should not be binding. For example, there are cases of fraud, coercion and imposition, and the like." ATIYAH, *supra* note 29, at 68. Does a promisee reasonably expect to legally enforce a contract she enters by knowingly committing fraud, coercion or imposition? She hopes it will be performed, or that the court will find nothing suspect, or that she can force an advantageous settlement, etc., but does she expect it to be legally enforceable as her due?

58. Cf. Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 525-26 (1986) ("Perceptive investors will typically act on probability estimates of possible changes in the legal regime, just as they will take into account the probabilities of changes in relevant market conditions—such as anticipated future demand, behavior of competitors, weather patterns, and the ultimate feasibility of untested inventions."). A utilitarian would also be concerned about disappointing the expectations of the donor. See MUNZER, *supra* note 28, at 401-02.

Elsewhere Atiyah regains his focus and again reveals his appreciation of the underlying problem when he points out that the moral code and the law of contracts must take account of one another. "It must be decided *when* one person is sufficiently entitled to entertain expectations, and to act upon them, so as to hold another responsible if those expectations, or conduct in reliance, are subsequently disappointed."⁵⁹

C. *The Likelihood of Reasonable Expectations*

How realistic must expectations be to warrant judicial protection? As used in the legal literature, they clearly fall substantially short of "certain to be met" (1.0). If the threshold probability was close to this maximal standard, as a practical matter, the notion would be superfluous. Should the needed probability be even close to this standard, a court would grant a remedy protecting these expectations without resort to the justification that these expectations are properly protected because they are reasonable. For an expectation to be this certain, the rule in question, and its applicability, must be quite clear-cut, well-established, well-known and entrenched. Such rule applications do not require justification by invoking the unfairness of disappointing reasonable expectations. In fact, they require virtually no warrant whatsoever. For example, assume that a drug manufacturer negligently contaminated its product labeled "aspirin" with a deadly poison that is not easily detected, thereby violating various state and federal statutes, to say nothing of the common law of products liability. In a routine case, if the defendant manufacturer contested its liability, the court would summarily reject the challenge without reference to the protection of the plaintiff's reasonable expectations. The issue can be easily resolved by quick citation to explicit statute and indistinguishable case law, without recourse to soft notions such as "reasonable expectations." The art of judicial decisionmaking instructs judges to turn to justifications of this sort only when they need to bolster holdings that are weakly supported, or unsupported by hard law. An elaborate opinion in an easy case leaves the impression that the court "doth protest too much."

59. ATIYAH, *supra* note 29, at 68. He proposes an external point of view for the initial decision. *See id.* ch. 5. Feinberg, more careful with the quantification, speaks in terms of "realistic hopes and expectations" in discussing right-generating interests. 1 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW* 44 (1984). Regan makes a similar point regarding reliance on contracts which could be stated equally well in terms of expectations: "People rely on contracts in part because contracts are known to be binding. In short, bindingness and reliance are a package, and must be explained together." Donald H. Regan, *Paternalism, Freedom, Identity, and Commitment*, in *PATERNALISM* 113, 130 (Rolf Sartorius ed., 1983). The gist of my objection to Hart, *see supra* text accompanying notes 45-50, is that he overlooks Regan's modified proposition: "bindingness [rights] and [expectations] are a package, and must be explained together."

A reason for pushing the threshold probability substantially below 1.0 is to avoid the tendency, if not the inevitability, to freeze the law at the status quo. The play in the joints of legal certainty must be maintained to allow for flexibility.⁶⁰ I am referring, of course, to what is often held out as the two overriding concerns of a legal system: first, to be certain or predictable so that the citizenry may order their affairs with confidence;⁶¹ and second, to be flexible enough to accommodate the changing social needs and views of what is a just social order.⁶² These inharmonious goals will not allow for,

60. Munzer refers to the tendency of the protection of expectations to maintain existing expectations as "entrenchment." See Munzer, *supra* note 16, at 439-41. He claims it cannot be equated with the reinforcement of the status quo. See *id.* at 441 ("The 'status quo' has many features, not all of which change or abide in tandem."). The modification of the existing situation is "disentrenchment." See *id.* at 440.

61. See, e.g., *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970) (Among the considerations against overruling past decisions is "the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise . . ."). "[T]he legal system constitutes a framework within which certain common expectations about the transactions, relationships, planned happenings, and accidents of daily life can be met (and this force for predictability and regularity can itself be viewed as a species of maintenance of order)." SAMUEL MERMIN, *LAW AND THE LEGAL SYSTEM* 6 (2d ed. 1982) (emphasis omitted).

62. See, e.g., P.S. ATIYAH, *Judicial Techniques and the Law of Contract*, in *ESSAYS ON CONTRACTS* 244, 270 (1986) ("Every law student knows of the need for the law to strike a balance between flexibility and certainty . . ."); EDGAR BODENHEIMER, *JURISPRUDENCE* 319 (rev. ed. 1974) ("The truly great systems of law . . . are those which are characterized by a peculiar and paradoxical blending of rigidity and elasticity."), quoted in W. Cole Durham, Jr., *Edgar Bodenheimer: Conservator of Civilized Legal Culture*, 26 U.C. DAVIS L. REV. 653, 656 (1993); BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 5 (1928) ("We have the claims of stability to be harmonized with those of progress."); MORRIS R. COHEN, *Rule Versus Discretion*, in *LAW AND THE SOCIAL ORDER* 259, 261 (1933) ("It would thus seem that life demands of law two seemingly contradictory qualities, certainty or fixity and flexibility; the former is needed that human enterprise be not paralyzed by doubt and uncertainty, and the latter that it be not strangled by the hand of the dead past."); SIDGWICK, *supra* note 19, at 271-73 (tension between justice based on the customary distribution of rights (conservative) and justice based on the ideal distribution (reformative)); 1 SIR PAUL VINOGRADOFF, *OUTLINES OF HISTORICAL JURISPRUDENCE* 146 (1920) ("Evolution in this domain [of law] means a constant struggle between two conflicting tendencies -- the certainty and stability of legal systems and progress and adaption to circumstances in order to achieve social justice."). The great work revealing the workings of the legal engine of change is, of course, CARDOZO, *supra* note 34.

It will be noticed that these two concerns can be put into terms of expectations without much ado. First, "confidence" clearly connotes a trust or faith founded upon an expectation of dependability. Second, that the law ought not to be the fixed yardstick of the Medes and the Persians is an outlook ensconced in our social fabric and implemented by mechanisms of change backed by the expectations of balanced use. Cf. *Daniel* 6:12 ("the law of the Medes and Persians, which altereth not"); ARISTOTLE, *POLITICS* 89 (Sir Ernest Barker trans., 1948) ("When we reflect that the improvement likely to be effected [by changed laws] may be small, and that it is a bad thing to accustom men to abrogate laws lightheartedly, it becomes clear that there are some defects, both in legislation and in government, which had better be left untouched."). For Pound's position that expectations drive legal change, see ROSCOE POUND, *JUSTICE ACCORDING*

even in principle, sharp line drawing. Practice reflects this. The more that expectations informed purely by established legal doctrine are certain to be vindicated, the less flexible is that doctrine. To partially resolve this conundrum, one must step back from established rules and peruse the grand regulative constituents of the law: "the currently accepted morals, mores, customs and usages, and, in sum, the general social milieu." This may help, but the tension persists.

In deciding when expectations are reasonable, as we push the probability down the slope from 1.0, the next obvious niche is 0.5+ (or "more probable than not"). For expectations to be reasonable, must the typical person foresee that it is more probable than not that they will be legally protected? I think so.⁶³ In any event, I put this proposition on the table to see where it leads. Then, to restate the definition of "reasonable expectations," they arise "when a person, passably acquainted with the state of the law and the legal process (which includes the currently accepted morals, mores, customs and usages, and, in sum, the general social milieu), foresees [objectively] that the occurrence of a particular contingency is [more] likely [than not] to receive proper legal protection."

But it must be quickly pointed out that, under this standard, it is possible for two (or more?) persons to have reasonable expectations that are mutually inconsistent. The standard looks to the expectations of a typical person in the shoes of the person with the expectations, but it does not look to an outside observer abstracted altogether from subjective perspectives.⁶⁴ The law

TO LAW 17 (1951). See also SUMMERS, *supra* note 18, at 184-89 (arguing that law is a mix of authoritativeness with reasonableness).

63. In the context of a mootness question, Justice Scalia addresses the standard by which it is determined whether there is a "reasonable expectation" that the respondent will be subjected to the same action again: "No one expects that to happen which he does not think probable; and his expectation cannot be shown to be reasonable unless the probability is demonstrated." Honig v. Doe, 484 U.S. 305, 333 (1988) (Scalia, J., dissenting). Scalia asserts that a "reasonable expectation" is equivalent to a "demonstrated probability," which means not simply that "a certain degree of probability exists," but rather that "a higher degree of probability exists." *Id.* at 334. But Scalia does not quantify this "higher degree" by specifying, for example, that the event simply must be more probable than not (0.5+).

64. The perspective of the outsider is that of the "ideal observer." "As a pure observer he records what is present for observation, and records it correctly. He records the values, and the evaluations, of those whom he observes." DAVID GAUTHIER, *MORALS BY AGREEMENT* 237 (1986) (distinguishing the "ideal sympathizer" and the "ideal observer"); see also RAWLS, *supra* note 11, at 184-87 (with further references). This strong notion of "reasonable expectations" which is based on the ideal observer is similar to the economic model of "rational expectations." "This phrase means that expectations contain no systematic bias, that is, the subjective expectations correspond to the objective frequencies of the random event." Robert Cooter, *The Cost of Coase*, 11 J. LEGAL STUD. 1, 22 (1982). "Rational expectations are the result of a learning process by which bias is corrected. There is a mechanism for learning in the legal set-

cannot realistically protect peculiar expectations that stem from individual foibles and irrationalities, and for this reason the principle, as suggested by the modifier "reasonable," is partially objectified.⁶⁵ However, because the law deals with the human condition, it must not ignore the normal range of responses to particular situations, and for this reason the principle is partially subjectified. The standard may be said to be of situated objectivity.⁶⁶ Therefore, because typical interacting parties may base their estimates of consequences on varied knowledge, and have differing viewpoints and outlooks, it is possible for them to draw inconsistent conclusions, all of which are reasonable based on their individual situations.⁶⁷ To place this into a contractual context, it is possible for one person to reasonably expect a contract term to be enforceable and for another person to reasonably expect the contract term to be unenforceable.⁶⁸ If the law of contracts is to protect

ting." *Id.* The mechanism is via the feedback loop from experience. This learning process "will result in revision of the subjective probabilities until they correspond to objective frequencies. The process will cease when expectations are rational." *Id.* While this learning process certainly informs reasonable expectations, the latter are generated even in the absence of sufficient experience to align them with objective frequencies. The dynamic growth of the law and continuing social change also prevent the feedback loop from reaching stasis.

65. Objectivity appears in Munzer's three conditions for a rational expectation: "an appropriately accurate and detailed knowledge of the law;" "some ratiocinative ability to make predictions on the basis of that knowledge;" and, "some ability to replicate the expectations and reasoning of others, especially officials." MUNZER, *supra* note 28, at 223.

66. For the situated objectivity of the "reasonable person" of the law of torts, see W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32 (5th ed. 1984).

67. Fletcher discusses the factors which "might explain the willingness of thoughtful American commentators to speak of both parties to a dispute as having rights or being justified." Fletcher, *supra* note 1, at 976. Two of the factors are based on theoretical analyses of rights. See *id.* at 977-80. A third one relates to reasonable expectations. Fletcher first notes that ideally everyone could know the legal significance of her contemplated act. "She need not guess how courts will subsequently evaluate the circumstances." *Id.* at 976. This "ideal of a self-regulating criminal law . . . with anarchistic overtones . . . suggests a body of norms rooted not in legislation, but in the tacit understandings of the community. From this perspective, claims of justification appear not as claims against courts, but primarily as claims of individuals against one another." *Id.* Fletcher maintains that this ideal does not govern contemporary legal theory. Instead, "[w]e are inclined to think of the entire criminal law as coercion imposed from above, as the product of intervention by police, prosecutors, and judges." *Id.* at 976-77. Hence, "there is no reason why officials, charged with finding reasonable solutions to practical problems, cannot find that two people in conflict . . . both have acted reasonably and therefore 'justifiably.'" *Id.* at 977. My defense of his conclusion, that more than one person could have acted reasonably, enters at a different point in his analysis. I would have it that the "tacit understandings of the community" may not be so univocal or sufficiently clear as to preclude conflicting reasonable expectations.

68. It seems that, in one sense, three (or more?) people could have inconsistent reasonable expectations. For example, person *A* could expect a contract term to be inapplicable. Person *B* could expect it to apply in such a way as to allow relief *X*. Person *C* could expect relief *Y*. And so on. All of these expectations could be reasonable under the circumstances.

There is also the question of higher-order expectations in which, for the second order, one

reasonable expectations, to some extent anyway, how can both persons be protected? The short and irresistible answer is that they cannot. One person's reasonable expectations must be sacrificed to another's.⁶⁹ Even worse, because each person's situated objectivity may neglect or undervalue relevant factors, it is possible for one person's reasonable expectations of, say, 0.6 to succumb to another's reasonable expectations of, say, 0.5+. For this reason alone, this model of the protection of reasonable expectations will not sharply resolve close cases.⁷⁰

D. *The Conflict of Reasonable Expectations*

The reasonable expectations of two claimants to an entitlement may be mutually inconsistent. As stated above, this is because the expectations of the claimants are measured by a standard of situated objectivity. Because their situations differ, the expectations may differ and conflict. Let us take a closer look at this.

Reasonable expectations are essentially the expectations of the reasonable person, that "Everyperson of the Law." Her characteristics are far from ideal.⁷¹ She does not reason perfectly.⁷² She does not have perfect

person has expectations regarding another person's expectations. See JON ELSTER, *ULYSSES AND THE SIRENS* 19 (rev. ed. 1984); DAVID LEWIS, *CONVENTION: A PHILOSOPHICAL STUDY* 28 (1969); Govert Den Hartogh, *Rehabilitating Legal Conventionalism*, 12 *LAW & PHIL.* 233, 240-41 (1993). The orders may increase indefinitely. See LEWIS, *supra*, at 28. The effect of higher-order reasonable expectations is here ignored.

69. While considering a hard case that turns on an unsettled rule of law, thereby giving the court the "discretion" to resolve the dispute either way, Dworkin writes that when "the plaintiff's claim is doubtful, then the court must, to some extent, surprise one or another of the parties; and if the court decides that on balance the plaintiff's argument is stronger, then it will also decide that the plaintiff was, on balance, more justified in his expectations." DWORKIN, *supra* note 13, at 86. I would be careful with the word "justified." If it is used in a purely probabilistic sense, then, as seen in the next sentence of the text above, I would disagree. Perhaps I can cite Hayek in support. He strongly endorses judicial adherence to precedent as a means of protecting reasonable expectations, see *infra* note 94, and also recognizes that rules may generate conflicting expectations which therefore require the formulation of new, more refined rules. "While the judge's starting point will be the expectations based on already established rules, he will often have to decide which of conflicting expectations held in equally good faith and equally sanctioned by recognized rules is to be regarded as legitimate." 1 HAYEK, *supra* note 14, at 115.

70. In discussing the legal protection of reliance and expectations, Morris surveys cases "illustrat[ing] that when the parties have conflicting expectations, it is important which set of expectations the court honors, because that choice determines the outcome. That choice, of course, depends on other factors often unarticulated and known only to the judges themselves." Morris, *supra* note 29, at 818. That reasonable expectations may conflict must reckon with Fuller's "internal morality of the law" which demands that rational compliance with the law be facilitated. See LON L. FULLER, *THE MORALITY OF LAW* 38-39 (rev. ed. 1969).

71. See generally KEETON ET AL., *supra* note 66, § 32.

knowledge.⁷³ When determining the scope of duties and some rights, the court creates this imperfect creature to stand in the stead of the parties.⁷⁴ It ascribes to her many of the characteristics, experiences and knowledge of the party she represents.⁷⁵ In light of her imperfections and contingent background, it is easy to see why her expectations might disagree with those of her fraternal twin who stands in for the opposing party. The twins incompatibly “foresee[] that the occurrence of a particular contingency is likely to receive proper legal protection.”

Our reasonable person is said to be “passably acquainted with the state of the law and the legal process (which includes the currently accepted morals, mores, custom and usages, and, in sum, the general social milieu).”⁷⁶ The first element, “the state of the law,” is the most important. When the law is clear for the particular issue, say, contracts must be supported by consideration, it is foolish to expect this doctrine not to be upheld. Precedent arouses expectations of continuance,⁷⁷ all the more so

72. *Id.* For sources of the shortfalls from ideal rationality, see Bailey Kuklin, *The Asymmetrical Conditions of Legal Responsibility in the Marketplace*, 44 U. MIAMI L. REV. 893, 936-93 (1990).

73. See KEETON ET AL., *supra* note 66, at 182-85.

74. Sam Murumba comments on an earlier draft: “Of course courts have delineated, somewhat, the contours of this amazing notion, but who is this person? Does this personification add anything to the standard of ‘reasonableness’ or does it simply conceal the decisionmaker’s evaluative role?”

75. But not all of them. “If the reasonable person were defined to be just like the defendant in every respect, he would arguably do exactly what the defendant did under the circumstances. Thus the standard of judgment collapses into a description of the particular defendant.” GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 513 (1978).

76. As the “Everyperson of the Law,” the reasonable person is deeply embedded in the social framework. In contracts, for example, “[w]e use the term ‘society’s contractual expectations’ because the concept is societal rather than legal. Social beliefs and attitudes determine what class of things obligate and what do not.” Joel Levin & Banks McDowell, *The Balance Theory of Contracts: Seeking Justice in Voluntary Obligations*, 29 MCGILL L.J. 24, 51 (1983). I contend, however, that the gap between the societal and the legal is breached.

77. “The law of civilised countries is, to a great extent, founded on precedent, because the experience of a thing having been done by others will give rise to a certain expectation of its being done again, and, in time, expectation becomes a sense of necessity.” A.L. Goodhart, *Introduction to SIR FREDERIC POLLOCK, JURISPRUDENCE AND LEGAL ESSAYS* ix, xxxi (1961). Even a single instance may suffice to establish a custom or precedent. *Id.* Expectation grows to a sense of necessity as, in time and with continual employment, the precedent becomes a convention. “Conventions rest on mutual expectations, and have something of the character of promises. A participant in a convention who undermines it in order to obtain personal advantage is not merely surprising his fellows; he is breaking faith with them.” Kenton F. Machina, *Freedom of Expression in Commerce*, 3 LAW & PHIL. 375, 401 (1984); see also JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 332 (Library of Ideas 1954) (1st ed. 1832) (“Sanctions apart, a convention [consisting of a promise or mutual promises] naturally raises in the mind of the promisee (or a convention tends to raise in the mind of the promisee), an expectation that its object will be accomplished: and to the expectation naturally raised by the

when it is well-established. The inquiry usually stops at the first signpost; legal doctrine is almost always determinative of reasonable expectations.⁷⁸

Obviously this is not always the case. For one, doctrine is sometimes unclear. Or clear doctrine becomes unclear as times change and trends impinge. Often, this is the prelude to a doctrinal revision or reversal. This is part and parcel of the legal process, and our reasonable person knows this and expects it, as do the agents of the legal process who bring about the change.⁷⁹ Our person not only knows the sources of this uncertainty but also the modes of operation of the agents of the uncertainty.⁸⁰ The government agents are not acting irrationally (we all hope and demand). One can roughly anticipate their moves, as they can anticipate the moves of the citizens, by being aware of the influences that move them. These are "the currently accepted morals, mores, custom and usages, and, in sum, the

convention, he naturally shapes his conduct."); ANTHONY DE JASAY, *SOCIAL CONTRACT, FREE RIDE* 13 (1989) ("The part of custom which, at least in the Germanic cultures, has little by little found its way into the law carries evidence of its consensual origin."). The convention therefore gives rise to a claim of right. See Machina, *supra*. A convention writ large functionally reflects "the currently accepted morals, mores, custom and usages, and the general social milieu," that is, the elements other than the law that constitute reasonable expectations. These solve the social coordination problem, allowing people to anticipate one another's behavior. See generally LEWIS, *supra* note 68, ch. I; William S. Boardman, *Coordination and the Moral Obligation to Obey the Law*, 97 *ETHICS* 546, 551-55 (1987).

78. Bentham grounds his theory of property on this reasoning. "Property is nothing but a basis of expectation; the expectation of deriving certain advantages from a thing which we are said to possess, in consequence of the relation in which we stand towards it. . . . Now this expectation, this persuasion, can only be the work of law." BENTHAM, *supra* note 2, at 111-12. Hence, "[p]roperty and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases." *Id.* at 113. For criticism of Bentham's view, see Munzer, *supra* note 16, at 472-74.

79. I mean "legal process" in the larger sense. It includes judicial and legislative developments, executive and administrative procedures and discretion, and all other formal mechanisms for affecting change in the law.

Bentham, asserting that the notion of property is grounded on the expectations aroused by the law, see *supra* note 78, cautions the legislator against changes in the law: "The legislator owes the greatest respect to this expectation which he has himself produced." BENTHAM, *supra* note 2, at 113. Bentham overlooks the interrelationship between the expectations of the legislators and the citizens. In this regard, Munzer refers to "layering" as when "the expectations of one person or group (for example, legal officials) will presuppose or depend on the expectations of another person or group (for example, those subject to a law)." Munzer, *supra* note 16, at 429. The existence of layering undermines the claim that the law should remain unchanged for fear of dashing expectations. See *id.* at 429-32.

80. Cf. LYONS, *supra* note 14, at 103 ("It is unclear, for example, that expectations that might be frustrated by the failure to follow past decisions would even be formed, unless there already existed a more or less regular practice of following precedent.").

general social milieu."⁸¹

We have been looking at what anchors the expectations of the reasonable person to see when she may properly believe that hers are more likely than not to be protected. A related question remains: How is the court to discern when this threshold has been reached? This talk of refined probabilities must not cloud the fact that the notion of "reasonable expectations" cannot in practice be employed as a yardstick to however many significant figures, perhaps in some cases not even to one significant figure. Unlike obscenity, we may not always know it when we see it.⁸² But usually we can.

The difficulty of discerning when expectations are reasonable becomes apparent when cases are examined that apply doctrines explicitly based on the protection of reasonable expectations. A few examples from controversial areas of the law will illustrate this. Takings law, for one, though in somewhat of a muddle,⁸³ has historically placed expectations in a central

81. In a word, norms. "Social norms are the historical precursor of laws. They establish what one *ought* to do, what one *ought not* to do, and what is *permitted* but not required to do. . . . And norms establish expectations about behavior in particular situations." JAMES S. COLEMAN, *THE ASYMMETRIC SOCIETY* 133 (1982). Cardozo concurs. See Goldberg, *supra* note 34, at 1330. Perhaps Coleman and Cardozo have it backwards: "Norms initially arise through the expectations of other people, together with their expression of approval and disapproval." Jon Elster, *Rationality, Morality, and Collective Action*, 96 *ETHICS* 136, 153 (1985). Or perhaps there is an interdependence. See *supra* text accompanying notes 37-44.

Pound asserts that persons in the "civilized society" "will carry out their undertakings according to the expectation which the moral sentiment of the community attaches thereto." POUND, *INTRODUCTION*, *supra* note 3, at 188. "The substitution of formal laws for certain norms, as is characteristic of modern society, has not eliminated norms as a means of social control." COLEMAN, *supra*. Nor, I argue, has it eliminated the pressure that norms put on the law to conform to them. Thus, even though the sources of the law may be hierarchical, from statutes through judicial precedents and down to morals, custom and usages, and the general social milieu (the latter collection may also be ordered), nevertheless, the "lower" sources may override the "higher" ones. For example, substantive due process, grounded on the "teachings of history" and "the basic values that underlie our society," *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring)), provides a strong trump against duly enacted law. Even for one who insists on a stronger hierarchy than I grant, "the tacit understandings and mutual accommodations of the members of the community are factors that typically underlie the efficacy of positive law." Martin P. Golding, *Jurisprudence and Legal Philosophy in Twentieth-Century America—Major Themes and Developments*, 36 *J. LEGAL EDUC.* 441, 446 (1986).

82. I refer to Justice Stewart's most regretted judicial pronouncement. See John P. MacKenzie, *Potter Stewart Is Dead at 70; Was on High Court 23 Years*, *N.Y. TIMES*, Dec. 8, 1985, § 1, at 1 ("As he lamented publicly when he retired in June 1981, Justice Stewart's epitaph could have been his phrase from a 1964 obscenity case: 'I know it when I see it.'").

83. See, e.g., BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 113 (1977) ("Indeed, the judges seem anxiously aware of the absence of an organizing conception of the takings clause."); Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 *CHI.-KENT L. REV.* 23, 38 (1989)

position.⁸⁴ The protected expectations must be reasonable in light of existing law.⁸⁵ Owing partially to the centrality of expectations, one of the primary criticisms of takings law is its uncertainty.⁸⁶ Another example is

(noting "the current muddle of takings doctrine"); Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984); Natasha Zalkin, Comment, *Shifting Sands and Shifting Doctrines: The Supreme Court's Changing Takings Doctrine and South Carolina's Coastal Zone Statute*, 79 CAL. L. REV. 205 (1991).

84. In weighing the conflicting public and private interests in determining whether a taking occurred as a result of regulatory legislation, one of the important factors put in the balance has been "reasonable investment-backed expectations." See, e.g., Zalkin, *supra* note 83, at 241-57. For a sophisticated discussion of the utilitarian concerns of takings stemming from the disappointment of expectations, see MUNZER, *supra* note 28, at 425-35.

85. Michelman points out the centrality of existing law to the takings doctrine: "Similarly, one might say that governmental activity that injuriously affects, but does not formally expropriate, a person's holdings amounts to a compensable 'taking' of property only [if it] contravenes specific 'investment-backed expectations' that were 'reasonable' under the law as it stood when the investment occurred." Frank I. Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1100 (1981). "Indeed, an impairment [of property] might seem essentially to consist of a violation of, or departure from, the rules as they stood when the reliance arose." *Id.* at 1102. But Michelman believes this is not necessarily the case. "There are, then, grounds both within and without the theory of property-as-expectation for at least entertaining the possibility of constitutional rights to protection against arbitrary or uncompensated deprivation of certain interests *not* treated as entitlements by the standing law." *Id.* at 1103. He recognizes that the existing formal rules, though very important, alone do not determine the notion of property. "In Professor Tribe's words, '[a]t stake must be not only what people *in fact* expect upon examining the body of positive law, but also what they are *entitled* to expect, positive law to the contrary notwithstanding.'" *Id.* at 1109 (quoting LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 469 (1978)); see also TRIBE at 465. The source of this entitlement, according to Michelman, is the Constitution. Michelman, *supra*, at 1109. This analysis of Michelman and Tribe relies on a narrow view of expectations. A broader view, one which I champion, would incorporate the normative principles of society, especially as manifested in the Constitution, in determining what expectations are reasonable in the context of constitutionally protected property, since these are generally known by the citizenry. The point needs emphasis because insightful commentators have lost sight of it: expectations are partially informed by social norms. See, e.g., Kaplow, *supra* note 58, at 524 ("[E]ven if actors rationally expect that legal change of a given type is unlikely, there is still the question of whether they have a compelling normative claim to fulfillment of that expectation."). Munzer advances a broader view in the takings context: "[O]ne should favor expectations that are part of a web of concordant expectations supported by social and legal institutions. More precisely, one should insist that, as a general matter, only expectations that are both rational and institutionally legitimate present a strong structural claim for protection." Stephen R. Munzer, *Compensation and Government Takings of Private Property*, in *COMPENSATORY JUSTICE*, *supra* note 1, at 195, 208. For Michelman's most famous view of takings, see Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967), and for criticism of it, see Munzer, *supra* note 16, at 474-80.

86. See, e.g., Zalkin, *supra* note 83, at 233 ("Numerous scholars and even Supreme Court Justices have bemoaned the lack of a 'set formula' or consistent rationale underlying the Court's takings doctrine."). In more general terms, "[i]n the United States, legitimate expectations under the Constitution are determined in a process that seems particularly subject to fashion." JOHN BRIGHAM, *PROPERTY AND THE POLITICS OF ENTITLEMENT* 41 (1990). Two recent Supreme

search and seizure law, which focuses on the protection of expectations. The Fourth Amendment safeguard against improper search and seizure involves "a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"⁸⁷ Along with an actual, subjective expectation, there is an element of objective, even normative, "reasonable" expectation. Under this standard, the courts must determine situation by situation which expectations are reasonable, the results of this process often being difficult to anticipate.⁸⁸ Other, sometimes less

Court cases refine the guidelines of regulatory takings law and adopt some per se rules, and therefore may bring greater certainty to the subject. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Time will tell about the degree of increased certainty. One inauspicious sign is that "expectations" remain in the calculus to do their muddling. In proffering by way of dictum a definition of the relevant property interest, Justice Scalia includes "how the owner's reasonable expectations have been shaped by the State's law of property" *Lucas*, 505 U.S. at 1017 n.7. Further, "our 'takings' jurisprudence . . . has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property." *Id.* at 1027. The spirit, if not the language, of Scalia's view is embraced in *Dolan*.

87. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). One critic writes: "This formulation begs the question, however, because United States citizens' expectations are based, in part, on the fact that they do not live in a police state. It also obscures the merits, which require the balancing of American ideals of liberty with a need for surveillance." *Morris*, *supra* note 29, at 821. As far as begging the question, this assertion has been addressed above. See discussion *supra* Part II.B.4. Even this quote from *Morris* acknowledges that the tautology is not total, the circularity is not vicious, since the relevant expectations have various sources ("in part"). As far as obscuring the merits, thus echoing Munzer's criticism of the principle of protecting legal expectations, see *supra* note 16, the criticism fails to address the relationship of expectations to the merits. Does not the reasonable person know and expect that the American ideals of liberty are balanced with a need for surveillance? If so, does this observation simply further beg the question? This general point, a leitmotif by now, is addressed below.

88. Thus, for example, an overnight apartment guest who had driven a car for a robbery and murder does expect protected privacy, *Minnesota v. Olson*, 495 U.S. 91 (1990), while, to the contrary, customs employees "involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty . . . have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test," *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 672 (1989), and similarly, regarding drug and alcohol testing, some railroad employees have expectations "diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees," *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 627 (1989). Compare *California v. Ciraolo*, 476 U.S. 207 (1986) (explaining that for purposes of governmental surveillance by aerial photography, there are protected, reasonable expectations of privacy regarding the curtilage area immediately surrounding a private residence) with *Oliver v. United States*, 466 U.S. 170 (1984) (recognizing no such expectations regarding open fields) and *Dow Chem. Co. v. United States*, 476 U.S. 227 (1986) (recognizing no such expectations regarding the open areas within the "industrial curtilage" of a plant complex).

One empirical investigation sheds doubt on whether the Supreme Court's view of the reach

controversial explicit applications of the principle that reasonable expectations are to be protected include insurance contracts,⁸⁹ standardized contracts in general,⁹⁰ relational contracts,⁹¹ et cetera.⁹²

As a practical and empirical matter, then, and, because of their partially subjectified probabilistic aspect, even in principle, there are cases in which one judge may properly assert that party *A*'s expectations are reasonable,

of privacy expected by people aligns with the actual view of the citizenry. See Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727 (1993).

89. Over thirty years ago, Robert Keeton synthesized a group of insurance cases on the basis of two principles, one of which is that the reasonable expectations of the insured are protected. See Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions: Part One*, 83 HARV. L. REV. 961 (1970) [hereinafter, Keeton, *Part One*]; Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions: Part Two*, 83 HARV. L. REV. 1281 (1970). The other unifying principle is that the insurer is to be denied any unconscionable advantage over the insured. See Keeton, *Part One, supra*, at 963. In his words, "[t]he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." *Id.* at 967. Not merely a rule of construction, this principle applies even if there is no ambiguity in the contract terms. See Roger C. Henderson, *The Doctrine of Reasonable Expectations in Insurance Law After Two Decades*, 51 OHIO ST. L.J. 823, 827 (1990); Keeton, *Part One, supra*, at 968. As one court puts it, "[w]hen members of the public purchase policies of insurance they are entitled to the broad measure of protection necessary to fulfill their reasonable expectations. They should not be subjected to technical encumbrances or to hidden pitfalls" *Kievit v. Loyal Protective Life Ins. Co.*, 170 A.2d 22, 26 (N.J. 1961). See, e.g., *Gray v. Zurich Ins. Co.*, 419 P.2d 168 (Cal. 1966); *Corgatelli v. Globe Life & Accident Ins. Co.*, 533 P.2d 737 (Idaho 1975); *Rodman v. State Farm Mut. Auto. Ins. Co.*, 208 N.W.2d 903 (Iowa 1973); *Collister v. Nationwide Life Ins. Co.*, 388 A.2d 1346 (Pa. 1978). For the currently mixed reception of this doctrine by the courts, see Jeffrey W. Stempel, *Reassessing the "Sophisticated" Policyholder Defense in Insurance Coverage Litigation*, 42 DRAKE L. REV. 807, 827-28 (1993).

90. A standardized agreement "is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing." RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981). In terms of expectations, "[a]part from government regulation, courts in construing and applying a standardized contract seek to effectuate the reasonable expectations of the average member of the public who accepts it." *Id.* cmt. e.

91. As Patterson summarizes, "[one] group of relational [contract] scholars believes that because norms grow out of the parties' relationship over time, and because norms become 'embedded' by virtue of expectations created over time, it is the task of courts to protect expectations which take on a norm-like status." Dennis Patterson, *The Pseudo-Debate over Default Rules in Contract Law*, 3 S. CAL. INTERDISC. L.J. 235, 261 (1993).

92. For example, in determining whether a conveyance includes an easement by implication, one court posits "that the proper adjustment of the conflicting claims of the parties in this type of case can be arrived at more directly by attempting to determine what a reasonable grantee would be justified in expecting as a part of his bargain when he purchases land under the particular circumstances." *Dressler v. Isaacs*, 343 P.2d 714, 720 (Or. 1959).

while another judge similarly asserts that party *B*'s inconsistent expectations are reasonable.⁹³ So much the worse for the usefulness of the principle of protecting reasonable expectations.

III. CONUNDRUMS

Some of the prior discussion has adumbrated underlying conundrums in the principle of protecting reasonable expectations. It is time to address them directly. I begin with a consideration of the fact that life teaches us that we must sometimes expect the unexpected. This being the case, the coherence of the principle of protecting reasonable expectations is critically challenged. Then I get to the nub of the problem: the generality of expectations.

A. *Expectations of the Unexpected*

The process of legal evolution, if fueled by the principle of protecting reasonable expectations, may confront a curious problem. To see an example of it, assume two parties enter a long-term contractual relationship during the course of which a relevant contract doctrine undergoes substantial revision. Based on the law existing at the time the legal relationship is established, the claimant has no reasonable expectations of vindication on a particular issue; she correctly believes her interest is unlikely to be protected. Later, during the course of the relationship, the legal tides shift and, owing to the change in probabilities, upon musing about the issue she forms reasonable expectations of vindication. Is the plausibility of the principle of protecting reasonable expectations undermined by this scenario?

One should also examine this problem from the vantage point of the antagonist who ultimately may lose the dispute because of the doctrinal change. To provide a further focus, assume that the contractual question at hand relates to a matter that is undergoing development in the higher courts at the point of contracting.⁹⁴ At the time, a trend is marked, but the person

93. Pound notices the basic problem of conflicting expectations when the law "adjust[s] relations and order[s] conduct so as to give the most effect to the whole scheme of expectations of men in civilized society with a minimum of friction and waste." POUND, *supra* note 62, at 29. Rough compromise among sincere, justifiable expectations in conflict is often required. *See id.* He concludes with an aggregative principle. "What we have to do in social control, and so in law, is to reconcile and adjust these desires or wants or expectations, so far as we can, so as to secure as much of the totality of them as we can." *Id.* at 31. Hayek also, who is certainly no utilitarian, wishes to "maximize the fulfilment of expectations as a whole." 1 HAYEK, *supra* note 14, at 103.

94. If no trend is evident, if the judiciary had continually reaffirmed the existing rule without any indication of doubt, a sudden change would be unfair. Dworkin makes a similar point in the context of his discussion of "conventionalism," which "holds that legal practice,

contemplating the probabilities accurately predicts that, though time may be against him, at this point it is likely that his position will prevail. On the highest court, however, is an eminent judge, such as a Mansfield or a Cardozo, who has frequently demonstrated that he or she is quite willing, *stare decisis* notwithstanding, to accelerate or even originate trends.⁹⁵ Other

properly understood, is a matter of respecting and enforcing these [distinct social] conventions, of treating their upshot, and nothing else, as law." DWORKIN, *supra* note 12, at 115. "If conventionalism were so singlemindedly practiced in a particular jurisdiction and so often announced and confirmed by public institutions that people were thereby entitled to rely on that style of adjudication, of course it would be unfair for some judge suddenly to abandon it." *Id.* at 141. His word "entitled" may introduce tautology into this proposition, but I support the underlying idea. On the other hand, if the legislature implemented the sudden change, our reasonable person, based on the regularity of this occurrence, would "expect" this, at least within a much wider scope. Hayek espouses conventionalism: "The chief concern of a common law judge must be the expectations which the parties in a transaction would have reasonably formed on the basis of the general practices that the ongoing order of actions rests on." 1 HAYEK, *supra* note 14, at 86; *see also id.* at 86-89, 96-97. Hayek writes that this principle restrains the judge from rejecting precedent and that only the legislature can correct misguided caselaw by means of prospective legislation which then informs expectations. *See id.* at 88-89. This contention fails to account for the common practice of courts anticipating the overruling of a common law doctrine to signal their inclination in the last cases reluctantly adhering to the lingering rule. For example, in *Greenberg v. Lorenz*, 173 N.E.2d 773 (N.Y. 1961), the court, while refraining from overruling the long line of cases holding that a warranty claim requires privity of contract, nevertheless indicates the general dissatisfaction with the rule and its disposition to reject it, which it does a year later in *Randy Knitwear, Inc. v. American Cyanamid Co.*, 181 N.E.2d 399 (N.Y. 1962). As one, unnamed judge states: "If I'm going to ignore a pretty clear line of cases I've gotta have some signals that our supreme court is ready to change. Fortunately, those signals are pretty clear a lot of the time." Lief H. Carter, *How Trial Judges Talk: Speculations About Foundationalism and Pragmatism in Legal Culture*, in LEGAL HERMENEUTICS 219, 232 (Gregory Leyh ed., 1992). For a discussion of the virtues of this signalling, see LLEWELLYN, *supra* note 33, at 299-305. Similarly, J.S. Mill believed that legislative signals impact on the expectations and hence justifiability of taxing increases in land values. *See* ATIYAH, *supra* note 1, at 640-41. Goodin states that there are two solutions to the "problems of transitions" relating to redistributions: first, advance notice; second, "to compensate losers straightaway in some other currency." Goodin, *supra* note 1, at 159.

95. For Mansfield, the father of modern contract law, no citations to cases need be given. Cardozo, known primarily for his transformation of tort law, made his mark in contracts as well. He suggests that the protection of reasonable expectations is a reason for his innovations. One notable case is *Allegheny College v. National Chautauqua County Bank*, 159 N.E. 173 (N.Y. 1927), in which the tone was set for the current rule that promises of charitable contributions are enforceable despite the lack of traditional consideration. Cardozo contends that judges in prior cases that have enforced charitable subscriptions by stretching the doctrines of consideration and promissory estoppel, "have been affected by the thought that 'defenses of that character' are 'breaches of faith towards the public, and especially towards those engaged in the same enterprise, and an unwarrantable disappointment of the reasonable expectations of those interested.'" *Id.* at 175. (As another judge notes, "[t]he Allegheny College Case indicates the growth of the judicial process wherein the law is made to conform to the justice of the case, and wherein the law enforces the reasonable expectations arising out of conduct." First Methodist Episcopal Church v. Howard's Estate, 233 N.Y.S. 451, 455 (N.Y. Sur. Ct. 1929). Another case is *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917), in which Cardozo recognizes, arguably,

judges on the court also subscribe to a judicial philosophy that downplays the importance of protecting expectations aroused only by the law on the books.⁹⁶ But our antagonist correctly believes that if a dispute arises, it is likely to be favorably settled or resolved in a lower, conservative court before the trend reaches this level. It is unlikely his case will get before the resourceful judge or court, perhaps because the stakes are too small, but if it does he realizes the chances are substantial that he will lose.⁹⁷ So *ex ante*, at the time of entering the consensual agreement, this reasonable person properly expects to prevail on the point. But in the unlikely event that the issue does wend its way before the innovative judge, these reasonable expectations, it seems, may be foreseeably disappointed.⁹⁸

This complication may be further exacerbated. From the above, a judicial trend is evident at the time of contracting that signals a possible doctrinal revision. But assume this is not the case. Instead, the winds of change are not aroused until after the contract is signed. It is not until sometime after the point of contracting that the fully informed parties have reason to anticipate a change in the rules. Or, to push this complication to the bottom of the slope, assume the winds of change do not stir at all, but rather, out of the blue, a surprising legislative enactment with retroactive

that the arousal of reasonable expectations is to be protected even in the absence of an express promise. "A promise may be lacking, and yet the whole writing may be 'instinct with an obligation,' imperfectly expressed." *Id.* at 214.

96. For example, Dworkin describes three interpretive theories, conventionalism, pragmatism, and law as integrity, only conventionalism being expressed in terms of protecting expectations. See DWORKIN, *supra* note 12, chs. 4-7. For an outline of Dworkin's view, with criticism, see Ken Kress, *The Interpretive Turn*, 97 ETHICS 834 (1987).

97. For the argument that this contemplated loss would not be unfair, see Margaret Jané Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 815 (1989) ("[W]here the line of evolution of legal interpretation is clearly foreseeable, it would not be unfair to hold people to what they can see is the emerging interpretation."). Compare the robust form of Holmesian predictivism in which case outcomes are to be predicted not only on the basis of "any relevant preexisting rules but also on such factors as past instances of judicial behavior, the stimuli provided by the raw facts of the case at hand, the ideologies, personalities, and personal values of the judges, their social backgrounds, and the like." SUMMERS, *supra* note 18, at 118.

98. Perhaps I speak too quickly of disappointed expectations: "Since every member of society has reason to know that the society's legal rules will reflect policies, and reason to know that a policy has the requisite social support, neither the policy nor judicial action reflecting the policy should normally involve unfair surprise." MELVIN A. EISENBERG, *THE NATURE OF THE COMMON LAW* 36 (1988). In what follows, I push this idea farther down the slippery slope.

One must not forget that the judge himself is subject to the push and pull of expectations. His judicial reasoning will partially reflect "what is expected of him by his audience. . . . In justifying his decision, the judge has to relate what he does to those expectations and show plausibly how he has used his power in a way which conforms to them." JOHN BELL, *POLICY ARGUMENTS IN JUDICIAL DECISIONS* 24 (1983).

reach,⁹⁹ or an “unprecedented” judicial decision effects the change.¹⁰⁰ These things happen. In these circumstances, what of the principle of protecting reasonable expectations?

Yes, these things do happen. Life inevitably teaches us this hard lesson. Even laypersons are informed of this by the various media, including the news, serials, docudramas and soap operas. In the context of the law, as elsewhere, the reasonable person expects the unexpected.¹⁰¹ For that matter, the reasonable person also expects that injustices will occasionally occur.¹⁰² In this sense, then, expectations are not disappointed.¹⁰³ But,

99. For examples of cases scrutinizing the retroactive reach of legislation for the sake of protecting reasonable expectations, see *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 719-23 (1978); *C.E.K. Indus. Mechanical Contractors v. NLRB*, 921 F.2d 350, 357 n.7 (1st Cir. 1990) (“private expectations”); *Coffey v. Dean Witter Reynolds, Inc.*, 891 F.2d 261, 265 (10th Cir. 1989); *Reed v. Hoy*, 891 F.2d 1421, 1424-26 (9th Cir. 1989); *Schrottman v. Barnicle*, 437 N.E.2d 205, 209 (Mass. 1982); *In re Giroux*, 704 P.2d 160, 162-63 (Wash. Ct. App. 1985).

Because the legislative process is more democratic than the judicial one, something can be said for giving it more reign to look backwards. See Munzer, *supra* note 16, at 450. In terms of expectations, “[l]egislative ‘precedents’ are properly less binding than judicial precedents, if only because they are *understood* to be less binding.” J. Roland Pennock, *Reason in Legislative Decisions*, in RATIONAL DECISION 98, 100 (Carl J. Friedrich ed., 1964). This may be because the two bodies are expected to undertake different functions: “It is the legislature’s function to remove inequities from existing law and hence openly to introduce innovations. . . . Law courts, on the other hand, best serve justice by using established procedure to assign to each that which is his due under existing law.” Margaret Spahr, *When the Supreme Court Subordinates Judicial Reason to Legislation*, in RATIONAL DECISION at 160, 161 (later criticizing the Court in *Brown v. Board of Educ.*, 347 U.S. 483 (1954), for being improperly legislative).

100. “Suddenly what seemed unchallengeable is challenged” DWORKIN, *supra* note 12, at 89.

101. See HANNAH ARENDT, *THE HUMAN CONDITION* 178 (1956) (“The fact that man is capable of action means that the unexpected can be expected from him, that he is able to perform what is infinitely improbable.”); MORRIS, *supra* note 29, at 825 (“Persons should recognize that their expectations will sometimes be disappointed.”).

102. See COLEMAN, *supra* note 4, at 279 (“A modern businessperson has reason to expect that some competitors will cheat if they can, in the same way that retailers expect certain shoppers to steal. It would be unreasonable to expect otherwise, and no reasonable person could expect otherwise.”); FREDERIC SCHICK, *HAVING REASONS: AN ESSAY ON RATIONALITY AND SOCIALITY* 79 (1984) (“For we don’t always suppose that those who will judge our conduct will be fair—that they will give us what we deserve. Nor need we to think they will be fair if they will be rational.”). To the contrary, Fried asserts: “Absent some special basis, the only reasonable expectations that persons have are that they will be treated rightly and fairly.” CHARLES FRIED, *AN ANATOMY OF VALUES* 221 (1970). Perhaps, as suggested by Shklar, the difference between these contrary views turns on the vagueness of “expectations” or “reasonable expectations”: “We feel betrayed, not just upset, when these expectations are not met. Statistics may tell us that this is probably going to happen, but that hardly makes us feel better.” JUDITH N. SHKLAR, *THE FACES OF INJUSTICE* 89 (1990).

of course, the factual question remains of whether these expectations are reasonable in the sense that the anticipated contingencies are more likely than not.

This analysis supports the proposition that these expectations of later doctrinal change, whether or not they are in the air at the time of contracting, are reasonable; because the reasonable person anticipates this possible turn of events, she discounts her expectations accordingly.¹⁰⁴ So long as the probabilities are appropriately determined by the person, and the court takes them into account when arriving at its ruling, one cannot say reasonable expectations are disappointed any more than one might say they are disappointed by the failure to call correctly a roll of the dice.¹⁰⁵

Under this analysis, there is no windfall to the party to the contract who reaps the benefit resulting from the rule change.¹⁰⁶ The parties negotiate the contract terms on the basis of the expectations then extant. Anticipated legal rights are an important factor in pricing the contract. As rational persons, the contracting parties anticipate the possibility of doctrinal revision, and accordingly incorporate this expectation into the contract terms. In Atiyah's words, "the essence of the matter is that the bargain struck between the parties, if they both know the law, and both act as rationally as economic men are supposed to act, will reflect the law as it stands, together with

103. Munzer considers this question: "Since rational persons allow for the possibility that their rational and legitimate expectations will not be protected, when . . . are their expectations overridden as distinct from being merely disappointed?" Munzer, *supra* note 16, at 437 n.26. He advances a gauge with much penumbra: "Should the government not protect his expectations for reasons that the citizen anticipated with some specificity, his expectations have been merely disappointed. Should the government not protect them for reasons that the citizen failed to anticipate with some specificity, . . . his expectations have been overridden." *Id.* But then, who am I to complain about fuzzy standards?

104. Compare this to Eisenberg's analysis: "A rational liability insurer therefore will not determine its premiums on the assumption that all immunities are written in stone, but according to the probability that a relevant immunity will be preserved or overturned in whole or in part." EISENBERG, *supra* note 98, at 114.

105. At this point, it is important to maintain the distinction between reasonable expectations and conative inclinations, such as hope and desire, that attach to the contemplation of future events. See *supra* part II.B.3.

106. In the context of the criminal law, the concern for windfalls takes on a different complexion. "[T]he argument that fairness requires the fulfillment of well-founded expectations is often inapplicable in the criminal law. When decision rules are more lenient than the relevant conduct rules, . . . no one is likely to complain about the frustration of an expectation of punishment." Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 634 (1984). For elaboration, see *id.* at 671-73. Dan-Cohen's observation may be arrived at from a different angle. It is not that "well-founded (reasonable) expectations" are to be "fulfilled," rather the common principle is that they are to be "protected." The goal to "protect" undesired expectations does not ring true.

appropriately discounted probabilities of its being changed."¹⁰⁷ From one perspective, then, their expectations of doctrinal revision were not reasonable, because they correctly anticipated that the revision was less likely than not. But from another perspective, the expectations of revision were reasonable, because the parties correctly anticipated the unlikely event and provided for it appropriately. It follows from this latter perspective that neither party lands a windfall or suffers a shock. Reasonable expectations are protected.

This reasoning, though plausible, seems peculiar. At first, reasonable expectations were defined as those for which the contingency is anticipated as more likely than not (0.5+). The economic analysis has taken us to the point where, because people anticipate and provide for the unexpected, the expectation of the unexpected seems to satisfy the standard of reasonability. Something seems amiss. I believe we are finally getting to the heart of the matter.

The economic analysis assumes that the parties correctly anticipate the probabilities of future legal changes and incorporate them appropriately. While some commentators argue that disruptive reliance on precedent that is overruled is "for the most part a figment of excited brains,"¹⁰⁸ others believe this consideration must be given substantial weight by the courts.¹⁰⁹

107. ATIYAH, *CONTRACTS*, *supra* note 1, at 332. From this he concludes: "Since the bargain struck, and the price to be paid, will thus reflect the legal remedies which are (or are expected to be) available, it is quite impossible to deduce what those legal remedies should be from the bargain itself." *Id.* Without resolving this complex point, Atiyah notes: "The result of this great weakness in classical economic theory was that when specific issues were raised by legislative proposals which would involve interference with freedom of contract, the arguments on the *principle* of interference were totally valueless, and indeed rather meaningless, from an economic viewpoint." *Id.* Similar reasoning applies to the disruption of expectations regarding property rights. *See id.* at 640-41.

108. BENJAMIN N. CARDOZO, *GROWTH OF THE LAW* 122 (1924). Cardozo justifies his legal realist observation: "The only rules there is ever any thought of changing are those that are invoked by injustice after the event to shelter and intrench itself. In the rarest instances, if ever, would conduct have been different if the rule had been known and the change foreseen." *Id.* Gray would sign Cardozo's judgment. *See* JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF LAW* 100 (2d ed. 1921) ("Practically in its application to actual affairs, for most of the laity, the Law, except for a few crude notions of the equity involved in some of its general principles, is all *ex post facto*.").

109. Freund would have the court, considering the question of retroactivity, balance these factors: "how firmly grounded, how just, are the expectations; how much dislocation will result from the decision; how amenable might the subject be to the rule-making of general legislation; how feasible would it be to enter a judicial declaration applicable only to future transactions?" Paul A. Freund, *Rationality in Judicial Decisions*, in *RATIONAL DECISION*, *supra* note 99, at 109, 118. Traynor generally agrees and would have the court retroactively overrule a bad precedent "if the hardships it would impose upon those who have relied upon the precedent

More generally, the contention that a possible overruling can be rationally anticipated is subject to the unrealistic ascription to the affected actors of superrationality. If all actors are said to be perfectly rational in this strong sense, in that they aptly anticipate all contingencies, justice arguments may be dissolved by claiming that the parties, by acting in the light of this ideal knowledge, consent to whatever contingency eventuates.¹¹⁰

The assumption of perfect rationality—that one's expectations are truly calculated—is problematic and, therefore, raises serious questions of realism and justice. I have addressed these elsewhere.¹¹¹ Instead, consider a question that gets to the heart of the matter with respect to the principle of protecting reasonable expectations: how are expectations to be characterized?

B. The Generality of Expectations

A straightforward case sufficiently reveals the fundamental problem. This is a case for which it is easy to argue that reasonable expectations support a particular position since the relevant legal rule is clear-cut, well-established, well-known and entrenched. For example, the relevant rule is that in ordinary circumstances enforceable promises require consideration. Because the hypothetical circumstances are quite ordinary, the particular case falls in the core of the rule. Let us join Crystal, the fortuneteller, as she presciently interrogates the parties at the time when the bare promise, unsupported by consideration, is made. "Promisor, do your expectations account for the facts that this offhanded promise of yours will lead to a raucous dispute in 17 days between you and the promisee, a lawsuit in 358 days, a judgment in your favor in 613 days, and . . . ?" (At this point, Crystal fills in the details with a Proustian tale of the fallout from this casual promise.) The promisor replies, not surprisingly, "Why, no. My expectations do not really embrace this scenario since I haven't the slightest clue that this will follow from my promise." "Well, then," Crystal responds, "let me rephrase the question. Are your expectations based on the eventuality that your promise will lead to a lawsuit in which you will

appear not so great as the hardships that would inure to those who would remain saddled with a bad precedent." Roger J. Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 HASTINGS L.J. 533, 540 (1977). Traynor concludes that "[t]he technique of prospective overruling enables courts to solve this dilemma by changing bad law without upsetting the reasonable expectations of those who relied on it." *Id.* at 541-42. This utilitarian or Kaldor-Hicks weighing technique "can serve in any case in which new rules are announced." *Id.* at 542. Neither Freund nor Traynor address the comparable court practice of signalling when an overruling is in the air. See *supra* note 94.

110. See Bailey Kuklin, *The Gaps Between the Fingers of the Invisible Hand*, 58 BROOK. L. REV. 835, 865-67 (1992) ("superrationality").

111. See Kuklin, *supra* note 72; Kuklin, *supra* note 29.

ultimately prevail?" Again the promisor forthrightly concedes, "Well, no, not really. As I think about my expectations, the thought doesn't cross my mind that there will be any problem regarding this promise." At this point the promisee jumps in, "Aha! Because your expectations, promisor, don't embody these possible occurrences, therefore, you should gain no support in any future dispute from the principle of protecting reasonable expectations."

The promisor, seeing through this gambit, demurs, "Wait a minute. Crystal's questions are not properly worded. If they are phrased in the subjunctive, my responses will differ. The second question, for example, should be reworded this way: 'Do I expect that *if* my promise leads to a lawsuit that I will ultimately prevail?' The answer to this is a loud 'yes.' Hence the principle regarding reasonable expectations is supportive of my position."

The promisee, dispirited by this retort, is silenced, but Crystal picks up the ball. "Do you, promisor, expect that if the courts begin to endorse more strongly the Kantian moral maxim supporting promisekeeping, and if your dispute wends its way before Judge Mansfield II who is about to be appointed to the supreme court,¹¹² and [so on], that you would ultimately succeed in vindicating your perceived deserts in a lawsuit with the promisee?" "Why, no," the promisor admits. "Under those circumstances, my lawsuit prospects would be dim as the view of what is my due has changed. But once again you misstate the proper question. Based on the current state of affairs, I don't anticipate that the courts will begin to endorse more strongly the Kantian maxim supporting promisekeeping (which I personally don't subscribe to now), nor do I foresee that my case will get before Judge Mansfield II, nor that she will even be appointed to the supreme court, nor any of these details you thrust at me. Therefore, my reasonable expectations aroused by what I now know and believe remain that my promise is unenforceable."

At this point the promisee sees through Crystal's countermove. "Wait a minute, promisor, first you assert that the proper question relating to expectations should be put in the subjunctive, but as soon as Crystal puts them in a 'what if' form, you claim that the proper question leaves out the

112. Mansfield hinted at a Kantian position on promisekeeping. In the case of *Pillan & Rose v. Van Mierop & Hopkins*, 97 Eng. Rep. 1035 (K.B. 1765), he opined that enforceable contracts should not require consideration. "I take it, that the ancient notion about the want of consideration was for the sake of evidence only: for when it is reduced into writing, as in covenants, specialties, bonds, etc. there was no objection to the want of consideration." *Id.* at 1038. This view of contracts, along with others of Mansfield, his founding of modern contract law notwithstanding, did not prevail.

subjunctive, or at least that it leaves out some plausible conjectures. This seems question begging. What standard do you propose as appropriate for specifying the relevant expectations?"

Crystal could direct comparable questions to the promisee that would demonstrate that the notion of expectations is vague. The notion can relate to contingencies described in infinite detail, as in the Proustian scenario above, or in broadest generality, as in the expectation that truth and justice will usually prevail. It can relate to contingencies depicted in the subjunctive or the indicative moods. Whether the expectation satisfies the standard of reasonability, that is, the contingency is perceived as likely to occur pursuant to one's due, often depends on the manner in which the particular contingency is characterized. On the one hand, narrow, detailed depictions are not reasonably expected because the particularities cannot be accurately anticipated.¹¹³ On the other hand, broad, general depictions are reasonably expected but overlook the fact that exceptions sometimes do and should control, as when it is reasonable to expect that precedent will prevail but, by way of limitation, protecting this broadly characterized expectation would prevent overrulings, which are known and desired to happen occasionally. As a rule of thumb, the more specifically the expectation is characterized, the less it is reasonably anticipated.

Because there is no apparent formula by which to tame this unruly concept of reasonable expectations, and its application, it is unavoidably open-ended.¹¹⁴ As I warned of in the introduction, throughout this Article I

113. In this regard, "[t]he argument that legal change should be expected is also factually misleading because the recognition that the legal system is dynamic does not give one clairvoyance concerning the precise changes that will occur." Kaplow, *supra* note 58, at 525.

114. It is largely for this reason, nebulousity, that Ackerman disapproves of a constitutional takings standard based on the structure of social expectations. See ACKERMAN, *supra* note 83, at 95-96. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), exemplifies the problem. On the one hand, "the Nollans had a reasonable expectation of being able to rehabilitate their house without having to tolerate strollers on the beach behind their house." Tideman, *supra* note 1, at 1719. On the other hand, "the Nollans should have known [reasonably expected?] that their renovation plans would interfere with the public's reasonable expectation of being able to apprehend the beach beyond their house . . ." *Id.* In the context of contractual unconscionability, Craswell comes to a similar conclusion. See Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1, 28-29 (1993). "In short, judicial reliance on such ambiguous phrases as 'reasonable expectations' . . . has done little to advance our understanding of the substantive criteria courts might use in evaluating challenged obligations under a liability rule." *Id.* at 29. Craswell correspondingly questions the usefulness of the doctrine of protecting reasonable expectations in the context of insurance contracts, standard form contracts, and products liability cases. See Richard Craswell, *The Relational Move: Some Questions from Law and Economics*, 3 S. CAL. INTERDISC. L.J. 91, 111-12 (1993). "In practice, however, courts have usually had to fall back on explicit normative analysis to give content to the parties' reasonable expectations." *Id.* at

have often used the ploy of orchestrating the characterization of the relevant expectations to score points. This tactic was particularly emphasized in the dialogue above, yet the concept also has other inherent complications.

Consistent with Connolly's definition of "essentially contested concepts," having rules of application that are open is only part of the problem with the notion of reasonable expectations.¹¹⁵ By turning on such factors as the currently accepted morals and mores, it also is, as Connolly puts it, "appraisive in that the state of affairs it describes is a valued achievement."¹¹⁶ Finally, the proposed feedback mechanism between the law and reasonable expectations, with inputs from the many factors that encompass the whole social milieu, reveals that "the practice described is *internally complex* in that its characterization involves reference to several dimensions."¹¹⁷ While I have not equally emphasized the complications ensuing from the three elements, it should be apparent that the legal protection of reasonable expectations involves a notion that fully satisfies the

112. See also Kaplow, *supra* note 58, at 525 ("The issue of whether a specific change can be anticipated is a matter of degree. The all-or-nothing approach of deeming particular expectations of change rational or irrational—and thus deeming reliance either reasonable or unreasonable—simply confuses the issue."). The position I take is also advanced by Kostritsky and Gordon. See Juliet P. Kostritsky, *Bargaining with Uncertainty, Moral Hazard, and Sunk Costs: A Default Rule for Precontractual Negotiations*, 44 HASTINGS L.J. 621, 638-39 (1993); Robert W. Gordon, Outline for AALS Contracts Workshop, in Association of American Law Schools Conference on Contracts: Discussion Outlines 51 (June 3-8, 1989) (unpublished pamphlet of discussion outlines, quoted in Kostritsky, *supra*). Kostritsky refers to Gordon's discussion of *Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267 (Wis. 1965), a case in which the plaintiff extensively relied on precontractual assurances of the defendant's agent. In basing the issue of liability on the parties' intentions and expectations, "[u]ltimately, [Gordon] explained, the empiricist must ask: 'Could [Red Owl] have predicted that [Hoffman] would reasonably rely on its assurances?'" Kostritsky, *supra*, at 639 (citing Gordon, *supra*, at 55). She then draws the conclusion I favor: "But the parties' reasonable expectations may be reconstructed in a variety of different and conflicting ways . . ." *Id.* As examples, she quotes Gordon's six ways of reconstructing the expectations. See *id.* (quoting Gordon, *supra*, at 55-56). Kostritsky concludes: "The lack of any determinate method for assessing the content and reasonableness of parties' assumptions underscores the limited value of empiricism as a theoretical model for precontractual liability." *Id.*

Finally, the inestimable Hume confronts a related problem when he justifies property on the basis of the expectations aroused by possession. In determining when possession occurs, and hence tacitly, when the associated expectations are to be protected, he concludes: "'tis in many cases impossible to determine when possession begins or ends; nor is there any certain standard, by which we can decide such controversies." DAVID HUME, A TREATISE OF HUMAN NATURE 506 (L.A. Selby-Bigge ed., 1888) (1st ed. 1739 & 1740).

115. For Connolly's definition, see *supra* note 5.

116. *Id.*

117. *Id.*

properties of an essentially contested concept. As such, it is among those that "essentially involve endless disputes about their proper uses on the part of their users."¹¹⁸

In Rawls's parlance, there are a multitude of possible conceptions of the concept of reasonable expectations,¹¹⁹ none of which is self-evident, formulaic, salient or noncontroversial. It is plagued by inescapable vagueness.¹²⁰ As Aristotle instructs us, we should not be unrealistic in hoping for exactitude in matters such as these.¹²¹ But here the inexactitude is so great as to limit the usefulness of the concept.

Three other instances will demonstrate the nature of the problem and its intractability. First, the concept of risk in torts is similarly vexed. Under what has been called the problem of the specificity of risk characterization,¹²² whether tort liability attaches turns on the manner of describing the relevant risk. If described narrowly, the risk is less foreseeable; if broadly, then more foreseeable. For example, one might pose an issue statement narrowly in this way: "When a cricket ball has been rarely hit out of a cricket grounds, is it a reasonably foreseeable risk that a passerby on a sparsely traveled side street may be struck by a hit ball?" Or one might pose it broadly: "Is it a foreseeable risk that a cricket ball hit out

118. CONNOLLY, *supra* note 5, at 10 (quoting Gallie, THE IMPORTANCE OF LANGUAGE, *supra* note 5, at 123).

119. See RAWLS, *supra* note 11, at 5-6 (distinguishing between the concept and the various conceptions of justice) (citing H.L.A. HART, THE CONCEPT OF LAW 155-59 (1961)).

120. I am referring to a level of uncertainty that goes beyond that normally found acceptable in the legal process: "Some uncertainty must be tolerated at the edges; sound social institutions will never stand or fall on the marginal classification issues that test every legal doctrine." RICHARD EPSTEIN, TAKINGS 114 (1985). See also John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 29 (1955) ("One expects border-line cases with any concept, and they are especially likely in connection with such involved concepts as those of a practice, institution, game, rule, and so on.").

121. See ARISTOTLE, ETHICA NICOMACHEA bk. I, § 3 (W.D. Ross ed., 1942) (stating that "it is the mark of an educated man to look for precision in each class of things just so far as the nature of the subject admits").

122. This label comes from Carl Hawkins, my torts professor. In speaking with him recently, he referred to, for the notion if not the label, the writings of Leon Green and the opinion of Magruder in *Marshall v. Nugent*, 222 F.2d 604 (1st Cir. 1955). Magruder notes that the courts, in circumscribing liability by the doctrine of proximate causation, speak in terms of foreseeable risk:

Of course, putting the inquiry in these terms does not furnish a formula which automatically decides each of an infinite variety of cases. Flexibility is still preserved by the further need of defining the risk, or risks, either narrowly, or more broadly, as seems appropriate and just in the special type of case.

Id. at 610.

of a cricket grounds will strike a passerby?"¹²³ The second issue statement is easier to answer in the affirmative.¹²⁴

A second example of an important, vague concept is Aristotle's precept of justice to treat like cases alike and unlike cases differently.¹²⁵ In judging whether cases are alike or different, how are their facts to be characterized? We say that the relevant facts must be material, but what makes a fact material? Are not the plausibly applicable rules crucial in determining the materiality of particular facts, the material facts in their own turn determining which of the rules is applicable?¹²⁶

A third example is the form of Kant's categorical imperative that declares that moral maxims are to be universalized. In Kant's words, "I ought never to act except in such a way *that I can also will that my maxim should become a universal law.*"¹²⁷ How is the nature of the act and the reach of the maxim to be specified? For example, should the maxim be, "always keep promises," or should it be, "always keep promises unless someone will be seriously injured by keeping them," or even, "always keep promises unless . . . [specifying various detailed contingencies]?" This has

123. This issue is suggested by *Bolton v. Stone*, [1951] App. Cas. 850.

124. Hart and Honore, in rejecting the claim that the notion of foreseeability is not useful in explicating tort causation issues because certain details may always be said to be unforeseen, observe: "[T]o avoid fallacies, the first question to ask is not 'Was this harm foreseeable?' but 'Under what specific description which fits this harm has experience taught us to anticipate harm?'" HART & HONORE, *supra* note 10, at 258. Hence, upon seeing storm clouds, "the rainstorm was foreseeable even if, when it occurs, it has other characteristics (e.g. lasted two hours, covered an area of 40 sq. miles) which we could not foresee but which might appear, *ex post facto*, in a more specific description of it." *Id.* Connolly generalizes: "A description does not refer to data or elements that are bound together merely on the basis of similarities adhering in them, *but to describe is to characterize a situation from the vantage point of certain interests, purposes, or standards.*" CONNOLLY, *supra* note 5, at 23.

125. See ARISTOTLE, *supra* note 121, bk. V, § 3.

126. Westen answers in the affirmative: "The determination that cases are relevantly similar presupposes a relevant rule of decision for comparing them, just as the formulation of a rule of decision for a series of cases presupposes a determination of relevant similarity. Each step presupposes the other . . ." PETER WESTEN, SPEAKING OF EQUALITY 220 (1990). See *id.* at 220-23; R. RANDALL KELSO & CHARLES D. KELSO, STUDYING LAW: AN INTRODUCTION 24 (1984) (stating that "a holding includes, first of all, the major premise (usually a rule of law) in light of which the facts were characterized to reach a conclusion"); cf. NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY 163 (1978) (in discussing "why the similarity counts as a legally relevant analogy," MacCormick concludes: "So the relevance of the analogy is dependent upon perceiving a rational principle within which the two items compared can both be contained—together, as it may be, with other related-type situations."). This is akin to the feedback mechanism within the principle of protecting reasonable expectations.

127. IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS 70 (H.J. Paton trans. ed., & 3d ed. Harper & Row 1956) (1st ed. 1785).

been called the "problem of relevant descriptions."¹²⁸ While many philosophers have attended to it, the solution remains elusive.¹²⁹

Because of this characteristic elusiveness, the plausibility of legally protecting reasonable expectations is problematic. It entails an essentially contested concept.

IV. THE USEFULNESS OF THE CONCEPT OF REASONABLE EXPECTATIONS

At this point, obvious questions loom. If many factors, including morals, mores and customs, are mutually interdependent with expectations, of what use is it to erect reasonable expectations as the (or a) keystone of the law? And if this keystone is an essentially contested concept, why bother?

A few responses remain. First, reasonable expectations are both on and beneath the surface of the law, and it is edifying to uncover them more fully. Second, the perspective from the vantage point of reasonable expectations provides a convenient magnifying glass, if not a microscope, through which the dynamic of the law and the interests of its participants may be scrutinized. Third, by way of negative reason or "what else can we do?," the mutual interdependence of the law and its influences cannot be avoided realistically by a justificatory grounding of the law on abstract principle that fails to take into consideration the convictions and practicalities articulated by the participants in the legal system. We are stuck with an unruly, essentially contested concept that, though defying exactitude, is indisputably persistent. This is also the case for the three other examples above: the specification of tortious risk, the alike treatment of like cases, and the determination of Kantian universalization. The recognized contestability has not led to the dismissal of these three concepts from the realm of moral and legal discourse, nor is the concept of reasonable expectations likely to be soon banished. Perhaps it is because the four concepts, complications

128. Onora Nell, as a prelude to her trenchant discussion, introduces the problem of using the universality test of principles to guide chosen acts. She examines the correspondence of principles and particular acts within the principles: "Not only can a given principle be acted on repeatedly and in various ways, but any given act exemplifies numerous principles Of any act and of any agent an indefinitely large number of descriptions is true." ONORA NELL, *ACTING ON PRINCIPLE: AN ESSAY ON KANTIAN ETHICS* 12 (1975). The problem, then, is "to specify some way of deciding which of the principles covering an act it is relevant to assess in a given context. We must find some method for deciding what the relevant descriptions of a given agent and act are." *See id.*

129. After rejecting the resolutions of the problem offered by several philosophers, Nell observes that "[a]ny adequate solution must state an effective criterion of selection that is generally applicable and yields plausible results. I cannot offer any solution which meets these standards." *See id.* at 143.

notwithstanding, ring true to our ears, resonating with the moral insistencies of human nature and given nurture.

Whatever virtues it might have, in the end, the principle of protecting reasonable expectations cannot alone resolve close controversies. Instead of serving as an algorithm, the principle may be useful as a heuristic only. Ultimately, the concept of reasonable expectations may do best at simply helping us understand why disputes arise.