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# RESTITUTIONARY DISGORGEMENT FOR OPPORTUNISTIC BREACH OF CONTRACT AND MITIGATION OF DAMAGES

*Caprice L. Roberts\**

*Is a restitutionary disgorgement remedy for certain breaches of contract compatible with the traditional contract principle of mitigation requiring nonbreaching parties to take reasonable steps to minimize damages? The relationship between disgorgement and mitigation is complex, in part because disgorgement seems to undermine classic contract notions such as Justice Holmes's choice theory. Nevertheless, disgorgement actually allows for certain value choices. Section 39 of the forthcoming Restatement (Third) of Restitution seeks to deter conscious wrongdoers from retaining profits from breach of contract. This article addresses one objection to disgorgement: that disgorgement will subvert a plaintiff's duty to mitigate a defendant's damages after a breach of contract. This objection depends on many unstable assumptions about both mitigation and disgorgement. This Article attempts to tease out those assumptions and explain why and how disgorgement ultimately could foster an environment in which actors operate conscientiously to mitigate avoidable consequences.*

Beneath the cloak of restitution lies the dagger that compels the conscious wrongdoer to “disgorge” his gains.<sup>1</sup>

[A disgorgement based remedy, here for breach of contract,] merely deprives the defendant of a profit

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\* Associate Dean of Faculty Research and Development and Professor of Law, West Virginia University College of Law. The author benefitted from presenting works-in-progress exploring restitutionary disgorgement at the Remedies Forum (Emory Law School), the Southeastern Association of Law Schools (“SEALS”), and the “Roundtable on Restitution and Unjust Enrichment in North America” (Washington & Lee University School of Law). The author owes a debt of gratitude for continuing dialogues with Professors Andrew Kull, Doug Rendleman, and Eoin O’Dell. The author also thanks Andrew Wright for thoughtful comments, Allen Mendenhall for helpful research assistance, and Matthew L. Clark and Bertha Romine for valuable revisions.

1. Warren v. Century Bankcorp., Inc., 741 P.2d 846, 852 (Okla. 1987).

wrongfully made, a profit which the plaintiff was entitled to make.<sup>2</sup>

It is true that a nonbreaching party to a contract has a duty to take reasonable steps to mitigate its damages, and that its failure to do so may prevent it from recovering damages that otherwise could have been avoided.<sup>3</sup>

## I. INTRODUCTION

A bold disgorgement remedy for opportunistic breach of contract is pending in one of the American Law Institute's ("ALI") current undertakings, the *Restatement (Third) of Restitution and Unjust Enrichment* ("Restatement").<sup>4</sup> Section 39 of the draft *Restatement* proposes disgorgement for "Profit Derived from Opportunistic Breach."<sup>5</sup> In cases where "breach of contract is both material and opportunistic," this remedy, rooted in restitution, would enable the injured party to disgorge "the profit realized by the defaulting promisor as a result of the breach."<sup>6</sup> This section explains the theory as follows: "Liability in restitution with disgorgement of profit is an alternative to liability for contract damages measured by injury to the promisee."<sup>7</sup> Under the umbrella of restitution and unjust enrichment, this new black-letter law authorizes a disgorgement remedy for certain breaches of contract. It is potentially groundbreaking because traditional American contract law does not have a rule encapsulating cases where disgorgement is the proper remedy for breach.<sup>8</sup> Further, the theoretical underpinnings of unjust enrichment and disgorgement diverge from governing principles of American contract law. This Article will explore this anticipated

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2. *Laurin v. DeCarolus Constr. Co.*, 363 N.E.2d 675, 679 (Mass. 1977) (validating a contract remedy measured by the fair market value of the defendant's gain rather than the plaintiff's diminution of value).

3. *Yang Ming Marine Transp. Corp. v. Okamoto Freighters Ltd.*, 259 F.3d 1086, 1095 (9th Cir. 2001) (citing *Buras v. Shell Oil Co.*, 666 F. Supp. 919, 924 (S.D. Miss. 1987)).

4. *RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT* (Tentative Draft No. 4, 2005).

5. *Id.* § 39.

6. *Id.* § 39(1).

7. *Id.*

8. *See id.* cmt. d at 11; *see also id.* at xv (acknowledging that contract orthodoxy does not have such a rule and that section 39 is "essentially new").

tension by focusing on disgorgement's interface with contract law's doctrine of mitigation.<sup>9</sup>

Is a restitutionary disgorgement remedy for certain breaches of contract compatible with the traditional mitigation principle that asks the nonbreaching party to take reasonable steps to minimize contract damages? This Article will examine this thorny issue and conclude that disgorgement conflicts with the underlying rationales for mitigation and contract law generally. Ultimately, however, the value choices of disgorgement, along with the intended rareness of its applicability to contract breaches, may warrant the shift in contract law and many of its historic doctrines, such as mitigation. Before engaging the substance, an explanation of this "bedeviling" and entrenched terminology is necessary.<sup>10</sup> Accordingly, Part II of this Article provides a general framework for understanding restitution, disgorgement, and mitigation. Part III of this Article explains the *Restatement's* narrow construction of disgorgement for breach of contract, despite some international precedent for a broader formulation and application. In Part IV, this Article discusses the meaning of and justifications for the mitigation doctrine against the backdrop of goals for traditional contract remedies and limitation principles. Part V analyzes the interplay between restitutionary disgorgement and contract law's mitigation doctrine. It offers two analytical frameworks: (i) the theoretical plane and (ii) the practical plane. For example, if the theoretical catalyst for this disgorgement remedy is deterrence (and perhaps punishment) of opportunistic breachers, placing mitigation requirements on the aggrieved party may make little sense.

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9. "The duty to mitigate is a universally accepted principle of contract law requiring that each party exert reasonable efforts to minimize losses whenever intervening events impede contractual objectives." Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 967 (1983). Professors Goetz and Scott acknowledge that the term "duty" is misleading, but utilize it because it is "common and convenient." *Id.* at 967 n.1. Properly construed, "the failure to mitigate merely 'disables' the injured party from recovering avoidable losses." *Id.* (citing *Rock v. Vandine*, 189 P. 157, 157-58 (Kan. 1920); JUDSON A. CRANE, *CASES ON DAMAGES* 102 n.1 (1928); CHARLES T. MCCORMICK, *HANDBOOK ON THE LAW OF DAMAGES* 128 (1935); E. Allan Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1184 (1970)).

10. Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191, 1191-92 (1995) ("The linguistic confusion that bedevils the law of restitution—necessitating laborious definitions before anyone can understand what you are talking about—affords an early indication that the common name of this neglected body of law was singularly ill-chosen.").

Although tensions exist between the foundations of restitutionary disgorgement and mitigation, this Article concludes in Part VI that a practical avenue may exist in which efforts to mitigate can serve as a prerequisite for restitutionary disgorgement for breach of contract. The value of this path depends on our commitment to providing only narrow access to disgorgement for breach of contract coupled with our continued interest in encouraging self-help and avoiding unnecessary consequences.

## II. FRAMING RESTITUTION, DISGORGEMENT, AND MITIGATION

Every substantive term in the title of this Article presents an academic landmine. The following formulations seek to clarify this Article's ultimate inquiry into the potential tension between restitutionary disgorgement—a provocative remedy for a novel, opportunistic breach of contract claim—and the mitigation doctrine in contract law.

Disgorgement is an ancient remedy that strips the defendant's gain.<sup>11</sup> A novel extension of that remedy is underway as part of a black-letter law project in the area of law known as “restitution and unjust enrichment.” This disgorgement remedy will alter the doctrinal landscape of contract law. This conclusion is true in part because the disgorgement remedy's foundational guides conflict with traditional contract law principles. I explore the broad ramifications, as well as the potential benefits, of American contract law making the leap in other articles.<sup>12</sup> This Article illustrates one dimension of the anticipated friction between disgorgement's unjust enrichment roots and contract law orthodoxy, including contract notions stemming from Justice Oliver Wendell Holmes's choice principles.<sup>13</sup> More specifically, this Article will evaluate the interplay between a

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11. See *Warren v. Century Bankcorp., Inc.*, 741 P.2d 846, 852 (Okla. 1987) (“The remedy in restitution rests on the ancient principles of disgorgement.”).

12. See, e.g., Caprice L. Roberts, *Restitutionary Disgorgement as a Moral Compass for Breach of Contract*, 77 U. CINN. L. REV. (forthcoming 2009) (manuscript, on file with author), available at <http://www.ssrn.com/abstract=1232258> [hereinafter Roberts, *Restitutionary Disgorgement*]; see also Caprice L. Roberts, *A Commonwealth of Perspective on Restitutionary Disgorgement for Breach of Contract*, 65 WASH. & LEE L. REV. 945 (2008) [hereinafter Roberts, *Commonwealth Disgorgement*].

13. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897), reprinted in 78 B.U. L. REV. 699, 702–03 (1998).

restitutionary disgorgement remedy and the plaintiff's "duty" to mitigate, or lessen, the defendant's damages in a breach of contract case.

Restitutionary disgorgement lacks common meaning. In fact, any definition invites controversy among doctrinal purists. To be clear, however, I intend the word "restitution" to mean that unjust enrichment must exist to trigger the remedy. I use "restitutionary" as an adjective that modifies disgorgement. The key word for my purpose is "disgorgement" because it is the *remedy*. Access to the type of disgorgement at issue must be grounded in unjust enrichment as developed under the law of restitution. American law, unfortunately, has (mis)characterized restitution at times to have only a limited meaning,<sup>14</sup> such as a deposit paid before a defendant's breach of the contract. Pursuant to this limited meaning, a plaintiff receives a restitution remedy in the form of the deposit returned or restored to the plaintiff. Among international scholars and courts, the law of restitution tends to be conceptually much richer and broader.<sup>15</sup> The broader unjust enrichment conception of restitution is intended in this Article. I prefer to think of the arena as the law of unjust enrichment, but not all scholars and other legal constituents agree on a common lexicon, so American law will retain both and thus speak in the language of the law of restitution and unjust enrichment.

Use of the term restitutionary in this Article means that it would be unjust for a defendant to retain a benefit without paying the plaintiff for it. This formulation may be familiar from cases in which a plaintiff delivers services without a valid enforceable contract but the court deems that the defendant should not be permitted to retain

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14. See, e.g., DOUG RENDLEMAN, REMEDIES CASES & MATERIALS 403-04 (7th ed. 2006) (explaining the myths to which many lawyers, judges, and professors cling when conducting restitution analysis). In England, Peter Birks spearheaded a formidable movement to establish a scheme for the law of restitution because the relaxation of forms of action in the nineteenth century caused restitution to "disappear from the common law map." PETER BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION vii (1985). He lamented and pronounced the "gap" of law "to be self-perpetuating since teachers and books are not called forth where there is no learning; but [noted that] the supply of cases never dries up, because the lives of litigants are not controlled by law school categories (though even litigants suffer when their lawyers have a blind-spot.)" *Id.*

15. See generally Chaim Saiman, *Restitution and the Production of Legal Doctrine*, 65 WASH. & LEE L. REV. 993 (2008) (exploring the rigorous, jurisprudential treatment of restitution claims in other countries, such as England, versus American courts that create "very little" substantive restitution law).

the benefits of such services without compensating the plaintiff.<sup>16</sup> Thus, the defendant will pay *quantum meruit*—as much as the plaintiff deserves—the reasonable value of the services provided.<sup>17</sup> Here, however, we are not dealing with the valuation of a plaintiff's services delivered to a defendant. Instead, the defendant may be sitting with a benefit wrongfully obtained,<sup>18</sup> a benefit rightfully belonging to the plaintiff; therefore, the profits derived from this wrong should be disgorged from the defendant and provided to the plaintiff.<sup>19</sup> Professor Kull offers a helpful hypothetical: “[I]f we discover that an embezzler has invested \$1,000 of the plaintiff's money to yield \$5,000, the plaintiff has a claim in restitution to \$5,000—not to \$1,000 or even \$1,000 plus market interest.”<sup>20</sup>

When would the benefit rightfully belong to the plaintiff? What does unjust mean in the law of restitution and unjust enrichment? The term unjust connotes unfairness. Unjust enrichment occurs, for example, when a defendant retains a benefit for which she should pay but has not paid. Specific examples abound and, to the shock of many law students and practitioners, many cases arise under freestanding restitution or unjust enrichment claims, i.e., the plaintiff does not need an underlying contract, tort, or property claim. A

16. 1 GEORGE E. PALMER, *THE LAW OF RESTITUTION* § 4.2 (1978) (“Sometimes restitution will be in specie and sometimes in the amount of money payments made by the plaintiff, but in a high percentage of the cases it will be for the money value of his performance.”); *id.* (exploring the thorniness of the concept “benefit” as “it tends to suggest that there must have been some addition to the defendant’s wealth”). For example, in *Planche v. Colburn*, 131 Eng. Rep. 305 (A.C. 1831), the court ruled the plaintiff could recover the value of his work in quasi contract where the defendant requested that the plaintiff write a book for publication. The plaintiff worked on the manuscript until the defendant abandoned the project, and the defendant never received a manuscript. *Id.* See also, PALMER, *supra* note 16, § 4.2, at 371 & nn.5–7 (discussing other examples where plaintiffs recover the reasonable value of their performance).

17. See, e.g., *Moses v. Stevens*, 19 Mass. 332 (2 Pick. 1824) (authorizing recovery in quantum meruit for the services performed by a minor who left employ before the promised term’s expiration). For a provocative discussion of the complexity of quantum meruit standards and suggestions for reform, see generally Candace S. Kovacic, *A Proposal to Simplify Quantum Meruit Litigation*, 35 AM. U. L. REV. 547 (1986).

18. FRANCESCO GIGLIO, *THE FOUNDATIONS OF RESTITUTION FOR WRONGS* 205 (2007) (“Unlike [pure restitution], here ‘the measure of the gain ignores whether or not any transfer has occurred and is measured by the actual profit accruing to the defendant from the wrong.’”) (citation omitted).

19. See Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1281 (1989) (“Avoidance of unjust enrichment explains why we award these profits to plaintiff. But we are not restoring anything that plaintiff once had or ever would have.”).

20. Andrew Kull, *Disgorgement for Breach, the “Restitution Interest,” and the Restatement of Contracts*, 79 TEX. L. REV. 2021, 2022–23 (2001).

quintessential freestanding example is mistaken transfer. For example, “a misaimed First Bank computer fires money into Sarah’s checking account, no gift to Sarah was intended, no contract between the two was breached, no conversion or other tort occurred, and no property right was infringed. But the money unjustly enriches Sarah, and surprise!, surprise!, she cannot keep it.”<sup>21</sup>

For all restitution claims, the unjust element derives, often, from a *sense* of justice and fairness. But the claim of unjust enrichment may be legal or equitable, depending on the remedy sought. Legal restitution would include claims, often labeled quasi-contract, where a defendant pays quantum meruit for a plaintiff’s services wrongfully retained.<sup>22</sup> Equitable restitution would also rely on the presence of unjust enrichment, but the remedy would require a constructive trust or other equitable remedy.<sup>23</sup>

This Article addresses the restitutionary disgorgement remedy that may lie in limited circumstances under contract law. Scholarly support exists for such a remedy, although debate ensues over proper line-drawing for applying the remedy.<sup>24</sup> In a pending black-letter law

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21. RENDLEMAN, *supra* note 14, at 383. Even in cases labeled “quasi-contract,” if the restitution recovery finds independent basis in the defendant’s unjust enrichment, the claim may be “freestanding” restitution. *Id.* at 402 (citing *Kistler v. Stoddard*, 688 S.W.2d 746 (Ark. Ct. App. 1985); *Kossian v. Am. Nat’l Ins. Co.*, 62 Cal. Rptr. 225 (Ct. App. 1967)).

22. *See, e.g., Campbell v. Tenn. Valley Auth.*, 421 F.2d 293 (5th Cir. 1969) (affirming a jury verdict on a “contract implied in law” for which the jury valued quantum meruit based on the fair market value rather than the defendant’s realized benefit); RENDLEMAN, *supra* note 14, at 401 (characterizing quasi contract as legal restitution with such common counts as “quantum meruit” in which a “plaintiff has performed services which will enrich the defendant unjustly unless the defendant pays him”). Yet, the “equity fallacy” remains prevalent in court discussions. *See, e.g., Vortt Exploration Co. v. Chevron U.S.A., Inc.*, 787 S.W.2d 942, 944 (Tex. 1990) (providing the following detailed factors for the “equitable remedy” of quantum meruit: “To recover under quantum meruit a claimant must prove that: ‘1) valuable services were rendered or materials furnished; 2) for the person sought to be charged; 3) which services and materials were accepted by the person sought to be charged, used and enjoyed by him; 4) under such circumstances as reasonably notified the person sought to be charged that the plaintiff in performing such services was expecting to be paid by the person sought to be charged.’”) (quoting *Bashara v. Baptist Mem’l Hosp. Sys.*, 685 S.W.2d 307, 310 (Tex. 1985)).

23. *See, e.g., Simonds v. Simonds*, 380 N.E.2d 189 (N.Y. 1978) (utilizing “relaxed tracing” to impose a constructive trust on part of a “substituted trust res”—life insurance proceeds of decedent’s beneficiary, his second wife—where decedent had promised to maintain at least \$7,000 of life insurance coverage for his first wife).

24. *See, e.g., HANOCH DAGAN, THE LAW AND ETHICS OF RESTITUTION* 260–82 (2004); ROBERT GOFF & GARETH JONES, *LAW OF RESTITUTION* 515–26 (6th ed. 2002); PETER D. MADDAUGH & JOHN D. MCCAMUS, *THE LAW OF RESTITUTION* 753–74 (2d ed. 2004); PALMER, *supra* note 16, § 4.9; Peter Birks, *Restitutionary Damages for Breach of Contract: Snapp and the Fusion of Law and Equity*, LLOYD’S MAR. & COM. L.Q. 421 (1987); John P. Dawson, *Restitution or Damages?*, 20 OHIO ST. L.J. 175, 186–89 (1959); E. Allan Farnsworth, *Your Loss or My*



project, restitutionary disgorgement is the proposed remedy for the “opportunistic breach of contract.”<sup>25</sup> Contract law’s legal lexicon does not possess a uniform definition of the phrase “opportunistic breach.”<sup>26</sup> It may mean selfish, advantageous, or exploitive behavior resulting in a breach of contract. The *Restatement* comments for section 39 emphasize “conscious advantage-taking” and “tak[ing] without asking.”<sup>27</sup>

By discouraging conscious advantage-taking, does section 39 prohibit efficient breach of contracts? Scholarly debate exists regarding distinctions between opportunistic breach and efficient breach.<sup>28</sup> Advocates of efficient breach encourage breaching a contract if the anticipated gain would exceed paying the other party’s damages and thus leave some parties in a better position and no one in a worse position.<sup>29</sup> Some of the spirit of section 39 contrasts the theory of efficient breach.<sup>30</sup> But section 39 does not view efficient breach as synonymous with opportunistic breach; rather, it “does not automatically punish an efficient breach with a disgorgement remedy, however, because of the requirement that the breach be opportunistic.”<sup>31</sup> Thus, section 39 narrows opportunism by requiring

*Gain? The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 YALE L.J. 1339 (1985).

25. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (Tentative Draft No. 4, 2005).

26. Although “opportunistic breach” does not yet possess a well-known uniform definition, scholars offer helpful guides. See, e.g., DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 392 (3d ed. 2002) (noting that “Judge Posner now recognizes a category of ‘opportunistic’ breach of contract that ought to be deterred”) (citing RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 4.8, at 130) (“If a promisor breaks his promise merely to take advantage of the vulnerability of the promisee in a setting (the normal contract setting) where performance is sequential rather than simultaneous, we might as well throw the book at the promisor.”); William S. Dodge, *The Case for Punitive Damages in Contracts*, 48 DUKE L.J. 629, 652 (1999) (defining opportunistic breach as occurring “if the breaching party attempts to get more than he bargained for at the expense of the nonbreaching party”).

27. RESTATEMENT, *supra* note 4, cmt. b, at 7–8.

28. LAYCOCK, *supra* note 26, at 392 (exploring the tension between opportunistic and efficient breach).

29. See, e.g., ROBIN PAUL MALLOY, LAW IN A MARKET CONTEXT: AN INTRODUCTION TO MARKET CONCEPTS IN LEGAL REASONING 199–202 (2004); see also POSNER, *supra* note 26, § 1.2, at 13 (describing “Pareto-superior transaction” as “one that makes at least one person better off and no one worse off”).

30. Roberts, *Restitutionary Disgorgement*, *supra* note 12 (exploring whether section 39 presents a threat to the efficient breach doctrine).

31. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (Tentative Draft No. 4, 2005).

the breach to be “deliberate” and “profitable,” and the injured party must establish that a damage remedy would be “inadequate.”<sup>32</sup> Notably, Judge Posner envisions a type of breach where the promisor breaches for no other reason except “to make money” and that “[w]e can deter this kind of behavior by making it worthless to the promisor, which we do by making him hand over all his profits from the breach to the promisee; no lighter sanction would deter.”<sup>33</sup>

The new disgorgement remedy for opportunistic breach of contract is a component of what will be the *Restatement (Third) of Restitution and Unjust Enrichment*.<sup>34</sup> The *Restatement (Second)* never came to fruition, but rather the ALI abandoned the effort. Thus, the new project nobly seeks to bring modern relevance to a complex, riveting, and far-reaching body of restitution and unjust enrichment law. Pursuant to years of rigorous revisions under the direction of the reporter, Andrew Kull, and the Restitution Working Group, the anticipated *Restatement* will replace the original 1937 *Restatement of Restitution*.<sup>35</sup>

The lines between this doctrinal area of law—restitution and unjust enrichment—and contract law are not separate and distinct. The *Restatement* will, by nature, overlap with numerous doctrinal subjects. Further, it is unclear when the next *Restatement of Contracts* might occur.<sup>36</sup> Accordingly, the ALI has determined that

32. *Id.* § 39(2). This section defines “opportunistic breach” as follows:

A breach is “opportunistic” if

- (a) the breach is deliberate;
- (b) the breach is profitable by the test of subsection (3); and
- (c) the promisee’s right to recover damages for the breach affords inadequate

protection to the promisee’s contractual entitlement. In determining the adequacy of damages for this purpose,

- (i) damages are ordinarily an adequate remedy if they can be used to acquire a full equivalent to the promised performance in a substitute transaction; and
- (ii) damages are ordinarily an inadequate remedy if they cannot be used to acquire a full equivalent to the promised performance in a substitute transaction.

*Id.*

33. POSNER, *supra* note 26, § 4.8, at 131.

34. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (Tentative Draft No. 4, 2005).

35. RESTATEMENT (FIRST) OF RESTITUTION (1937).

36. The ALI published the most recent black-letter treatment of contracts, RESTATEMENT (SECOND) OF CONTRACTS (1981), in 1982.

including the disgorgement remedy in the *Restatement of Restitution and Unjust Enrichment*, rather than holding it in abeyance for a future *Restatement of Contracts*, is wise.

Professor Kull acknowledges that the *Restatement's* proposed disgorgement remedy for opportunistic breach of contract is an "essentially new" rule, although not without precedent.<sup>37</sup> He reassures that limiting language will narrow the application of the remedy.<sup>38</sup> Yet, the underlying premise is virtually limitless. Accordingly, as explored in a related article, the implications of the rule may well be broad in the area of contract law and beyond.<sup>39</sup>

As noted, this Article will keep its focus on a core concept in contract damages, mitigation, or avoidability. Whatever label one chooses, the following principle reveals the intention of the substantive doctrine of limitation: "A court ordinarily will not compensate an injured party for loss that that party could have avoided by making efforts appropriate, in the eyes of the court, to the circumstances."<sup>40</sup>

The notion of mitigation, or the duty to mitigate damages, is another landmine conceptually. Professor Doug Rendleman laudably attempts to minimize the effects of blurring terminology. He clarifies some definitional problems but acknowledges that imprecision will remain:

The expression "mitigation of damages" technically describes the ways a *defendant* may decrease a plaintiff's damages. The same expression is frequently used to describe what more correctly is termed "avoidable consequences," the steps plaintiff should take to prevent her damages from mounting. "Minimize damages" or "avoidable consequences," is preferred, but "mitigation of damages," though a little imprecise, is too entrenched in the legal vocabulary to budge.<sup>41</sup>

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37. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT, *Reporter's Introductory Memorandum*, at xv (Tentative Draft No. 4, 2005).

38. *Id.* § 39 cmt. a, at 6 ("The restitution claim here described is infrequently available, because a breach of contract that satisfies the cumulative tests of § 39 is distinctly rare.").

39. Roberts, *Restitutionary Disgorgement*, *supra* note 12.

40. E. ALLAN FARNSWORTH, *CONTRACTS*, § 12.12, at 806 (3d ed. 1999).

41. RENDLEMAN, *supra* note 14, at 101; *see also* Goetz & Scott, *supra* note 9, at 967 n.1.

Such technical distinctions are important, but in the end, the author faces the familiar dilemma—to correct the imprecision or risk multiplying the problem by speaking in the language most, including non-academics, will understand.<sup>42</sup> For now, this author opts for the latter—adopting the one word, “mitigation,” to capture any interest that may exist in the plaintiff minimizing or avoiding damages. This Article will explore the various substantive conceptions in Part IV.B.<sup>43</sup>

Without a doubt, discord exists between the restitutionary disgorgement remedy and the doctrine of mitigation. International scholars have recognized the potential consequences of disgorgement relief: “The general availability of gain-based relief also would affect contract law in other ways. It would, for instance, tend to undermine the duty to mitigate and subvert the rules governing ‘cost to cure’ claims.”<sup>44</sup> Before fully exploring the effects of restitutionary disgorgement on contract’s doctrine of mitigation, however, an examination of the *Restatement*’s conceptualization of restitutionary disgorgement is necessary.

### III. RESTITUTIONARY DISGORGEMENT

#### A. Disgorgement Generally

Commonwealth countries permit, and international scholars call for, broader reach of disgorgement principles in contract law.<sup>45</sup> Although not unprecedented in American law, this remedy will be essentially new to the American scene. The ALI has likely determined that it is wise to proceed with a limited version of disgorgement. As discussed in other articles,<sup>46</sup> I believe that the underlying concepts and the end result will resonate with students,

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42. Put plainly: “Speak to me in a language I can hear.” SMASHING PUMPKINS, *Thirty-Three*, on MELLON COLLIE & THE INFINITE SADNESS (Virgin Records 1995).

43. See *infra* Part IV.B (examining the meaning and justifications for mitigating contract damages).

44. Mitchell McInnes, *Disgorgement for Breach of Contract: The Search for a Principled Relationship*, in UNJUST ENRICHMENT & THE LAW OF CONTRACT 236 n.39 (E.J.H. Schrage ed., 2001) (citing S. M. Waddams, *Profits Derived from Breach of Contract: Damages or Restitution*, 11 J. CONTRACT L. 115, 118–20 (1997)).

45. Roberts, *Commonwealth Disgorgement*, *supra* note 12 (exploring broader international support for disgorgement for breach of contract).

46. See Roberts, *Restitutionary Disgorgement*, *supra* note 12; Roberts, *Commonwealth Disgorgement*, *supra* note 12.

practitioners, and many scholars. Accordingly, the black-letter text is narrow, while the spirit is broad. Therefore, the future may, and perhaps should, hold a broader remedy.

For now, the restitutionary disgorgement remedy in American law will be limited by the proposed language in the *Restatement*. To be sure, neither the *Restatement* nor American case law supports restitutionary disgorgement as a readily available, alternative remedy for contractual breach.<sup>47</sup> Rather, the *Restatement* is narrowly worded and intended to create a limited avenue to thwart conscious wrongdoers from profiting through breach where legal damages would be inadequate.

### B. Section 39's Narrow Conception

Section 39 utilizes words of limitation, but the spirit surrounding the section is broad. Thus, despite the rule's narrow construction, the implications may be sweeping. With those words of caution, the entirety of the section provides:

#### § 39. Profit Derived from Opportunistic Breach

(1) If a breach of contract is both material and opportunistic, the injured promisee has a claim in restitution to the profit realized by the defaulting promisor as a result of the breach. Liability in restitution with disgorgement of profit is an alternative to liability for contract damages measured by injury to the promisee.

(2) A breach is "opportunistic" if

(a) the breach is deliberate;

(b) the breach is profitable by the test of subsection (3); and

(c) the promisee's right to recover damages for the breach affords inadequate protection to the promisee's contractual entitlement. In determining the adequacy of damages for this purpose,

(i) damages are ordinarily an adequate remedy if they can be used to acquire a full equivalent to the promised performance in a substitute transaction; and

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47. See generally RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (Tentative Draft No. 4, 2005).

(ii) damages are ordinarily an inadequate remedy if they cannot be used to acquire a full equivalent to the promised performance in a substitute transaction.

(3) A breach is “profitable” when it results in gains to the defaulting promisor (net of potential liability in damages) greater than the promisor would have realized from performance of the contract. Profits from breach include saved expenditure and consequential gains that the defaulting promisor would not have realized but for the breach. The amount of such profits must be proved with reasonable certainty.

(4) Disgorgement by the rule of this Section will be denied

(a) if the parties’ agreement authorizes the promisor to choose between performance of the contract and a remedial alternative such as payment of liquidated damages; or

(b) to the extent that disgorgement would result in an inappropriate windfall to the promisee, or would otherwise be inequitable in a particular case.<sup>48</sup>

“Traditional contract law,” as Professor Kull acknowledges, “contains no rule identifying the cases in which disgorgement is an appropriate remedy for breach.”<sup>49</sup> This new rule, section 39 in the *Restatement of Restitution*,<sup>50</sup> crystallizes the law for a bold remedy available for certain breaches of contract. A gain-based remedy for a breach of contract case is not unprecedented, however. American law simply lacks an overarching theory to explain the phenomenon. The *Restatement* proposes section 39 to fill this void. Section 39, years in the making, offers:

a general theory of disgorgement in contract cases (namely, that it is a remedy for opportunistic breach); a definition of opportunism in this context (deliberate and profitable breach where the promisee’s entitlement is inadequately protected by a damage remedy); and a practical test for the

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48. *Id.*

49. *Id.* cmt. d, at 11.

50. *Id.* § 39.

one element of that definition (inadequacy of damages) that has traditionally been the most problematic.<sup>51</sup>

In the careful drafting of section 39, the *Restatement* attempts to ensure narrow application of this restitutionary disgorgement remedy. In fact, it intends to authorize disgorgement only for “exceptional cases” in which “a party’s profitable breach of contract may be a source of unjust enrichment at the expense of the other contracting party.”<sup>52</sup> Professor Kull asserts that the proposed disgorgement remedy is “infrequently available, because a breach of contract that satisfies the cumulative tests of § 39 is distinctly rare.”<sup>53</sup> He maintains that the “innovation” of the section stems not from the ability to disgorge a defendant’s wrongfully obtained profits from breach “but in stating a rule to generalize these commonly accepted outcomes.”<sup>54</sup>

The spirit of section 39, if not the letter, occasions interesting ripples in the sea of contract law. Notably, this restitutionary disgorgement remedy enters against the backdrop of contract law’s Holmesian underpinning—the choice principle.<sup>55</sup> As Professor Kull acknowledges, “[t]here is substantial truth, though not of course the whole story, in the Holmesian paradox according to which the obligation imposed by contract lies in a choice between performance and payment of damages.”<sup>56</sup>

Such a formulation is most apt “in those transactional contexts where damages can be calculated with relative confidence as a full equivalent of performance.”<sup>57</sup> Accordingly, Professor Kull offers disgorgement as a remedy parallel to other traditional equitable remedies that “supplement the protection afforded by a liability in damages, precisely at those points where the difficulty of proving damages poses a systematic risk of inadequate protection” of the plaintiff’s interests.<sup>58</sup> Disgorgement is analogous to the equitable remedies of specific performance and injunctive relief, which are

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51. *Id.* cmt. d, at 11.

52. *Id.* cmt. a, at 4.

53. *Id.* at 6.

54. *Id.*

55. Holmes, *supra* note 13.

56. RESTATEMENT, *supra* note 4, at 5–6.

57. *Id.* at 6.

58. *Id.*

available to protect particular contract “entitlements.”<sup>59</sup> According to Professor Kull, “[t]he law of restitution affords a comparable protection after the fact, awarding gains from a profitable breach of a contract that the defendant can no longer be required to perform.”<sup>60</sup>

In addition to paralleling equitable remedies, another feature that aims to cabin this restitutionary disgorgement is that the breach must be opportunistic. The provocative nature of the term, coupled with the power and bounty of disgorgement, may provide significant temptation to overutilize section 39. But the *Restatement* seeks to subside fears of abuse with language of limitation regarding section 39’s application. In addition to the inadequacy of damages requirement, section 39 defines “opportunistic” to identify only breaches that are “deliberate” and “profitable.”<sup>61</sup> Section 39 defines “profitable” as “when [the breach] results in gains to the defaulting promisor (net of potential liability in damages) greater than the promisor would have realized from performance of the contract.”<sup>62</sup> But, will we know it when we see this type of case?

According to Professor Kull, “[c]ases in which restitution reaches the profits from a *breach of contract* are those in which the promisee’s contractual position is vulnerable to abuse.”<sup>63</sup> One is “vulnerable” if she faces challenges “in recovering, as damages, a full equivalent of the performance for which the promisee has bargained.”<sup>64</sup> As an example of such a situation, Professor Kull offers: “A promisor who was permitted to *exploit* the shortcomings of the promisee’s damage remedy could accept the price of the promised performance, then deliver something less than what was promised.”<sup>65</sup> In Professor Kull’s estimation, this example “results in unjust enrichment as between the parties.”<sup>66</sup>

Disgorgement will combat opportunistic breach, for example, when specific performance is routinely available, such as “a

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59. *Id.*

60. *Id.*

61. *Id.* § 39(2).

62. *Id.* § 39(3).

63. *Id.* cmt. b, at 7.

64. *Id.*

65. *Id.* (emphasis added).

66. *Id.*



promised conveyance of real property (or any other unique good).<sup>67</sup> The following illustrations represent the sorts of opportunism the law of restitution condemns.<sup>68</sup> The first involves a promise to sell property; the second a violation of a covenant not to compete.

1. Vendor and Purchaser agree on a sale of Blackacre for \$100,000. Two weeks before the scheduled closing date, Vendor conveys Blackacre to a second purchaser for \$110,000. Purchaser is entitled to recover \$10,000 from Vendor by the rule of this Section. Purchaser need not prove the value of Blackacre on the scheduled closing date; nor could Vendor reduce or avoid his liability under this Section by proving that the market value of Blackacre on that date was something less than \$110,000.<sup>69</sup>
2. Buyer pays Seller \$500,000 cash in exchange for (i) Seller's existing business as a going concern and

67. *Id.* cmt. e, at 12.

68. All of the illustrations are exact copies from the *Restatement's* proposed illustrations for section 39. The *Restatement* also provides examples where disgorgement will not lie, such as the case of nonconforming tender:

Seller agrees to manufacture and deliver to Buyer 1000 widgets at \$1000 each. Seller's normal cost of production is \$250 per widget. Before the date fixed for delivery, problems with Seller's manufacturing equipment increase Seller's cost of production to \$350 per widget. Seeking to minimize its own cost of performance, Seller acquires similar widgets from Supplier at \$300 each and tenders them to Buyer. Although Seller's conduct is evidently self-interested, it is consistent, under the circumstances, with reasonable commercial standards of fair dealing in the trade (U.C.C. § 2-103(b)). Buyer accepts the goods but notifies Seller that they are nonconforming and sues for breach of warranty. Buyer proves at trial that the goods did not conform to the contract and that each of Supplier's widgets was worth \$10 less than a comparable widget manufactured by Seller. Seller's breach of contract is deliberate and profitable (saving \$50,000 by comparison with the cost to Seller of making a conforming tender), but it is not opportunistic: on the facts assumed, there is no reason to conclude that Buyer's entitlement will be inadequately protected by an ordinary damage remedy. Buyer is entitled to damages of \$10,000 (U.C.C. § 2-714(2)), but Buyer is not entitled to Seller's saved expenditure of \$50,000.

*Id.* illus. 13, at 23–24; *see also* Roberts, *Restitutionary Disgorgement*, *supra* note 12, at 36–37 (noting that illustration 13 raises provocative questions about efficient versus opportunistic breach).

69. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT illus. 1, at 13 (Tentative Draft No. 4, 2005). Illustration 2 involves a contract that expressly provided that timber and gravel would convey with the property, but prior to conveyance the vendor removes timber and gravel for a net gain of \$10,000. *Id.* illus. 2, at 14. The purchaser does not possess a property right yet, and the removal of the timber and gravel do not diminish the value of the property. The *Restatement* maintains that purchaser should recover the \$10,000 under the rule of section 39. *See* Laurin v. DeCarolus Constr. Co., 363 N.E.2d 675 (Mass. 1977); *see also* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39, at 31 (Tentative Draft No. 4, 2005) (discussing *Laurin* in conjunction with illustration 2).

(ii) Seller's promise not to compete with Buyer for a period of three years. The restraints thus imposed on Seller are reasonable, and the promise not to compete is enforceable under local law. Acting in deliberate disregard of his contractual obligations, Seller operates a new business in competition with Buyer for the final year of the three-year term, realizing profits of \$50,000. Buyer is entitled to recover \$50,000 from Seller by the rule of this Section. It is not a condition of restitution that Buyer prove damages as a result of Seller's breach.<sup>70</sup>

"By *condemning* [such forms] of opportunism, the rule of § 39 reinforces the contractual position of the vulnerable party and *condemns* a form of conscious advantage-taking that is the equivalent, in the contractual context, of an intentional and profitable tort."<sup>71</sup> Professor Kull clarifies, "Restitution (through the disgorgement remedy) seeks to defeat" an "opportunistic calculation" where "the wrongdoer takes without asking."<sup>72</sup> The availability of disgorgement will force the defendant's hand. At minimum, disgorgement seeks to "reduc[e] the likelihood that the conscious disregard of another's entitlement can be more advantageous than its negotiated acquisition."<sup>73</sup> Thus, a party considering breach will have an *incentive* to negotiate "modification or release of his own contractual obligation."<sup>74</sup>

Section 39 also delimits access to the remedy by providing two significant caveats. The *Restatement* declares that disgorgement will be unavailable: (1) if the contract provides a choice between performance and an alternative remedy such as liquidated damages or (2) "to the extent that disgorgement would result in an inappropriate windfall to the promisee, or would otherwise be inequitable in a particular case."<sup>75</sup> The first exception is uncontroversial as it simply provides that the parties are free to contract around the disgorgement remedy just as they may with expectation damages. The greater potential for controversy stems

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70. *Id.* illus. 6, at 17.

71. *Id.* cmt. b, at 7 (emphasis added).

72. *Id.* at 8.

73. *Id.*

74. *Id.*

75. *Id.* § 39(4), at 4.

from the second inappropriate-windfall caveat. Section 39 will prolong litigation because it provides defendants with a formidable weapon of argumentation to ward off disgorgement, and it requires interpretation. To the extent that the inappropriate-windfall caveat simply signifies that the judge retains discretion to deny relief, it may not need to be stated in these words. The judge already possesses such discretion because the design of disgorgement is equitable and thus parallel to specific performance and injunctive relief. Further, if an inappropriate windfall exists, the judge could deny or limit disgorgement on the more central ground that a defendant's retention of the profit would not constitute an unjust enrichment warranting this restitutionary relief.

Professor Kull maintains that the overall purpose of this disgorgement remedy "is not merely to frustrate conscious wrongdoers but to reinforce the stability of the contract itself, enhancing the ability of the parties to negotiate for a contractual performance that may not be easily valued in money."<sup>76</sup> Given that the underlying rationale of disgorgement contrasts in many respects with the foundational principles of contract doctrine, the goal of disgorgement reinforcing the contract may pose a tall order. The possibility of strengthening the vulnerable party's post-contract bargaining power may well be worth upsetting contract law's doctrinal appletart.

In sum, section 39 is innovative and potentially powerful, albeit limited by significant requirements. Plaintiffs' lawyers will certainly be eager to test those boundaries. They will capitalize on the foundation of unjust enrichment and language of disapprobation, opportunistic and conscious wrongdoing. As the trial period of this black-letter formulation unfolds, the interface with traditional contract doctrines, such as mitigation, should be fascinating.

#### IV. CONTRACT MITIGATION WITHIN THE CONTEXT OF THE GOALS OF CONTRACT DAMAGES

##### *A. Goals of Contract Damages*

The primary goal of damages in contract law is compensation. Unlike tort law, contract law does not also service the desire to

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76. *Id.* at 8.

punish—at least not officially. In fact, orthodox American contract law does not permit punitive damages for breach of contract.<sup>77</sup> In order to recover punitive damages in connection with a breach of contract, the damages must emanate from an independent tort.<sup>78</sup> Because the focus of contract law is not on penalizing a contract breacher, contract damages look to the plaintiff rather than the defendant. If following the *preferred* monetary remedy of expectation damages,<sup>79</sup> the key is the plaintiff—plaintiff's thwarted, expected "benefit of the bargain."<sup>80</sup> The alternative reliance measure also keys to the plaintiff's loss in the form of out-of-pocket expenses spent in reliance on the contract.<sup>81</sup> Thus, the primary contract

77. "The firmly established [American] common law rule holds that punitive damages are not to be awarded for simple breach of contract." DAN B. DOBBS, *DOBBS LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION*, § 12.5(2), at 117 (2d ed. 1993) (citing cases extensively and the RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981)). In Canada, however, the winds of change are present. A recent case permitted the recovery of punitive damages for breach of contract. See *Whiten v. Pilot Ins. Co.*, [2002] 1 S.C.R. 595, 2002 SCC 18 (Can.); see also Robert J. Sharpe, *Remedies for Bad Behaviour in Canadian Contract Law*, in SECOND INTERNATIONAL REMEDIES SYMPOSIUM, AUCKLAND, NEW ZEALAND (forthcoming 2008) (noting Canadian "courts' increasing tendency to make contract damage awards to sanction bad behaviour rather than compensate for the loss of the plaintiff's economic expectation interest").

78. See DOBBS, *supra* note 77, § 12.5(2), at 118 (citing various cases in which the court denied damages where an independent tort did not exist).

79. See *Robinson v. Harman*, (1848) 154 Eng. Rep. 363, 365 (Exch.) (advancing the expectancy rule that "where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed"); see also L.L. Fuller & William R. Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 56 (1936) (setting forth three categories of contract damages listed in order of: (i) the restitution interest, (ii) the reliance interest, and (iii) the expectation interest; and arguing that the restitution interest "presents the strongest case for [judicial] relief" in order to maintain an Aristotelian equilibrium); see generally Maree Chetwin, *Fuller and Perdue's Limitations: Opportunities, Performance and the Contractual Remedies Act 1979*, in SECOND INTERNATIONAL SYMPOSIUM ON THE LAW OF REMEDIES—ADVANCING THE COMMON LAW OF REMEDIES: PRAXIS AND PEDAGOGY THROUGHOUT THE COMMONWEALTH (forthcoming 2008) (providing a modern exploration of Fuller and Perdue's classifications from the perspective of New Zealand law).

80. See, e.g., *Franklin Fed. Sav. Bank v. United States*, 55 Fed. Cl. 108, 114 (2003) ("One approach [to breach-of-contract damages] is to give the nonbreaching party the benefits he or she expected to receive had the breach not occurred, also known as the 'benefit of the bargain'"); *J.R. Loftus, Inc. v. White*, 649 N.E.2d 1196, 1198 (N.Y. 1995) (defining expectancy damages, the traditional measure, as the "anticipated profit or full contract price less the cost of performance"); *Ballow v. PHICO Ins. Co.*, 878 P.2d 672, 678 n.5 (Colo. 1994) (recognizing the "benefit of the bargain rule" designed to give the plaintiff her expectation interest).

81. See 24 SAMUEL WILLISTON & RICHARD A. LORD, *A TREATISE ON THE LAW OF CONTRACTS*, § 64:2 at 30–32 (4th ed., West Group 1990) ("Reliance damages are designed to compensate the plaintiff for any reasonably foreseeable costs incurred or expenditures made in reliance on the promise that has now been broken. An award of reliance damages returns the plaintiff to its precontractual position by putting a dollar value on the detriment the plaintiff

monetary remedies—expectation damages and reliance damages—aim to compensate the plaintiff for the harm caused by the defendant's breach.<sup>82</sup>

In contrast to this traditional contract landscape, disgorgement focuses on the defendant. Disgorgement is a gain-based damage; it keys to the gain, or benefit, the defendant wrongfully possesses. Furthermore, it may infuse punishment, which I maintain in a related article.<sup>83</sup> Even if it is permissible to award disgorgement for a breach of contract without punishing the defendant, the remedy shifts the focus away from the plaintiff's loss to the defendant's enrichment.

But contract damage doctrines are not unfamiliar with looking to a defendant's interests. The main mission of traditional contract law damages is compensating a plaintiff's loss; yet, contract law does not ignore the defendant's concerns, including fairness to the defendant even though the defendant is the breaching party. Contract law offers a gentler landing to the breaching defendant by asking the plaintiff to curtail the flow of her damages, if possible, and, in some cases, to act affirmatively to aid the defendant in lessening damages. Accordingly, the contractual doctrine of mitigation, like disgorgement, keys to the defendant.

Are these two apparent defendant-centric notions parallel and compatible? At least one critical, foundational distinction exists: restitutionary disgorgement is itself a remedy, while the doctrine of mitigation is a *limitation* on contract damages. The full interplay between the contractual doctrine of mitigation and restitutionary disgorgement will depend in part upon the contours and roots of the mitigation doctrine.

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incurred in reliance on the now-broken promise and reimbursing expenditures the plaintiff made in performing or preparing to perform its part of the contract.”).

82. *See id.* Rescinding the contract and restoring monies paid by the plaintiff may key to the plaintiff. These actions ask: What traveled to the defendant from the plaintiff? Or, do these actions key to the defendant? What did the defendant gain wrongfully? *See also* Fuller & Perdue, *supra* note 79, at 55 (maintaining that this restitution interest sought to recover values provided to the defendant, i.e. the defendant's gain).

83. *See* Roberts, *Restitutionary Disgorgement*, *supra* note 12, at 33, 43.

B. *Mitigation, Avoiding Consequences,  
Minimizing Damages*

i. *Mitigation in Context: Roots of Contract  
Limitation Doctrines*

The notion of a plaintiff mitigating the defendant's damage is one example of limitations on plaintiff's recovery. A seminal limitation on a plaintiff's recovery stems from *Hadley v. Baxendale*.<sup>84</sup> *Hadley's* "contemplation of [the] parties" doctrine<sup>85</sup> provides a significant limitation on a plaintiff's consequential damages.<sup>86</sup> Under the *Hadley* limitation, a defendant will be liable for consequential damages (e.g., plaintiff's loss of profits) *only if* both parties contemplated such special damages at the time of contracting.<sup>87</sup> Given restitutionary disgorgement's focus on a defendant's profits gained rather than a plaintiff's lost profits,<sup>88</sup> the *Hadley* doctrine raises complex questions for discussion in a future article. Yet, *Hadley's* stronghold—as more than a century-old, widely applied limitation on contractual damages—offers a useful template for understanding the roots of contractual doctrines of limitation more generally.

The foundational principles justifying limitation doctrines, such as *Hadley's* contemplation of the parties rule, shed light on the examination of the compatibility of restitutionary disgorgement and mitigation. According to Professor Dan Dobbs's remedies treatise, three broad rationales may support the *Hadley* limitation: (i) moral, (ii) economic, and (iii) pragmatic.<sup>89</sup> Elucidating these three categories will inform the instant exploration of mitigation.

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84. (1854) 156 Eng. Rep. 145 (Exch.).

85. This doctrine is sometimes shorthand as the "foreseeability test," where the defendant is not liable for "unforeseeable" harms resulting from a breach of contract. DOBBS, *supra* note 77, § 12.4(6), at 93. Interestingly, the *Hadley* court never uttered this precise formulation. *Id.*

86. Plaintiff's general damages, i.e., those damages that are the "natural and ordinary consequences" of breach and "based on the value of the very performance promised," "are always recoverable." *Id.* § 12.4(5), at 85.

87. *See id.* § 12.4(6), at 93.

88. Arguably, a plaintiff may maintain that the defendant's wrongfully obtained profits represent the plaintiff's hypothetical losses. This analogy requires some creative leveraging. The losses are not actual losses where a plaintiff can show lost profits, such as the mill owner in *Hadley*. Instead, the plaintiff may claim that the defendant's contractual breach caused a lost opportunity that simultaneously enabled the defendant to gain profits.

89. DOBBS, *supra* note 77, § 12.4(5).

The term “moral” in Dobbs’s discussion appears to denote a contrast with a natural law conception and perhaps even a positivist one. In Dobbs’s interpretation, “[d]amages are not, in other words, measured by a rule of law imposed *from above*, but by the parties’ own agreement.”<sup>90</sup> If “from above” implies other worldly, a god, or universal principles, then the term moral contrasts with a natural law framework. A natural law conception might support a mitigation limitation on damages that derives from, for example, the “Golden Rule.”<sup>91</sup> Essentially, a plaintiff *should* keep damages down because he *should* do unto others—here defendants—as the plaintiff would want done to himself.<sup>92</sup> Dobbs’s moral basis does not include an *ought* that comes “from above.” Accordingly, such a conception of moral basis appears not to trigger an inquiry into rightdoing versus wrongdoing, at least not in the sense of *judgment*. Whatever obligation arises, it is the product of the voluntary agreement of the parties.

If “from above” means not from human-made, top-down laws, but instead from bottom-up, voluntary creations of obligations between parties, then Dobbs’s moral basis may also contrast with a positivist conception. Certainly, common law doctrines, as well as statutes, will support any ultimate legal enforcement of damages as envisioned by “the parties’ own agreement.”<sup>93</sup> Yet, the from above quotation emphasizes that contract law, unlike tort law, derives its force and scope from voluntary acts of individual parties. The public policy driving American tort law imposes responsibilities and

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90. *Id.* at 85 (emphasis added). The “will theory” is also relevant. In examining justifications for the “rule protecting the expectancy,” Fuller and Perdue offer the much discussed “will theory” of contract law. “This theory views the contracting parties as exercising, so to speak, a legislative power, so that the legal enforcement of a contract becomes merely an implementing by the state of a kind of private law already established by the parties. If A has made, in proper form, a promise to pay B one thousand dollars, we compel A to pay this sum simply because the rule or *lex* set up by the parties calls for this payment. *Uti lingua nuncupassit, ita jus esto.*” Fuller & Perdue, *supra* note 79, at 58 (citing BERNHARD WINDSCHEID, LEHRBUCH DES PANDEKTENRECHTS, § 68, n.la (9th ed. 1906) (“A legal transaction is the exercise of the creative power which the private will possesses in legal matters. The individual commands, and the law adopts his command as its own.”)).

91. See generally JEFFREY WATTLES, THE GOLDEN RULE (Oxford University Press 1996) (revealing the history behind the “Golden Rule” generally and citing to Confucian, Greek, Jewish, and Christian texts specifically); Neil Duxbury, *Golden Rule Reasoning, Moral Judgment and Law*, 84 NOTRE DAME L. REV. (forthcoming 2008) (defending the Golden Rule as a fairness principle that requires doing good towards others).

92. See *Matthew* 7:12.

93. DOBBS, *supra* note 77, § 12.4(5), at 85.

consequences on actors, whereas contract law's duties and consequences stem from the voluntary agreements of the parties. Therefore, Dobbs's treatment of the *Hadley* limitation provides: "The moral basis for limiting contract liability lies in the idea that the boundaries of contract liability are determined by the contract itself; the scope of the risks assumed by the defendant delineate[s] the scope of his liability."<sup>94</sup> If the consequential damages are within the contemplation of both parties at the time of contracting, then such damages are recoverable under *Hadley*.<sup>95</sup> But, if a defendant did not "explicitly or impliedly" undertake a promise to protect against such special harms, the *Hadley* principle denies recovery of such harms.<sup>96</sup> Thus, the "contemplation of the parties" limitation, in this moral conception, derives from the parties' understanding of the risks undertaken as part of, and only as contemplated at the time of, their agreement. In contrast, the mitigation doctrine may come from above rather than comfortably within the confines of the agreement the parties made. Further discussion of this contrast follows in Part IV.B.ii.

Under an economic rationale, at least three theories exist: (1) "increased costs;" (2) "cross-subsidies;" and (3) "efficient use of resources." Dobbs initially frames each of these justifications in the negative in order to avoid an anticipated economic harm. He explains the economic basis for a limitation as stemming from a concern that "unrestricted liability for all provable consequential damages would tend to (a) raise the price of the goods or services the defendant provides, (b) 'cross subsidize' some users of the good or services at the expense of other users, and (c) sometimes produce an 'inefficient' use of resources."<sup>97</sup> Such economic considerations possess import for the mitigation doctrine, as explored in the next subsection of this Article.

As a final rationale, Dobbs simply provides a justification that is admittedly "skimpier and pragmatic rather than principled."<sup>98</sup> He

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94. *Id.*

95. *See id.*

96. *Id.*

97. *Id.* at 88 (citing RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* § 4.9 (3d ed. 1986) ("setting appropriate incentives to deal with the potential loss")); Gwyn D. Quillen, *Contract Damages and Cross-Subsidization*, 61 S. CAL. L. REV. 1125 (1988).

98. DOBBS, *supra* note 77, § 12.4(6), at 91.



offers the “pragmatic limitation” as the notion “that liability must stop somewhere and that courts must have a language for stating the stopping place.”<sup>99</sup> Dobbs correctly observes that the pragmatic rationale supports “any kind of limitation,” not merely a *Hadley* limitation.<sup>100</sup> A pragmatic limitation, as so defined, thus serves as a possible basis for a mitigation principle. Is it the driving principle behind the mitigation doctrine? If so, an examination of the various conceptions of the mitigation doctrine, obligations it may impose, and its roots is necessary.

## ii. Conceptions of Mitigation and Avoidance

Treatments of mitigation run the gamut. The terminology varies. Further, misconceptions exist about whether a contract plaintiff possesses the oft-cited duty to mitigate. Dobbs’s remedies treatise frames the issue under the broad rubric of “avoidable consequences” and “minimizing damages.”<sup>101</sup> He primarily utilizes the doctrine of avoidable consequences because it applies to damages generally as well as to contract damages in particular. As discussed in the Introduction,<sup>102</sup> contract treatments often adopt the phrase “duty to mitigate”<sup>103</sup> rather than the phrase “avoidable consequences,” which is more commonly seen in tort law.<sup>104</sup> In any event, the meaning desired here is that “the plaintiff must make reasonable efforts to minimize consequential damages resulting from the breach.”<sup>105</sup> Although courts often shorthand the discussion to emphasize a plaintiff’s duty to mitigate damages, it is more precise to understand the meaning to be “only that the plaintiff’s recovery is

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99. *Id.*

100. *Id.*

101. *Id.* § 12.6(1)–(2), at 127.

102. *See supra* Part I.

103. *See, e.g.,* Robert A. Hillman, *Keeping the Deal Together After Material Breach—Common Law Mitigation Rules, the UCC, and the Restatement (Second) of Contracts*, 47 U. COLO. L. REV. 553 (1976).

104. *See Coker v. Abell-Howe Co.*, 491 N.W.2d 143, 150 (Iowa 1992) (holding that a party cannot recover damages flowing from consequences that the party could reasonably have avoided); *see also* *Walter v. Wal-Mart Stores, Inc.*, 748 A.2d 961, 969–70 (Me. 2000) (distinguishing the doctrine of avoidable consequences from the doctrine of contributory negligence).

105. DOBBS, *supra* note 77, § 12.6(2), at 128 (noting also that the defendant carries the burden “to show what damages could have been avoided by different and reasonable conduct of the plaintiff”).

reduced to the extent that he unreasonably fails to minimize his damages.”<sup>106</sup> Moreover, a “plaintiff’s damages are not reduced for failure to make an effort; they are reduced for failure to avoid damages that a reasonable effort would have avoided.”<sup>107</sup>

Importantly, this view of mitigation includes both affirmative and negative components. For example, if a plaintiff receives notice of a defendant’s anticipatory repudiation of the promised contractual performance, the plaintiff must *not act* any further to create more damage. *Rockingham County v. Luten Bridge Co.*<sup>108</sup> represents the classic example of this facet of mitigation.<sup>109</sup> When the plaintiff learned that the defendant, Rockingham County, did not plan to perform as promised (payment),<sup>110</sup> the plaintiff *should have* stopped any further contractual performance in order to curtail additional damages “piling up” (building the bridge).<sup>111</sup> Accordingly, the

106. *Id.* at 131.

107. *Id.*

108. 35 F.2d 301 (4th Cir. 1929).

109. *See id.*; *see also* Barak Richman, Jordi Weinstock & Jason Mehta, *A Bridge, a Tax Revolt, and the Struggle to Industrialize: The Story and Legacy of Rockingham County v. Luten Bridge Co.*, 84 N.C. L. REV. 1841, 1841–42 (2006) (“*Rockingham County v. Luten Bridge Co.* is now a staple in most contracts casebooks,” but the “opinion was an effort to arm county governments with the powers necessary to facilitate industrialization and secure good governance. The duty to mitigate damages was merely an afterthought.”) (emphasis omitted).

110. Professor Richman and commentators Weinstock and Mehta note:

The popular story goes as follows: Rockingham County entered into a contract with the Luten Bridge Company to build a bridge over the Dan River. Shortly after work commenced, the county repudiated the contract. Nonetheless, the Luten Bridge Company continued with its construction project and sued the county for the entire bill.

Richman et al., *supra* note 109, at 1841. The authors “revisited” the opinion and offer that, under two arguments, “[T]he board of county commissioners as constituted by Hampton, Barber, and Martin could, in [Judge] Parker’s view, speak for the county. As such, their declarations that the county no longer wanted the bridge and their instructions to the Luten Bridge Company to halt construction constituted official county actions.” *Id.* at 1885. The *Luten Bridge* holding relies upon the finding that an effective anticipatory repudiation occurred via those official county actions.

111. *Luten Bridge*, 35 F.2d at 307 (“If A enters into a binding contract to build a house for B, B, of course, has no right to rescind the contract without A’s consent. But if, before the house is built, he decides that he does not want it, and notifies A to that effect, A has no right to proceed with the building and thus pile up damages.”). Applying this principle, the Fourth Circuit reasoned that

[T]he county decided not to build the road of which the bridge was to be a part, and did not build it. The bridge, built in the midst of the forest, is of no value to the county because of this change of circumstances. When, therefore, the county gave notice to the plaintiff that it would not proceed with the project, plaintiff should have desisted from further work. It had no right thus to pile up damages by proceeding with the erection of a useless bridge.

defendant will not be held liable for the consequential damages that the plaintiff could have reasonably avoided.<sup>112</sup>

In contrast, the affirmative version of mitigation extends by requiring the plaintiff to take steps to lessen the defendant's damage.<sup>113</sup> The nonbreaching party should "take reasonable affirmative steps to make appropriate substitute arrangements to avoid loss."<sup>114</sup> The breaching party, however, carries "[t]he burden of showing that the injured party could have, but has not, taken appropriate steps" to avoid damages.<sup>115</sup> If the breaching party meets this burden, the court will reduce the injured party's damages by "the amount of loss that could have been avoided."<sup>116</sup>

With the sale of goods, the affirmative version has some traction. For example, if certain carrier problems occur, the Uniform Commercial Code ("U.C.C.") provides that "substitute performance must be tendered and accepted" if "a commercially reasonable substitute is available."<sup>117</sup> The U.C.C. also states that the aggrieved party may await performance for a commercially reasonable time after learning of repudiation or may resort to any remedy for breach, including one in which the plaintiff buyer may "cover" by securing a market substitute.<sup>118</sup> For example, if a seller provides notice that it

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*Id.*

112. See SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 64:27 (4th ed. 2002) ("Damages which the plaintiff might have avoided with reasonable effort without undue risk, expense, burden, or humiliation will be considered either as not having been caused by the defendant's wrong or as not being chargeable against the defendant.").

113. FARNSWORTH, *supra* note 40, at 809.

114. *Id.*

115. *Id.* at 807.

116. *Id.* at 809.

117. U.C.C. § 2-614(1) (1998).

118. *Id.* §§ 2-711(1) (Buyer's Remedies), 2-712 (Buyer's "Cover"). Yet, the U.C.C. states that "[f]ailure of the buyer to effect cover within this section does not bar him from any other remedy." *Id.* § 2-712(3). Under the alternative U.C.C. formula, however, damages are measured by "the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages . . . , but less expenses saved in consequence of the seller's breach." *Id.* § 2-713(1). More notably, the buyer may recover consequential damages only if: (i) the seller "at the time of contracting had reason to know" of the "general or particular requirements and needs" from which the loss flows, and (ii) the loss "could not reasonably be prevented by cover or otherwise." *Id.* § 2-715(2) (emphasis added). If the buyer is the breaching party, comparable minimizing principles apply. See *id.* § 2-706(1) (Seller's Remedies). Such minimizing doctrines are inapplicable if the seller is a "lost volume seller" in that the seller has an unlimited supply and thus should not have her damages reduced because she could have sold both the defendant's contracted goods and the substitute

will fail to deliver the promised bushels of peaches, the plaintiff buyer must cover by purchasing substitute peaches on the market or forego any claim to consequential damages.<sup>119</sup> If the plaintiff could have purchased but failed to purchase comparable peaches available on the market at a cheaper price than the contract, the defendant will be able to maintain that if the plaintiff had taken the proper steps to mitigate, the plaintiff would have benefitted from the breach and should recover no consequential damages.<sup>120</sup> Only if the peaches promised were unique (i.e., no market substitute and thus no cover option) may the plaintiff instead seek specific performance.<sup>121</sup> If the

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deal. See *id.* § 2-708(2); *Neri v. Retail Marine Corp.*, 285 N.E.2d 311 (N.Y. 1972). In other words, the efforts to engage in a *substitute* transaction do not amount to avoiding or minimizing damages because it is not the breach that created the opportunity for a substitute transaction; rather, seller could have accomplished both sales, so damages would not be reduced by the other sale. The lost volume concept extends to service contracts where the seller has the capacity to expand and service both the breached contract and the ostensible replacement contract. See, e.g., *Kearsarge Computer, Inc. v. Acme Staple Co.*, 366 A.2d 467, 471 (N.H. 1976) (awarding the plaintiff full contract price on the “theory . . . that the second sale would have occurred even if the defendant did not breach his contract” because the plaintiff’s business was expandable); *M & R Contractors & Builders, Inc. v. Michael*, 138 A.2d 350 (Md. 1958) (applying to a building contractor). Conceptually, the lost volume principle “presumes that [the seller] can accept a virtually unlimited amount of business so that income generated from accounts acquired after the breach does not mitigate the plaintiff’s damages.” *Kearsarge*, 366 A.2d at 471 (citing 5 ARTHUR CORBIN, CONTRACTS § 1041 (1964)). The lost volume seller doctrine is not without limits, whether in the sales or services context. The Seventh Circuit, for example, refined the lost volume doctrine by endorsing one commentator’s position that under “the economic law of diminishing returns or increasing marginal costs[,] . . . as a seller’s volume increases, . . . a point will inevitably be reached where the cost of selling each additional item diminishes the incremental return to the seller and eventually makes it entirely unprofitable to conclude the next sale.” *R.E. Davis Chem. Corp. v. Diasonics, Inc.*, 826 F.2d 678, 684 (7th Cir. 1987) (quoting Morris G. Shanker, *The Case for a Literal Reading of UCC Section 2-708(2) (One Profit for the Reseller)*, 24 CASE W. RES. L. REV. 697, 705 (1973)). On remand, the plaintiff met the burden of establishing that it would have been profitable to produce and sell both units. See *R.E. Davis Chem. Corp.* 924 F.2d at 709.

119. U.C.C. § 2-715(2).

120. *Acme Mills & Elevator Co. v. Johnson*, 133 S.W. 784 (Ky. 1911). Some support may exist for a plaintiff to seek recovery for hypothetical, reasonable incidental costs for what it would have cost to accomplish the hypothetical cover deal. DOBBS, *supra* note 77, § 12.6(2), at 140–41. Dobbs posits that the “rule pattern” should be completed. *Id.* at 140. He explains that there are “two parallel ‘actuality’ rules”—“actual reduction of damages by successfully minimizing actions and with actual expenses incurred to minimize damages.” *Id.* Accordingly, he suggests that there should also be “two parallel ‘hypothetical’ rules”: the recognized “damages reduction” for what “would have occurred if the plaintiff had behaved reasonably” and then the missing corollary—plaintiff’s offset to this damages reduction by a hypothetical reasonable expenditure of funds it would have taken to have behaved reasonably. *Id.*

121. See U.C.C. § 2-716(1). *Compare Paloukos v. Intermountain Chevrolet Co.*, 588 P.2d 939 (Idaho 1978) (denying specific performance of a 1974 Chevrolet pickup truck), with *Sedmak v. Charlie’s Chevrolet, Inc.*, 622 S.W.2d 694 (Mo. Ct. App. 1981) (permitting specific performance for a limited edition “Indy Pace car”). For a pre-Code case granting specific performance for a good, see *Curice Bros. Co. v. Catts*, 66 A. 935 (N.J. Ch. 1907) (noting that

plaintiff purchased the comparable peaches within a commercially reasonable time in a rising market such that the cover price exceeded contract price, then the defendant's damages will be the cover price minus the contract price.<sup>122</sup> Thus, each of these scenarios reflects the incentives for self-help that the U.C.C. adopts in order to facilitate minimizing damages and to keep the wheels of commerce flowing.<sup>123</sup>

The affirmative version also applies beyond the sale-of-goods context. For example, the employment context incorporates minimizing rules. Accordingly, "when the defendant repudiates a contract obligation before time for its performance, the plaintiff will sometimes be expected to make efforts to minimize damages by securing substitute performance."<sup>124</sup> Employment cases, in contrast with sale-of-goods cases, often demonstrate the greater tension regarding whether the substitute is sufficiently comparable. Thus, "the employee is not expected to minimize damages by accepting an entirely different position with the employer or an abandonment of rights under the original contract."<sup>125</sup> The uniqueness of the position under the contract makes it less likely that the defendant can offer a viable substitute<sup>126</sup> or that one exists with another employer. Still, the nonbreaching party must make reasonable efforts to find substitute employment. If the breaching party can show the plaintiff failed to do so, the court will reduce the plaintiff's damages to the extent that the plaintiff could have avoided the harm.

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market uncertainty for tomato crops established the inadequacy of legal remedies and thus warranted the equitable remedy of specific performance, injunctive relief, and a receiver to harvest the entire tomato crop from the specified land as promised).

122. See U.C.C. § 2-712. If a plaintiff makes the purchase, but it occurs after a commercially reasonable time, the result is less than clear; however, some support exists for penalizing the plaintiff for the unreasonable delay. DOBBS, *supra* note 77, § 12.6(2), at 134 n.39 (emphasizing that Professors Summers and White maintained that "waiting too long will deprive the plaintiff of the cover remedy and also bar or diminish any consequential damages recovery that could have been avoided by taking reasonable action").

123. See U.C.C. § 2-715 cmt. 2 (noting that subsection 2 regarding consequential damages "modifies the rule by requiring first that the buyer attempt to minimize his damages in good faith, either by cover or otherwise").

124. DOBBS, *supra* note 77, § 12.6(2), at 134 (citing RESTATEMENT (SECOND) OF CONTRACTS § 350 cmt. f (1981)).

125. *Id.* at 135.

126. See *Parker v. Twentieth Century-Fox Film Corp.*, 474 P.2d 689 (Cal. 1970) (ruling, as a matter of law, that the offered substitute film, *Big Country*, *Big Man*, was not substantially similar to an agreed upon film, but instead was found to be "inferior" employment for the plaintiff Shirley MacLaine, who expected to perform in the film *Bloomer Girl* pursuant to the contract).

Contracts case law broadly supports the notion that a plaintiff should minimize damages by stopping the accumulation of losses and, when appropriate, by taking reasonable affirmative steps to find a substitute transaction. This minimization principle is known in many circles as the duty to mitigate damages for breach of contract. The use of the term stirs controversy because it is not a duty in the traditional sense.<sup>127</sup> Rather, adoption of the term duty misleads the audience because “the injured party incurs no liability to the party in breach by failing to take such steps.”<sup>128</sup> Although the entrenched terminology lacks precision, the limiting principle of mitigation or avoidability remains intact: the nonbreaching party, who fails to take reasonable steps, “is simply precluded from recovering damages for loss that it could have avoided, had it taken such steps.”<sup>129</sup>

### iii. Justifications for the Mitigation Doctrine

Like the *Hadley* principle, the mitigation concept also serves as a doctrine of limitation on contract damages. As noted, Professor Dobbs suggested three rationales for *Hadley*’s “contemplation of the parties” limitation: (i) moral, (ii) economic, and (iii) pragmatic.<sup>130</sup> Depending upon how one defines a moral rationale, all three foundational principles may have relevance to the doctrine of mitigation. Professor Dobbs’s narrow construction of the moral rationale, however, appears not to apply. Under a different moral framework—one that includes the principle that “promises ought to be kept”—compatibility with the mitigation doctrine is debatable. And perhaps, such moral considerations run counter to an avoidability limitation. The economic and pragmatic justifications resonate more clearly. Additional driving forces may also help to explain the mitigation doctrine.

Regarding Professor Dobbs’s moral rationale—“damages as measured by our agreement”—it does not serve as a ground for the doctrine of mitigation. He maintains that the *Hadley* limitation stems

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127. See Stephanie G. Flynn, *Duty to Mitigate Damages upon a Tenant’s Abandonment*, 34 REAL PROP. PROB. & TR. J. 721, 723 (2000) (“The word ‘duty’ is not here used in the ordinary sense of a legal duty, since there is no corresponding ‘right,’ and the breach of the ‘duty’ does not give rise to ‘liability,’ as these words are commonly understood.”) (internal quotation marks omitted).

128. FARNSWORTH, *supra* note 40, at 807.

129. *Id.*

130. See *supra* Part IV.B.i (exploring the foundations of the *Hadley* doctrine).

from the agreement between the parties.<sup>131</sup> Accordingly, damages flow from the voluntary agreement. This notion is most clear if the contract actually contains a liquidated damages clause. If the contract contains a liquidated damages clause, then the parties have explicitly made clear the damages that should flow in the event of breach. Liquidated damages are enforceable, however, only if damages were “difficult to ascertain” and the liquidated damages provision represents a “reasonable estimation” of the damages (at the time of contract or the time of breach)<sup>132</sup> rather than a penalty.<sup>133</sup>

Without liquidated damages, the preferred contract remedy is expectancy damages and, in the alternative, reliance damages. Both of these fit within Dobbs’s construct in that they hinge upon the agreement made. Expectancy damages yield the benefit of the bargain by hypothetically placing the plaintiff where she expected to be had the defendant performed as promised and then requiring the defendant to pay the corresponding monetary amount.<sup>134</sup> In the simplest form of expectancy damages, the breaching party pays the promised contract amount as the ordinary or natural consequence of breach.<sup>135</sup> Upon entering a contract, the parties also anticipate that

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131. See DOBBS, *supra* note 77, § 12.4(4), at 82.

132. See, e.g., ALFRED WILLIAM BAYS, *GENERAL LAW OF CONTRACTS: WITH PRELIMINARY CHAPTERS ON GENERAL SURVEY AND QUESTIONS AND ANSWERS* 189 (2d ed. 1920) (“If the damages will be difficult to ascertain and the amount is reasonable, a provision in a contract stated to be by way of liquidated damages, will be so construed. If the damages are difficult to ascertain and the sum is stated to be payable as damages, and is not unreasonable in amount, it will be so enforced.”).

133. See, e.g., *Vanderbilt Univ. v. DiNardo*, 174 F.3d 751, 755 (6th Cir. 1999) (“In Tennessee, a provision will be considered one for liquidated damages, rather than a penalty, if it is reasonable in relation to the anticipated damages for breach, measured prospectively at the time the contract was entered into, and not grossly disproportionate to the actual damages.”); *Kellam v. Hampton*, 124 S.W. 970, 970 (Tex. App. 1910) (“Where damages are not capable of being ascertained by any satisfactory rule and the language of the contract admits of the construction, the sum reserved is ‘liquidated damages,’ but where the loss may be easily determined by proof of market values, the sum reserved is a ‘penalty’ subject to the intention of the parties as evidenced by the contract.”).

134. See *RESTATEMENT (SECOND) OF CONTRACTS* § 347 (“[T]he injured party has a right to damages based on his expectation interest as measured by (a) the loss in the value to him of the other party’s performance caused by its failure or deficiency, plus (b) any other loss, including incidental or consequential loss, caused by the breach, less (c) any cost or other loss that he has avoided by not having to perform.”).

135. *Id.* The primary aim of expectancy relief is to award money damages to compensate the plaintiff for the position she would have occupied upon the performance of the promise, i.e., for her expectation interest otherwise known as the benefit of the bargain. *Id.* “Damages for breach of contract embrace both losses incurred and gains prevented; contract damages seek to approximate the agreed upon performance.” 22 AM. JUR. 2D *Damages* § 46, at 86 (2003).

performance may require out-of-pocket costs. These costs may amount to a reliance form of damages if the claim for expectancy damages fails.

If a plaintiff instead seeks consequential damages, such as lost profits, as her expectancy measure instead of reliance damages, she may well fail under the *Hadley* limitation. To recover lost profits under *Hadley*, the parties must have contemplated them at the time of contracting.<sup>136</sup> If the lost profits were not reasonably foreseeable at the time of the agreement, they are not recoverable under the *Hadley* principle.<sup>137</sup> This consequence flows at least in part, as Dobbs suggests, from the agreement of the parties; it asks, what did they contemplate at the time of contracting? Broadly, the moral rationale, under Dobbs's framing, holds that damages should be measured by

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Generally, in a breach-of-contract action, a plaintiff may recover the amount of damages necessary to place him in the same position he would have occupied had the breach not occurred. In other words, the general rule of damages in a breach-of-contract action is that the award should place the injured party in the same or as good a position as he would have been in had the contract been performed, less proper deductions. However, the injured party should not be put in a better position than had the contract been performed or be provided with a windfall recovery.

*Id.* at 86–87. Would a disgorgement remedy—measured by the defendant's wrongful gain of profits—pose a windfall to the plaintiff? Section 39 states that disgorgement relief will not flow to the extent that the amount constitutes a windfall to the plaintiff. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT, § 39(4) (Tentative Draft No. 4, 2005). Ostensibly, a plaintiff would prefer disgorgement over expectancy damages if the defendant's profit is more than the benefit of the bargain, but the disgorgement would then represent a windfall. Section 39's inadequacy requirement means there is no viable expectancy damage; thus, in practice, whether the profit gained constitutes a windfall will be a matter of interpretation.

136. *Hadley v. Baxendale*, (1854) 156 Eng. Rep. 145, 147–48 (Exch.) (“Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated.”).

137. *Id.* (“[I]f these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, perhaps, would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants.”)



the agreement.<sup>138</sup> The *Hadley* principle takes Dobbs's moral rationale deeper by placing beyond the pale any consequential damages that were not in the contemplation of the parties at the time of contracting.<sup>139</sup> Accordingly, the contract and the parties' contemplation at the time of contracting support the notion that the breacher should be responsible to pay damages in the amount reasonably foreseen by the parties.

Does the mitigation doctrine also flow from the agreement of the parties rather than from above? Again, the core mitigation or avoidance principle is that a plaintiff must take reasonable steps to avoid the consequences of the defendant's breach. Assuming the contract does not contain a provision calling for such steps,<sup>140</sup> does this limit come from the contract? Without explicit contract language, it is hard to conceive that these affirmative requirements flow from the contract. Under a negative form of avoidance, the plaintiff should cease activity to stop the accumulation of damage. This negative limit does not appear to spring from the contract unless it is implicit in the parties' understanding. But, if the negative form stems from common sense, it arguably also comes from above. Accordingly, Professor Dobbs's narrow conception of the moral rationale does not appear to cover the doctrine of mitigation in any of its forms.

Unbounded by Professor Dobbs's construction, the term morality garners broader meaning. Many will disagree about the precise contours. But, if we assume a broader conception of morality that infuses an *ought from above* or a *conscience from within*,<sup>141</sup> the doctrine of mitigation likely runs counter to such a broader morality. Under one possible moral frame, Professor Robin West maintains that one is morally obligated to perform contractual promises rather than weigh the option to pay damages or perform.<sup>142</sup> Professor West thus rejects the Holmesian-choice model, which permits weighing

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138. DOBBS, *supra* note 77, § 12.4(5), at 85.

139. *Hadley*, *supra* note 136.

140. Of course, the parties are free to agree to an avoidance of damages principle, as long as it does not violate public policy.

141. Dobbs's notion may have intended an *ought* from the contract itself. In other words, the act of agreeing creates an obligation by which one *ought* to abide. Whether one squares that obligation by paying for the consequences rather than actually rendering the performance promised is an issue for another day. See generally DOBBS, *supra* note 77.

142. Robin West, *Three Positivisms*, 78 B.U. L. REV. 791, 811 (1998).

the option to pay damages or perform.<sup>143</sup> Seana Shiffrin, Professor of Philosophy and Law, explores this “divergence” between a promise and a legally enforceable contract: “If contract law ran parallel to morality, then contract law would—as the norms of promises do—require that promisors keep their promises as opposed merely to paying off their promisees.”<sup>144</sup>

Furthermore, Professor Shiffrin contends that “[t]he mitigation doctrine provides another example of divergence.”<sup>145</sup> She acknowledges, however, that “morality does not look sympathetically upon promisees who stay idle while easily avoidable damages accumulate.”<sup>146</sup> An anti-sentiment for idleness does not ground a legal doctrine that imposes potentially affirmative duties on the nonbreaching party instead of the breacher.<sup>147</sup> In fact, Professor Shiffrin asserts that “promissory norms” run in the opposite direction because they “would ordinarily place the burden on the promisor, rather than the promisee, to locate and provide” a reasonable substitute.<sup>148</sup> If the promisor opts to mitigate harms, such behavior may be supererogatory. With significant force, Professor Shiffrin maintains:

It is morally distasteful to expect the promisee to do work that could be done by the promisor when the occasion for the work is the promisor’s own wrongdoing. That expectation is especially distasteful when its rationale is that it makes the promisor’s wrongdoing easier, simpler, more convenient, or less costly.<sup>149</sup>

Professor Shiffrin’s theory is persuasive, as long as one views breach as morally wrong. A traditional Holmesian conception of the legal principles of contract would resist this temptation. Further, advocates of the choice principle might argue that the doctrine of

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143. *Id.*

144. Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 722 (2007).

145. *Id.* at 724.

146. *Id.*

147. *See id.* (noting that morality’s anti-sympathy for idleness in the face of “easily avoidable” harms “is a far cry from what contract expects of the promisee and what it fails to demand of the breaching promisor”).

148. *Id.* at 725.

149. *Id.*

mitigation does not require any moral rationale if other sufficient rationales exist (such as the economic or pragmatic rationales).<sup>150</sup>

But, is there a conception of morality that is compatible with the mitigation doctrine? The answer could be yes, at least if one performs an ends-based analysis. If the mitigation doctrine requires a plaintiff to take reasonable steps to avoid the consequences of breach, what are possible morally infused bases for this conclusion? Perhaps, the Protestant work ethic,<sup>151</sup> or other comparable moral bases for self-help,<sup>152</sup> would support a requirement that an employee seek substitute employment in the event of breach, rather than being “lazy.”<sup>153</sup> Or perhaps moral support for the doctrine of mitigation flows from the notion that it is “the virtuous thing to do—namely, to be gracious and forgiving in the face of another’s wrong.”<sup>154</sup> Professor Shiffrin suggests that certain circumstances might exist where “it can be morally wrong for the promisee to refuse to mitigate, especially when the costs of refusal are very steep and disproportionate to the seriousness of what is promised.”<sup>155</sup> At minimum, one may have an ethical obligation to weigh the present circumstances and act conscientiously with an eye towards all consequences.

The clearest rationale supporting mitigation stems from economic considerations. According to Professor Farnsworth, “[t]he economic justification of such a rule is plain for it encourages the injured party to act so as to minimize the wasteful results of breach.”<sup>156</sup> The mitigation doctrine is a nod to resource constraints,

150. Of course, the economic and pragmatic rationales are not necessarily mutually exclusive with morality.

151. See generally MAX WEBER, TALCOTT PARSONS & MICHAEL D. COE, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM*, (TALCOTT PARSONS TRANS.) (2003).

152. See generally RALPH WALDO EMERSON, *Self-Reliance*, in *THE AMERICAN SCHOLAR SELF-RELIANCE COMPENSATION* (Am. Book Co. 1893).

153. See Mark S. Kende, *Deconstructing Constructive Discharge: The Misapplication of Constructive Discharge Standards in Employment Discrimination Remedies*, 71 NOTRE DAME L. REV. 39, 75 (1995) (“[T]he purpose of the mitigation rule is to encourage employees to continue working . . . [and] eliminate the possibility that an employee can simply depart without reason and remain lazily at home with hopes of profiting.”).

154. Shiffrin, *supra* note 144 at 726.

155. *Id.* at 725 (noting also that the moral wrongfulness of a promisee’s refusal to mitigate “may depend on a number of factors to which the law is insensitive, including the closeness of the relationship, the history of the relationship, the reason for breach, the reason the promisor wants to shift the burden, and how cumbersome mitigation activities would be”).

156. FARNSWORTH, *supra* note 40, § 12.12, at 806.

but it asks something of the nonbreacher rather than the breacher. In fact, the doctrine of mitigation, in Professor Farnsworth's estimation, "allows the obligor to call upon the obligee's efforts to reduce the cost of satisfying the obligor's duty to perform."<sup>157</sup> As Professor Shiffrin emphasized, American contract law does not morally obligate the promisor to perform.<sup>158</sup> Rather, it requires only that the promisor pay damages for breach unless circumstances warrant specific performance. Accordingly, the breacher ordinarily must *satisfy the legal* duty by paying expectancy damages for the ordinary consequences of breach and the other consequences within the contemplation of the parties at the time of contracting.<sup>159</sup> Yet, the breacher may use the mitigation doctrine to reduce those damages. Why would the law *favor* the breacher versus the nonbreacher? On economic grounds, the law of contracts encourages the avoidance of waste. Thus, a party who learns of breach should stop further activity that would continue the accumulation of damages. Perhaps this is simply common sense, but it is also founded in economic rationality. Further, economic theory also supports an affirmative mitigation principle that asks the nonbreacher to take reasonable steps to secure a suitable substitute. The nonbreacher's successful mitigation ideally results in a better allocation of resources and services for broader economic welfare.

Under Professor Dobbs's pragmatic conception, the mitigation doctrine also finds support. Perhaps any identifiable rule would find pragmatic support. The clearer the rule, the more it services Dobbs's pragmatism because it assists courts in establishing a cutoff for liability. For instance, jurisdictions adopting tort law's economic loss rule<sup>160</sup> are more *pragmatic* than jurisdictions utilizing the duty

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157. *Id.* at 807.

158. Shiffrin, *supra* note 144, at 725.

159. Alternatively, the breacher pays reliance damages to compensate the nonbreaching party for his out-of-pocket expenses made in reliance on the contract. *Compare* *Hawkins v. McGee*, 146 A. 641, 643 (N.H. 1929) (utilizing an expectancy measure because the goal of contract law is "to put the plaintiff in as good a position as he would have been in had the defendant kept his contract") (citing 3 SAMUEL WILLISTON, *THE LAW OF CONTRACTS* § 1338), *with* *Sullivan v. O'Connor*, 296 N.E.2d 183, 187 (Mass. 1973) (endorsing a reliance measure as the best alternative in cases such as a "breach of the patient-physician agreements . . . [where] a recovery limited to restitution seems plainly too meager . . ." but "[o]n the other hand, an expectancy recovery may well be excessive").

160. *See, e.g.*, *Local Joint Exec. Bd., Culinary Workers Union, Local No. 226 v. Stern*, 651 P.2d 637, 638 (Nev. 1982) (*per curiam*) ("The well established common law rule is that absent

and proximate cause standards of tort doctrine.<sup>161</sup> More broadly, this observation may be a byproduct from the nature of rules versus standards.<sup>162</sup> Do the concepts of mitigation and avoidance resemble a bright-line rule? At times, they may. When mitigation efforts result in the plaintiff finding a replacement, the court will reduce the damages by the savings.

Yet, like most doctrines, mitigation principles have room for interpretation. For example, vigorous debate may ensue regarding “reasonableness” of the plaintiff’s failure to stop, act, or take proper steps. Such interpretation may make line-drawing more difficult. But, Professor Dobbs’s concern with pragmatism presumes that we need and want a cutoff for liability. From a legal perspective, I agree that we do not want the consequences of breach to extend to infinity,

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privity of contract or an injury to person or property, a plaintiff may not recover in negligence for economic loss.”).

161. *See, e.g., J’Aire Corp. v. Gregory*, 598 P.2d 60, 65 (Cal. 1979) (advocating that a special duty of care criteria will “place a limit on recovery by focusing judicial attention on the foreseeability of the injury and the nexus between the defendant’s conduct and the plaintiff’s injury” and that “[t]hese factors and ordinary principles of tort law such as proximate cause are fully adequate to limit recovery without the drastic consequence of an absolute rule which bars recovery in all such cases”).

162. Professor Kathleen Sullivan concisely summarizes the essence of the rules versus standards debate:

Law translates background social policies or political principles such as truth, fairness, efficiency, autonomy, and democracy into a grid of legal directives that decisionmakers in turn apply to particular cases and facts. In a non-legal society, one might apply these background policies or principles directly to a fact situation. But, in a society with laws, using the intermediary of legal directives is thought to make decisionmakers’ lives easier, improve the quality of their decisions, or constrain their naked exercises of choice.

Kathleen M. Sullivan, *The Supreme Court—1991 Term Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57 (1992). “A rule may be understood as simply the crystalline precipitate of prior fluid balancing that has repeatedly come out the same way . . . . On this view, a rule is a standard that has reached epistemological maturity.” *Id.* at 62 (citing generally for the rules and standards debate: MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 15–63 (1987); FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 104 n.35 (1991); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687–1713 (1976); Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 783–90 (1989); Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 592–93 (1988); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 379–430 (1985)); *see also* JOHN P. DAWSON ET AL., *CONTRACTS: CASES & COMMENT* 86 (8th ed. 2003) (exploring rules versus standards and Judge Posner’s take: (i) rules focus on a few facts as conclusive of legal liability, while standards allow “consideration of all” and (ii) rules are “definite,” “inflexible, even arbitrary, and thus overinclusive” and/or “underinclusive,” while standards are “flexible, but vague and open-ended”) (quoting *MindGames, Inc. v. W. Publ’g Co.*, 218 F.3d 652, 656–57 (7th Cir. 2000)).

whether tort or contract. In fact, the interests of complete justice tilt otherwise.<sup>163</sup> The legal system contains principles that might support a world without “limitations” on liability or damages.<sup>164</sup> Those strains include the maxim, “[f]or every wrong, there is a remedy,” along with notions of corrective justice.<sup>165</sup> Yet, the law retains its limits. Why then would the law diverge from complete justice? Perhaps the following pragmatic explanation suffices:

While it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by the realities of this world. Every injury has ramifying consequences like the ripples of the waters without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree.<sup>166</sup>

Yet, some principle or policy must drive the choice as to when liability should cease. Pragmatism does not provide that driving value for deciding when to cut off liability or remedies.

Can the law be sensitive to values that stem from justice and/or economic considerations while still providing a bright-line rule?<sup>167</sup> In response to this potential objection, Professor Shiffrin notes that clear, yet more sensitive, rules exist “in other equally complex contexts.”<sup>168</sup> More pointedly, she wonders, “why, if a blunt rule is necessary, it should be fashioned to favor systematically the breaching promisor and not the promisee.”<sup>169</sup> Regardless of the foundation for a doctrine of mitigation—moral, economic, pragmatic, or otherwise—this final point reiterates that the doctrine both creates incentives and generates consequences that favor the breacher over the nonbreacher.

Each doctrine, limitation, and remedy creates—or reinforces—line-drawing. In so doing, each has an opportunity to value an

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163. See Shiffrin, *supra* note 144, at 724 (“If one is bound to perform but without excuse voluntarily elects to breach one’s duty, a case could be made that the promisor should be liable for all consequential damages.”).

164. See, e.g., *id.* at 724.

165. CAL. CIV. CODE § 3523 (Deering 2008).

166. *Tobin v. Grossman*, 249 N.E.2d 419, 424 (N.Y. 1969); see also RENDLEMAN, *supra* note 14, at 541.

167. See Shiffrin, *supra* note 144, at 725 (considering the potential argument that sensitivity factors are incompatible with “the need to formulate a clear rule”).

168. *Id.*

169. *Id.* at 725–26.

underlying policy. The pendency of this new rule of restitutionary disgorgement for opportunistic breach of contract provides a moment to revisit policies supporting related doctrines, such as mitigation. Disgorgement also includes value choices, but those may be in tension with the rationales for mitigation. Notably, restitutionary disgorgement when available as a remedy for breach of contract seeks to re-shift the balance that mitigation honors; disgorgement favors the nonbreacher by allowing her to recover more than her loss.

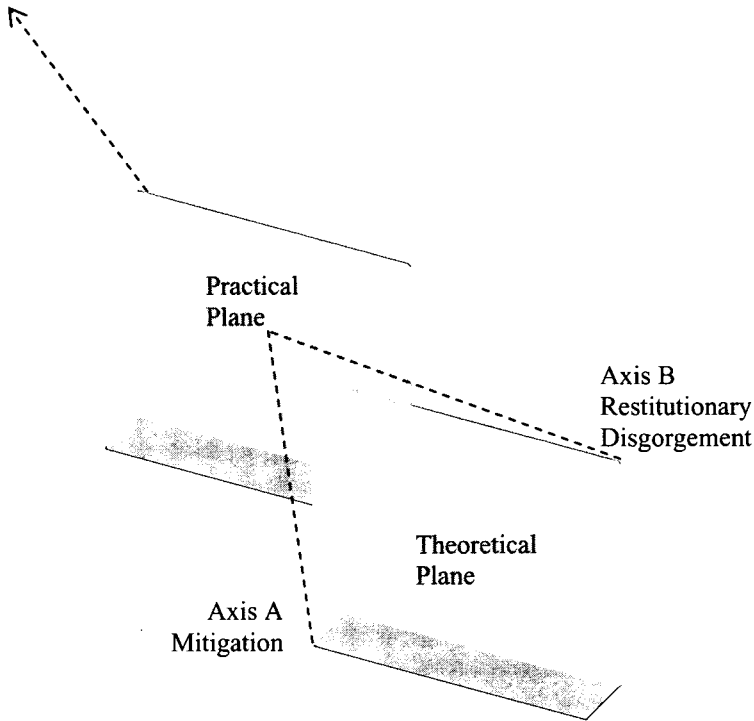
#### V. THE INTERPLAY BETWEEN RESTITUTIONARY DISGORGEMENT AND CONTRACT MITIGATION

The pending disgorgement section in its narrowest conception will have limited application. Restitutionary disgorgement will effectively be available *only* when the plaintiff can establish a right to specific performance. Even under this narrow conception, disgorgement possibly conflicts with contract law's doctrine of mitigation.<sup>170</sup>

The following diagram facilitates the discussion of this possible tension between mitigation, Axis A, and restitutionary disgorgement, Axis B. The root of the tension between the two axes exists primarily on the theoretical plane, but room for reconciliation exists on the practical plane. The following diagram depicts this construct.

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170. Not surprisingly, specific performance also poses friction with the doctrine of mitigation. See Lionel Smith, *Understanding Specific Performance*, in *COMPARATIVE REMEDIES FOR BREACH OF CONTRACT* 221 (E. McKendrick & N. Cohen eds., 2005) ("It is notorious that specific performance is, in some cases, overcompensatory, because it seems to override the plaintiff's duty to mitigate her loss during the period between breach and judicial order.").



The underlying principles of disgorgement generally conflict with the traditional theoretical underpinnings of American contract law. Contract's doctrine of mitigation is no exception to this underlying friction.

#### *A. Theoretical Plane—Tensions between Disgorgement and Mitigation Rationales*

As explored in related articles,<sup>171</sup> American contract law's preferred remedy is expectancy.<sup>172</sup> This remedy is compensatory,<sup>173</sup>

171. See Roberts, *Restitutory Disgorgement*, *supra* note 12; Roberts, *Commonwealth Disgorgement*, *supra* note 12.

172. DAWSON ET AL., *supra* note 162, at 3 (characterizing the expectancy measure as "contract law's normal rule of recovery").

173. *Id.* (explaining that expectancy damages provide "the award of a sum of money intended to give the injured party 'compensation'"). The compensatory nature can be complex given its "hypothetical" exploration into a position the plaintiff would have occupied "if history had been different." *Id.* (quoting 5 ARTHUR CORBIN, CORBIN ON CONTRACTS § 992 (1964)).



and American contract law prohibits punitive damages.<sup>174</sup> In fact, contract law generally does not judge the breaching party's motives. Similarly, disgorgement's underlying principles contrast markedly with these basic tenets of contract law.

Disgorgement, familiar in the law of restitution and unjust enrichment, now seeks a more visible role as a remedy for a limited set of contractual breaches. As Professor Dawson feared, unjust enrichment injects slippery notions of justice and fairness. Disgorgement, rooted in unjust enrichment, seeks to disgorge the profits from a defendant's conscious wrongdoing. Then, add the layer of the *Restatement's* cabining of disgorgement to opportunistic breaches of contract. Ostensibly, the term opportunistic labels a set of contractual breaches that involve conscious wrongdoing of the sort warranting disgorgement.<sup>175</sup> Professor Kull assures that opportunistic is defined by the wording of the pending *Restatement* provision. Most notably, the breach must be deliberate and profitable as defined in the *Restatement*.<sup>176</sup>

Yet the term opportunistic implies moral blameworthiness. Even putting aside its connotations, its common definition is: "exploiting immediate opportunities, especially in an unplanned or selfish way."<sup>177</sup> Further, the *Restatement's* proposed remedy of disgorgement for such breaches possesses punitive elements, as I explore extensively in another article.<sup>178</sup> One may conclude, however, that enabling restitutionary disgorgement for opportunistic breaches of contract does not have punitive aspects. Regardless, the disgorgement remedy admittedly and undeniably focuses on the defendant's gain rather than the plaintiff's loss. This feature alone is a foundational shift from traditional contract doctrine.

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174. RESTATEMENT (SECOND) OF CONTRACTS § 355 (1979); see also Shiffrin, *supra* note 144, at 710 ("Contract law's stance on the wrongfulness of promissory breach is equivocal at best, manifested most clearly by its general prohibition of punitive damages."). *But cf.* Dodge, *supra* note 26 (advocating that economic efficiency supports punitive damages for willful breach of contract).

175. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT, § 39 cmt. g, at 22 (Tentative Draft No. 4, 2005) (offering that the instant disgorgement remedy will "principally" apply to "instances of conscious wrongdoing" rather than "any default that results from the defendant's inadvertence, negligence, or unsuccessful attempt").

176. *Id.* § 39(2).

177. CONCISE OXFORD ENGLISH DICTIONARY 1003 (11th ed. 2004).

178. Roberts, *Restitutionary Disgorgement*, *supra* note 12.

The theoretical rationales for mitigation, as explored above,<sup>179</sup> are also in discord with the justifications for a restitutionary disgorgement remedy for opportunistic breach of contract. Whether viewed through moral, economic, or pragmatic lenses, the primary thrust behind the mitigation principle is *don't be lazy—instead avoid unnecessary consequences*. It asks the nonbreaching party to participate and avoid consequences by stopping or by acting. Mitigation's focus on the nonbreacher runs counter to disgorgement principles. Disgorgement focuses on the breacher and holds the breacher accountable for her conscious wrongdoing. At maximum, this accountability will subject the breacher to blame and punishment.

The incentive to avoid consequences may have multiple foundations and multiple beneficiaries. For example, if the nonbreacher effectively mitigates, it benefits the breacher (by reducing damages), may benefit society (by allocating resources more efficiently), and may also benefit the nonbreacher (by providing the benefit of the bargain more quickly than litigation). This arguable benefit to the nonbreacher does not mean that the plaintiff preferred breach to performance. But where a party has breached, the doctrine of mitigation may benefit the plaintiff who would rather not wait for damages at the end of litigation. The plaintiff, however, might think, "I am innocent, and I will wait for the defendant to pay my full damages." If the law prefers that a plaintiff resist the idleness temptation—for whatever reason—then it should continue to support the doctrine of mitigation. Given the tension between the theoretical underpinnings of disgorgement and mitigation, is it possible to live in a legal world with both?

*B. Practical Plane—Possible Reconciliation for  
Disgorgement and Mitigation*

With the theoretical underpinnings in mind, how might disgorgement and mitigation work together in practice? The theory no doubt influences the contours of the doctrines and thus their practical applications. Even if disgorgement's frame is the defendant's gain rather than the plaintiff's loss, the law may still have an interest in keeping the plaintiff's losses down. Three

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179. See *supra* Part IV.B.iii.

conceptualizations capture the practical interplay between restitutionary disgorgement and mitigation. These categories are: (i) Mitigation Inapplicable; (ii) Mitigation Reduction; and (iii) Mitigation Prerequisite.

#### i. Mitigation Inapplicable

Prior to the *Restatement's* proposed restitutionary disgorgement remedy, Professor Dobbs addressed the interplay between the concept of damage minimization via substitute transactions and a plaintiff's right to specific performance.<sup>180</sup> Dobbs's remedies treatise declares:

If the plaintiff is entitled to specific performance at his option, that entitlement is necessarily inconsistent with any expectation that the plaintiff will minimize by securing substitute performance; the right to demand performance from *A* must mean that there is no obligation to accept performance from *B* instead.<sup>181</sup>

In other words, if a plaintiff is able to secure a substitute, specific performance is unnecessary and impermissible because the ability to secure a *reasonable* substitute belies an argument of uniqueness. Accordingly, section 39 disgorgement would also be unavailable.

As crafted, the *Restatement's* disgorgement remedy is available *only* if the plaintiff lacks an adequate damage remedy.<sup>182</sup> Thus, "where substitutes for the promised subject matter are attainable and expectation damages would be adequate, a defendant's profits or savings should not be the basis of recovery."<sup>183</sup> This phrasing raises the irreparable injury test utilized for equitable efforts to obtain specific performance.<sup>184</sup> Irreparable injury asks whether the plaintiff has been irreparably harmed such that legal remedies are inadequate. If the promised performance is unique, then ostensibly the legal

180. DOBBS, *supra* note 77, § 12.6(2), at 137.

181. *Id.*

182. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39(2)(c) (Tentative Draft No. 4, 2005).

183. Peter Benson, *Disgorgement for Breach of Contract and Corrective Justice: An Analysis in Outline*, in UNDERSTANDING UNJUST ENRICHMENT 312 (Jason W. Neyers et al. eds., 2004).

184. DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 37 (1991) (examining the rule and its decline) (cited by Professor Kull in RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 reporter's note c, at 30 (Tentative Draft No. 4, 2005)).

remedy of money (e.g., expectancy) damages “will not do” because a market substitute is unattainable, and thus an extraordinary equitable remedy, such as specific performance, should be available. If disgorgement, as proposed in the *Restatement*, runs parallel to specific performance, the remedy would require uniqueness of the promised performance. If the performance is unique, by definition, affirmative mitigation is impossible.

A tricky question arises if the plaintiff does not secure a substitute, and the defendant argues that the plaintiff should have taken reasonable steps to find one. If the defendant can show that a suitable substitute hypothetically existed, then the promised performance is not unique, fails to qualify for specific performance, and similarly fails to trigger a path to section 39 disgorgement. This logic supports Professor Dobbs’s assessment regarding the inapplicability of the mitigation doctrine to specific performance and extends to disgorgement.<sup>185</sup> But could there be any similarities between the doctrine of mitigation and disgorgement if we view mitigation more broadly?

## ii. Mitigation Reduction

Is it possible to grant to the plaintiff the defendant’s gain minus the avoidable consequences the plaintiff could have saved? This “mitigation reduction” theory would represent the marginal difference between unavoidable loss to the plaintiff and the defendant’s gain—the profits wrongfully obtained as a result of the breach. It would honor the notion that a plaintiff cannot “run up the score” by continuing to accumulate damage. Instead, the plaintiff would be incentivized to mitigate or else face a possible reduction of the disgorgement amount. Accordingly, if a plaintiff seeks to disgorge the profits that the defendant garnered as a result of a breach of contract, the court might disgorge such profits but deduct an amount that the plaintiff should have avoided by stopping activities under the contract. This notion is not symmetrical. A defendant’s gain is not measured by a plaintiff’s loss. So, deducting from the defendant’s profit the amounts that the plaintiff should have saved may not make sense. Why not let the plaintiff be free to accumulate losses after learning of breach because the defendant will

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185. DOBBS, *supra* note 77, § 12.6(2) at 137.

not be responsible for paying for them anyway? Then, the plaintiff can disgorge the causally linked profits and apply them towards the plaintiff's loss if so desired.

Does disgorgement as limited in section 39 permit this reduction? Again, the *Restatement's* proposal appears to contain an irreparable injury standard, as if the plaintiff were seeking specific performance.<sup>186</sup> As discussed in Part V.B.i, affirmative mitigation appears to be incongruous with section 39 disgorgement. But what of negative mitigation? When notified of anticipatory repudiation, should a plaintiff "put down the shovel" to avoid unnecessary consequences? If the plaintiff stops, the plaintiff may be able to sue for disgorgement if the plaintiff satisfies the requirements of section 39. As proposed, section 39 does not appear to mandate negative mitigation. Yet, if the plaintiff continues with the performance under the contract—for whatever reason—he can still seek the disgorgement remedy. The remedy would be directly linked to the defendant's gain. If a plaintiff should have taken reasonable steps to stop unnecessary consequences, should a remedy disgorging a defendant's profits deduct those avoidable consequences? The lack of a symbiotic connection may render this avenue less preferred than having mitigation serve as a prerequisite to a disgorgement remedy.

### iii. Mitigation Prerequisite

Assuming the law wanted to value self-help and reallocation, perhaps efforts to mitigate could be a prerequisite for seeking the disgorgement remedy. Implicitly, the showing of uniqueness may approach this direction already. Certain areas, such as contracts for the sale of land, arrive with sufficient historical support for establishing uniqueness that a plaintiff need not have taken any steps to *prove* uniqueness. Note that if a plaintiff is seeking specific performance, it is ordinarily the plaintiff's burden to pass the irreparable injury hurdle. The mitigation doctrine traditionally places the burden on the defendant. So, in many cases where uniqueness is a matter of interpretation should the plaintiff be required to attempt to take reasonable steps to avoid the consequence? If so, who should carry this burden of proof? If the

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186. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39(2)(c) (Tentative Draft No. 4, 2005).

law and the *Restatement* seek to make disgorgement truly rare, then the plaintiff must carry this additional burden to justify what may be an extraordinary remedy.

A mitigation prerequisite would also honor the values of self-help and efficient allocation of resources. Further, it would leave the possibility that a defendant may be able to retain profits from its replacement deal. Of course, if the profits are the result of conscious wrongdoing, perhaps disgorgement advocates would be unsatisfied with this result. If so, then the *Restatement* should not adopt mitigation as a prerequisite. Instead, the *Restatement* should lower the proposed hurdles for the disgorgement remedy, namely, the inadequacy requirement. This bolder move, however, would require greater acknowledgement of the desire to inject moral blameworthiness and disincentivize opportunistic breaches of contract. A more readily applicable disgorgement remedy, however, will raise more judicial and scholarly eyebrows because it contrasts with the governing narrative of contract law: one may choose to breach and pay the consequences, expectancy damages.

## VI. CONCLUSION

The topic of unjust enrichment restitution is ripe for further utilization in American law. The pending *Restatement*, anticipated for publication in 2010, will go far in revitalizing this subject and edifying constituents about its nuanced contours. One of the boldest, and most exciting, components of the pending *Restatement* is section 39's disgorgement remedy for opportunistic breaches of contract. Like moths to a flame, plaintiffs' lawyers, students, and academics will be instantly attracted to this essentially new rule. Many facets of unjust enrichment and restitution law overlap with other substantive areas of law. Therefore, concerns about the anticipated impact of any new sections on the substantive doctrines of contract, tort, and property law require careful consideration.

Restitutionary disgorgement for opportunistic breach of contract poses significant tensions with the underlying foundation of contract law, or at least with the official story of contract law. It claims narrow application, but comes with broad theoretical justifications that may conflict with the influential choice principle of contract law. The choice principle balances freedom with responsibility without emphasizing blameworthiness. Disgorgement, rooted in unjust

enrichment, provides an inroad into examining the conscious wrongdoing of the breacher. If applied, it de-opportunizes breach. The defendant may feel judged, and perhaps even punished, for obtaining a *bigger, better deal*. At minimum, disgorgement refocuses the inquiry on the breacher's behavior and the breacher's gain. Both are a shift from the focus of contract law's traditional gaze.

As examined in the instant Article, contract law's doctrine of mitigation demonstrates the underlying tensions with a restitutionary disgorgement remedy. On the theoretical plane, potentially deep conflicts regarding the supporting rationale for disgorgement and mitigation exist. Yet, on the practical plane, three potential avenues exist regarding the interface between the disgorgement remedy and the mitigation doctrine: (i) Mitigation Inapplicable, (ii) Mitigation Reduction, and (iii) Mitigation Prerequisite. Ultimately, this Article shows the possibilities for the law to find an avenue to permit the bold disgorgement remedy in the proper contractual breach circumstances and to foster an environment in which actors operate conscientiously to mitigate avoidable consequences.