Retribution in Contract Law

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For the last several centuries, there has been a powerful clash between two very different ways of understanding what contract law and contract remedies ought to accomplish. The older view, which found its most powerful philosophical expression in Kant and has been advanced by modern scholars like Charles Fried,[1] *is firmly rooted in the principle of respect for individual autonomy, and holds that parties have an obligation to keep their promises because they have invoked a convention (i.e., contract law) whose very purpose "it is to give grounds — moral grounds — for another to expect the promised performance."*[2] *According to this view of contract law, when a party invokes such a convention but nevertheless breaches their contract, not only do they wrong the other party by failing to properly value and respect them as autonomous agents, but their wrong frequently harms the other party as well, thereby creating a normative imbalance between the parties that seems to demand rectification on the ground of corrective justice.*[3] *It is for this reason that,*

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[1] *See, e.g.*, CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 17 (1981) ("There exists a convention that defines the practice of promising and its entailments. This convention provides a way that a person may create expectations in others. By virtue of the basic Kantian principles of trust and respect, it is wrong to invoke that convention in order to make a promise, and then break it.").

[2] *Id.* at 16.

[3] *See, e.g.*, Jules L. Coleman, *The Mixed Conception of Corrective Justice*, 77 IOWA L. REV. 427, 435 (1992) (explaining that "[i]f one person has wronged another, then

where such breaches occur, contract law remedies are typically fashioned to restore the equality that existed between the parties prior to the breach[4] *by requiring the wrongdoer to "hand over the equivalent of the promised performance,"*[5] *which is typically measured by an award of expectation damages or, where appropriate, specific performance.*[6] *By forcing the breaching party to render to the promisee the actual promise owed by way of specific performance, or to pay its equivalent by way of expectation damages, these remedies fit perfectly with Aristotle's conception of corrective justice,*[7] *which seeks to restore the balance between the parties by taking from the wrongdoing party, and giving to the injured party, that which rightfully belongs to the latter.*[8]

Juxtaposed against this older view is a more recent (and largely incompatible) theory about the way in which courts should think about, and therefore award remedies for, contract breaches. Specifically, this newer view, powerfully articulated by Oliver Wendell Holmes Jr. towards the end of the nineteenth century, holds that courts should not focus (primarily, anyway) on enforcing promises to prevent wrongs or to protect party autonomy. Rather, courts should focus on promoting economic efficiency, which is best accomplished by allowing the promisor to choose between performing the contract, on the one hand, or breaching

corrective justice imposes a duty on the wrongdoer to rectify his wrong" because "the system of rights and responsibilities between them" *has been affected)*.

[4] *See, e.g.*, Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403, 408 (1992) ("Corrective justice embraces quantitative equality in two ways. First, because one party has what belongs to the other party, the actor's gain is equal to the victim's loss. Second, the holdings of the parties immediately prior to their interaction provide the baseline from which the gain and the loss are computed. That baseline, accordingly, functions as the mean of equality for this form of justice.").

[5] FRIED, *supra* note 1, at 17.

[6] Expectation damages are designed to protect the injured party's expectation interest, "which is his interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed." RESTATEMENT (SECOND) OF CONTRACTS § 344(a) (AM. LAW INST. 1981).

[7] *See* ARISTOTLE, NICOMACHEAN ETHICS, Book V, ch. 4 §§ 3-4 (Terence Irwin trans., Hackett Publ'g Co. 2d ed. 1999) ("For here it does not matter if a decent person has taken from a base person, or a base person from a decent person, or if a decent or a base person has committed adultery. Rather, the law looks only at differences in the harm [inflicted], and treats the people involved as equals, if one does injustice while the other suffers it, and one has done the harm while the other has suffered it. And so the judge tries to restore this unjust situation to equality, since it is unequal.").

[8] *See* Weinrib, *supra* note 4, at 403, 408 (arguing that Aristotle's conception of corrective justice "focuses on a quantity that represents what rightfully belongs to one party but is now wrongly possessed by another party and therefore must be shifted back to its rightful owner"); *see also* Anita L. Allen & Maria H. Morales, *Hobbes, Formalism, and Corrective Justice*, 77 IOWA L. REV. 713, 731 (1992).

and paying money damages to the injured party, on the other, depending not on which course of action is the most moral, which usually consists in performing one's obligations, but on which course of action is the most efficient.[9] *According to this newer theory, the purpose of a contract is to fashion it in such a way that it encourages parties to perform their duties where such performance is efficient, and to breach their obligations where performance is inefficient.*[10] *This idea has been picked up by many scholars and judges working within the law and economics tradition, who have suggested that contract remedies should not be primarily concerned with compensation, but with providing the contracting parties with the right economic incentives.*[11]

This Article argues that, as a descriptive matter, if we are to judge courts by what they actually *do, rather than by what many commentators and judges say they do, then each of the previously-described theories of contract law remedies are incomplete at best, and misleading (to both the public and other judges following precedent) at worst. Specifically, this*

[9] *See, e.g.*, OLIVER WENDELL HOLMES, JR., THE COMMON LAW 301 (1881) [hereinafter THE COMMON LAW] ("The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves him free from interference until the time for fulfillment has gone by, and therefore free to break his contract if he chooses."); *see also* Oliver Wendell Holmes, Jr., The Path of the Law, An Address at the Dedication of the New Hall of the Boston University School of Law (Jan. 8, 1897), *in* 10 HARV. L. REV. 457, 462 (1897) [hereinafter The Path of the Law] ("The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, — and nothing else.").

[10] *See, e.g.*, Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273, 284 (1970) ("Repudiation of obligations should be encouraged where the promisor is able to profit from his default after placing his promisee in as good a position as he would have occupied had performance been rendered." (emphasis added)); *see also* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 119 (4th ed. 1992) ("[I]n some cases a party [to a contract] is tempted to break his contract simply because his profit from breach would exceed his [expected] profit from completion of the contract. If [his profit from breach] would also exceed the expected profit to the other party from completion of the contract, and if damages are limited to the loss of [expected] profit, there will be an incentive to commit a breach. But there should be.").

[11] *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 94 (7th ed. 2007) [hereinafter ECONOMIC ANALYSIS] (footnote omitted) ("The basic aim of contract law . . . is to deter people from behaving opportunistically toward their contracting parties."). To provide a party with the correct economic incentives, the remedy should be treated as part of a mathematical equation and set as "equal to the amount of harm caused by the wrongdoer, multiplied by the inverse of the probability of detection, which would ensure that all nondetected wrongdoers would also be optimally deterred." Marco Jimenez, *Remedial Consilience*, 62 EMORY L.J. 1309, 1343 (2013) [hereinafter *Remedial Consilience*] (footnote omitted).

Article will argue that, when one looks at the way in which courts actually decide cases, the wrongfulness[12] *of the* promisor's breach *plays an important role in a court's determination of the remedy it ultimately awards. The problem with the two leading theories of contract law remedies is that they fail to take the promisor's wrongfulness into account, and in doing so, fail to capture something quite surprising (to traditional ways of thinking about contract remedies, anyway) about the way many judges actually think about contract remedies. Indeed, contrary to frequent claims made by courts and commentators alike, this Article argues that the notion of retribution, or punishing promisors more severely for wrongful breaches than for innocent breaches, plays an important role in a court's calculation of contract damages, though it has been scarcely recognized in the literature.*[13]

By marshalling evidence from breach of contract cases in which judges are confronted with a choice between awarding two or more different remedies to "compensate" the injured party, this Article argues that the court's inquiry into the wrongfulness of the promisor's breach, which

[12] As used in this Article, a "wrongful" breach refers to one that is intentional, willful, or deliberate — in short, a breach that could have been avoided by the promisor but was not, frequently because the breaching party could gain more through the breach than through the performance. Specifically, this Article argues that courts invoke a sense of "wrongfulness" when peering into a wrongdoer's state of mind, paying particular consideration to the considerations animating the promisor's breach. Generally speaking, a breach is deemed wrongful where the promisor could have avoided the breach but did not due to some perceived advantage and, especially, where the breach was at the expense of the promisee. On the other hand, where a breach could not be reasonably avoided, or where a reasonable party in promisor's shoes would also have breached (e.g., due to bankruptcy), the breach is not considered wrongful. Therefore, the definition of wrongfulness proposed here focuses on the wrongdoer's internal state of mind, something that, according to contract theorists and judges alike, should not matter. This Article argues that it does.

[13] For a few notable exceptions, see George M. Cohen, *The Fault Lines in Contract Damages*, 80 VA. L. REV. 1225, 1232-33 (1994) [hereinafter *Fault Lines*]; Robert A. Hillman, *Contract Lore*, 27 J. CORP. L. 505, 509-10 (2002); Steve Thel & Peter Siegelman, *Willfulness Versus Expectation: A Promisor-Based Defense of Willful Breach Doctrine*, 107 MICH. L. REV. 1517, 1517-18 (2009) [hereinafter *Willfulness*]. Some interesting work had also been done suggesting that these retributive damages awards are probably rooted in the psychology of the individual, many of whom believe "that breach is morally wrong and . . . contract damages should reflect the ethical culpability of the breaching party." Tess Wilkinson-Ryan & David A. Hoffman, *Breach Is for Suckers*, 63 VAND. L. REV. 1003, 1004 (2010) (citing Tess Wilkinson-Ryan & Jonathan Baron, *Moral Judgment and Moral Heuristics in Breach of Contract*, 6 J. EMPIRICAL LEGAL STUD. 405, 405 (2009)); *see also id.* at 1041 (arguing that an individual's feelings about breach "may be explained as a function of *perceived exploitation*. Where one party feels particularly exploited, that party will demand higher damages to compensate breach") (emphasis added).

traditional contract doctrine maintains courts simply do not (and should not) do, will frequently play an important role in the judge's choice of remedy, with a larger remedy being awarded in proportion to the degree that the promisor's actions are deemed "wrongful." This behavior suggests that judges are not merely trying to compensate injured parties, but that they are trying to punish breaching parties for particularly wrongful breaches. More specifically, the cases seem to show that courts are concerned with the idea of proportional retribution, or with punishing the wrongdoer in proportion to both the wrongfulness of his or her acts, and the damages that are caused to the injured party by such acts.

This Article will proceed in three Parts. Part I discusses the ways in which traditional contract law is typically said to be unconcerned with the wrongfulness of the breaching party's behavior. Part II will discuss the leading theories regarding how contract damages ought to be awarded, paying particular attention to the corrective justice view emphasizing compensation and the law and economics view emphasizing efficiency. At this time, the retributive view will be introduced as an alternative theory by which courts tend to think about contract damages, and will define more clearly what, exactly, is meant by retribution in the context of contract law. Finally, in Part III, this Article will examine a number of contracts cases across several different remedial frontiers to show how courts frequently consider the wrongfulness of the promisor's breach when determining which "compensatory" remedy to award, which, of course, suggests that what they are really doing is not really compensation at all, but retributively punishing the breaching parties for their wrongful conduct.

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INTRODUCTION

Stretching back to an idea articulated by Holmes over a century ago,[14] the received wisdom is that contract remedies do not exist to punish a breaching party,[15] nor to compel a promisor to perform his or her promise,[16] but simply to compensate a promisee for an injury it has suffered.[17] This idea is prominently played out in the theory of efficient breach,[18] which operates under the assumption that the willfulness or wrongfulness of a promisor's breach is irrelevant so long as the promisor compensates the promisee for any injuries caused by the promisor's breach. According to this view, morality is best left out of contract law,[19] at least when it comes to determining a promisee's remedy.[20]

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[14] THE COMMON LAW, *supra* note 9 ("The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves him free from interference until the time for fulfillment has gone by, and therefore free to break his contract if he chooses."); *see also* The Path of the Law, *supra* note 9, at 462 ("The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, — and nothing else.").

[15] E. ALLAN FARNSWORTH, CONTRACTS § 12.8, at 760 (4th ed. 2004) ("[A] court will not ordinarily award damages that are described as 'punitive,' intended to punish the party in breach.").

[16] *Id.* § 12.1, at 730 ("Our system of contract remedies is not directed at *compulsion* of *promisors* to *prevent* breach; it is aimed, instead, at *relief* to *promisees* to *redress* breach.").

[17] *Id.* § 12.8, at 760 ("No matter how reprehensible the breach, damages are generally limited to those required to compensate the injured party for the lost expectation, for it is afundamental [sic] tenant of the law of contract remedies that an injured party should not be put in a better position than has the contract been performed."); *see also* Globe Ref. Co. v. Landa Cotton Oil Co., 190 U.S. 540, 544 (1903) (Holmes, J.) ("If a contract is broken, the measure of damages generally is the same, whatever the cause of the breach."); Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554, 558 (1977) ("The modern law of contract damages is based on the premise that a contractual obligation is not necessarily an obligation to perform, but rather an obligation to choose between performance and compensatory damages.").

[18] *See* Birmingham, *supra* note 10, at 284 ("Repudiation of obligations should be encouraged where the promisor is able to profit from his default after placing his promisee in as good a position as he would have occupied had performance been rendered.").

[19] *See* The Path of the Law, *supra* note 9, at 462 ("Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract. Among other things, here again the so called primary rights and duties are invested with a mystic significance beyond what can be assigned and explained. The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,

Indeed, apart from a few well-recognized exceptions,[21] the general unwillingness of courts to award punitive damages in contracts disputes may be cited as proof of the law's ostensible disdain for

— and nothing else. If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference. But such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can.").

[20] *See* Clark A. Remington, *Intentional Interference with Contract and the Doctrine of Efficient Breach: Fine Tuning the Notion of the Contract Breacher as Wrongdoer*, 47 BUFF. L. REV. 645, 647 (1999) ("The law has come to regard the obligation to perform a contract as being generally equivalent to an option to perform or pay damages.").

[21] *See, e.g.*, Boise Dodge, Inc. v. Clark, 453 P.2d 551, 556 (Idaho 1969) ("The rule established in Idaho is that punitive damages may be assessed in contract actions where there is fraud, malice, oppression or other sufficient reason for doing so. This rule recognizes that in certain cases elements of tort, for which punitive damages have always been recoverable upon a showing of malice, may be inextricably mixed with elements of contract, in which punitive damages generally are not recoverable. In such cases, punitive damages are allowed according to the substance of a showing of willful fraud."); Clarendon Mobile Home Sales, Inc. v. Fitzgerald, 381 A.2d 1063, 1065 (Vt. 1977) ("Punitive damages are generally not recoverable in actions for breach of contract. However, in certain extraordinary cases in which the breach has the character of a wilful and wanton or fraudulent tort, punitive damages may be allowed. Punitive damages are awarded not as compensation to the sufferer, but 'on account of the bad spirit and wrong intention' of the breachor.") (citations omitted); DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 180 (4th ed. 2010) ("Emotional Distress is generally not compensable in contract. But most courts treat bad-faith breach of an insurance contract as a tort; this opens the doors to emotional distress and punitive damages. That theory had begun to spread to other kinds of contracts with a power imbalance between parties, especially employment contracts, but that movement largely died after Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988)."); Nicholas J. Johnson, *The Boundaries of Extracompensatory Relief for Abusive Breach of Contract*, 33 CONN. L. REV. 181, 181-83 (2000) ("At the edges of contract doctrine, two notable experiments manifest the sense that some breaches demand more than compensatory damages. One, the failed California experiment with bad faith breach, permitted the plaintiff to collect punitive damages for defendant's 'bad faith' denial of the existence of a contract. . . . Another experiment, allowing the award of punitive damages against insurance companies for bad conduct breaches, is an enduring exception to the general bar on extracompensatory damages in contract law." (footnotes omitted)). In a telling comment about the purpose of such damages, which serve a completely different function than compensation, the *Boise Dodge, Inc.* court went on to note that: "Though the existence of punitive damages has been denounced as anomalous in the law, '(d)espite such denunciations the great majority of states retain the doctrine of exemplary damages in full force.' The criticism that punitive damages are superfluous in view of the criminal law fallaciously assumes a complete identity of criminal and civil punishment. The existence of such a remedy serves useful, if limited, functions in the law as a means of punishing conduct which consciously disregards the rights of others and as a means of deterring tortious conduct generally." *Boise Dodge, Inc.*, 453 P.2d at 557 (footnotes omitted).

punishing promisors who breach their contracts.[22] For instance, Professor Farnsworth, in his treatise on contract law, noted that:

> [A] court will not ordinarily award damages that are described as "punitive," intended to punish the party in breach, or sometimes as "exemplary," intended to make an example of that party. No matter how reprehensible the breach, damages are generally limited to those required to compensate the injured party for lost expectation, for it is a fundamental tenet of the law of contract remedies that an injured party should not be put in a better position than had the contract been performed.[23]

Although it is true that courts will sometimes punish a breaching party via an award of punitive damages where the breach of contract is

[22] *See* CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 289-91 (1935) ("This enumeration of the classes of cases where punitive damages are recoverable has left untouched one important question, May such damages be recovered in actions for breach of contract? We have seen two types of situations . . . where punitive damages are undoubtedly proper, first, the case where one by fraudulent representations has caused another to enter into a contract of purchase and to part with the value; second, where one has entered into a contract with a carrier or other public servant and the latter wantonly breached its duty of service imposed by the law . . . . In actions based solely and necessarily upon breach of contract alone, the overwhelming majority of the decisions deny recovery of exemplary damages. It is true that extreme cases may be encountered where a deliberate willful and inexcusable breach of contract may seem as morally culpable and as worthy of punishment as a willful or wanton tort . . . . The denial of such recovery in cases of contract probably flows first from the desire to restrict the field of exemplary damages, the allowance of which is usually regarded as an anomaly, and second, from the belief that, since the vast majority of breaches of contract are due to inability or to erroneous beliefs as to the scope of obligation, it is of doubtful wisdom to add to the risks imposed on entering into a contract this liability to an acrimonious contest over whether a breach was malicious or fraudulent and the danger of a large and undefined recovery of punitive damages."); *id.* ("It is true, fraud always merits punishment, but the courts regard it unwise and impracticable to attempt to punish a fraudulent breach of contract by requiring the defaulter to pay to the other party more than he has lost by the breach. The advantage of punishing the fraud would be more than counterbalanced by the disastrous uncertainty in the administration of the law of contracts which would surely result." (citing Woods, J., dissenting in Welborn v. Dixon)); *see also* Erlich v. Menezes, 981 P.2d 978, 984 (Cal. 1999) ("Our previous decisions detail the reasons for denying tort recovery in contract breach cases: the different objectives underlying tort and contract breach; the importance of predictability in assuring commercial stability in contractual dealings; the potential for converting every contract breach into a tort, with accompanying punitive damage recovery, and the preference for legislative action in affording appropriate remedies." (citations omitted)).

[23] FARNSWORTH, *supra* note 15 (footnotes omitted).

accompanied by an independent tort,[24] fraud,[25] or in other proper circumstances,[26] the traditional view is that courts should be unconcerned with whether the breaching party has willfully or wrongfully breached,[27] or with whether his or her actions are otherwise blameworthy.[28] And if the blameworthiness is unimportant, of course, then courts should award remedies with the aim of compensating injured parties, rather than punishing breaching parties.[29] According to this view, even though courts have sometimes "gone astray" and spoken of the promisor's breach in terms of blameworthiness or willfulness,[30] more often than not, these results have been treated as aberrational and disavowed.[31]

[24] *Id.* § 12.8, at 761 ("Punitive damages may, however, be awarded in tort actions, and a number of courts have awarded them for a breach of contract that is in some respect tortious. In an early application of this principle, punitive damages were assessed against public utilities and others engaged in furnishing a public service that were liable in tort for failing to discharge their obligation to the public." (citations omitted)); *id.* § 12.8, at 761 n.24 ("[R]ailroad's failure to transport purchaser of ticket to proper station was 'not only a breach of contract and a violation of public duty by . . . a common carrier, but a willful, deliberate, conscious wrong'" (quoting Fort Smith & W. Ry. v. Ford, 126 P. 745, 746 (Okla. 1912)). Professor Farnsworth also noted that "Other courts impose [punitive damages] when the breach is accompanied by conduct that is 'fraudulent,' even in the absence of an independent tort that would justify punitive damages." *Id.* § 12.8, at 761.

[25] *See, e.g.*, Welborn v. Dixon, 49 S.E. 232, 234 (S.C. 1904) (explaining that when "breach of contract is accompanied with a fraudulent act, the rule is well settled . . . that the defendant may be made to respond in punitive as well as in compensatory damages").

[26] *See* FARNSWORTH, *supra* note 15, § 12.17, at 810 ("Other courts have looked to the nature of the breach and allowed damages for emotional disturbance on the ground that the breach of contract was reprehensible, perhaps amounting to a tort, or that caused bodily harm." (citations omitted)).

[27] *See id.* § 12.3, at 737 ("'Willful' breaches should not be distinguished from other breaches.").

[28] Or, to put the matter more bluntly, the traditional view would hold that efficient, non-opportunistic breaches cannot be blameworthy, even though such breaches were done deliberately. *See, e.g.*, Patton v. Mid-Continent Sys., Inc., 841 F.2d 742, 750 (7th Cir. 1988) (Posner, J.) ("Even if the breach is deliberate, it is not necessarily blameworthy."); Richard A. Posner, *Let Us Never Blame a Contract Breaker*, 107 MICH. L. REV. 1349, 1349-50 (2009) [hereinafter *Never Blame a Contract Breaker*].

[29] *See* FARNSWORTH, *supra* note 15, §§ 12.1, 12.3, at 730, 737 ("Somewhat surprisingly, our system of contract remedies rejects, for the most part, compulsion of the promisor as a goal. It does not impose criminal penalties on one who refuses to perform one's promise, nor does it generally require one to pay punitive damages . . . . Punitive damages should not be awarded for breach of contract because they will encourage performance when breach would be socially more desirable.").

[30] *See, e.g.*, *id.* §§ 12.8, 12.13, at 760, 790-92 ("The skeptical reader may well ask whether persons of judicial temperament are immune from the temptation to depart

Indeed, this thinking is even behind the theory of efficient breach,[32] which ostensibly allows a promisor to breach and pay damages to the promisee where it is in the promisor's best interest to do so. It remains to be seen whether this official attitude will change with the recent publication of the *Restatement (Third) of Restitution and Unjust Enrichment* § 39.[33] This is the official position, anyway, and these platitudes are constantly repeated by the high priests of contract law until they take on the shape and form of dogma. Indeed, lest there is any confusion, in a recent symposium exploring the idea of fault in contract law, then Judge Richard Posner penned the article *Let Us Never Blame a Contract Breaker*, which argues, straightforwardly enough, how one should never *punish* a promisor that breaches its contract — for, once again, punishment is reserved for wrongdoers, and a breaching party has done nothing wrong,[34] according to this view, but has merely chosen to breach rather than to perform.[35]

When we look at the cases, however, we see something quite different. Indeed, it is this Article's thesis that, whenever the court is faced with a choice between two seemingly equivalent "compensatory" remedies (e.g., cost of completion versus diminution in value damages, or actual lost profits versus hypothetical lost profits), or

from a rule oblivious to blame. . . . Some courts have suggested that the measure of recovery in these cases turns on whether the breach is inadvertent or intentional . . . . The court's emphasis of the willful character of the breach as a basis for allowing the larger amount is of special interest." (first citing Lagerloef Trading Co. v. American Paper Prods. Co. 291 F. 947 (7th Cir. 1923), then citing Groves v. John Wunder Co., 286 N.W. 235, 236, 238 (Minn. 1939))).

[31] *See, e.g.*, *id.* § 12.13, at 791-92 ("Other courts have declined to follow the decision in *Groves v. John Wunder Co.*, even when the breach might be characterized as 'willful' and willfulness does not figure in the Restatement Second's damage formulation." (footnotes omitted)).

[32] *See id.* § 12.3, at 736-37, 736 n.3 ("For judicial endorsement of the notion of efficient breach by one of its leading advocates, *see* Patton v. Mid-Continent Sys., 841 F.2d 742 (7th Cir. 1988) (Posner, J: "Even if the breach is deliberate, it is not necessarily blameworthy . . . .").

[33] *See infra* Part III.D.

[34] *Never Blame a Contract Breaker*, *supra* note 28, at 1349 ("[C]oncepts of fault or blame, at least when understood in moral terms rather than translated into economic or other practical terms, are not useful addenda to the doctrines of contract law.").

[35] *Id.* at 1349-50; *see, e.g.*, THE COMMON LAW, *supra* note 9, at 301 ("The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves him free from interference until the time for fulfillment has gone by, and therefore free to break his contract if he chooses."); *see also* The Path of the Law, *supra* note 9, at 462 ("The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, — and nothing else.").

whenever a court has discretion in applying one of the traditional limitations on compensatory damages (such as certainty, avoidability, or foreseeability), the behavior of the breaching party is of significant importance to many judges. Indeed, after a brief discussion in Part II of the leading theories governing contract law remedies, and an introduction into the use of retribution in contract law, Part III of this Article will discuss many cases in which the court had a remedial choice between awarding two very different compensatory remedies, and will examine the influence of the breaching parties' behavior on the court's ultimate selection of such remedies. Part III will also examine the extent to which courts tend to apply with more or less rigor the traditional limitations of damages based on the general innocence or blameworthiness of the breaching party's behavior. Finally, the Article will conclude by exploring the way in which courts and commentators have begun to embrace the "disgorgement" remedy in contract law to deter promisors from engaging in opportunistic breaches by incentivizing them to perform their contracts, rather than by giving them a choice between performance, on the one hand, and a payment of money damages, on the other, as traditional contract doctrine would suggest.

I. AGAINST RETRIBUTION: CONTRACT REMEDIES IN THEORY[36]

A. Compensation

With apologies to Jane Austen, there is perhaps no truth more universally acknowledged in contract law than that an injured party in possession of a breached contract must be in want of a compensatory remedy, the purpose of which is to put the injured party in the position it would have occupied but for the breach.[37] This compensatory remedy, in turn, can be either in kind or

[36] *See generally Remedial Consilience*, *supra* note 11, (discussing the four distinct remedial interests, the relationship between and among these interests, and the importance of the protective interest).

[37] *See, e.g.*, Chronister Oil Co. v. Unocal Ref. & Mktg., 34 F.3d 462, 464 (7th Cir. 1994) ("The point of an award of damages, whether it is for a breach of contract or for a tort, is, so far as possible, to put the victim where he would have been had the breach or tort not taken place."); *see also* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 1, 3 (Aspen Publishers, Inc. 3d ed. 2002) [hereinafter MODERN AMERICAN REMEDIES, 3d ed.]. This principle, of course, stretches far beyond contract law, and underpins most private law remedies. *See, e.g.*, Ill. Cent. R.R. v. Crail, 281 U.S. 57, 63 (1930) ("[T]he basic principle underlying common law remedies [is] that they shall afford only compensation for the injury suffered . . . .").

substitutionary. Where the remedy is in kind, of course, the court will force the promisor to give to the promisee the very performance that was promised, whereas when the relief is substitutionary, the court will generally require the promisor to pay to the promisee a sum of money approximating the value of the promised performance.

The most important thing about the compensatory remedy is that, where the relief is substitutionary, the amount of compensation awarded is not a matter of the judge's or jury's discretion, but must be calibrated, so far as possible, to restore the injured party to his or her rightful position.[38] In contract law, this is most typically done through an award of expectation damages,[39] but is sometimes accomplished by awarding reliance damages[40] (e.g., where expectation damages are difficult to calculate) or where money damages are inadequate to put the injured party in its contracted-for position, by awarding specific performance.[41]

The benefit of the compensation principle is twofold. First, where there is a well-functioning market, compensatory damages will often allow the injured party (e.g., a party who failed to receive the 100 widgets it contracted for) to use the damages award to purchase an exact equivalent of the promised performance on the open market

[38] *See* United States v. Hatahley, 257 F.2d 920, 923 (10th Cir. 1958) ("The fundamental principle of damages is to restore the injured party, as nearly as possible, to the position he would have been in had it not been for the wrong of the other party.").

[39] RESTATEMENT (SECOND) OF CONTRACTS § 347, § 347 cmt. a (AM. LAW INST. 1981) ("Contract damages are ordinarily based on the injured party's expectation interest and are intended to . . . put him in as good a position as he would have been in had the contract been performed.").

[40] *See, e.g.*, *id.* § 349 ("As an alternative to [expectation damages], the injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed."); *see also id.* cmt. a ("Under the rule stated in this Section, the injured party may, if he chooses, ignore the element of profit and recover as damages his expenditures in reliance. He may choose to do this . . . in the case of a losing contract, one under which he would have had a loss rather than a profit. In that case, however, it is open to the party in breach to prove the amount of the loss, to the extent that he can do so with reasonable certainty under the standard stated in § 352, and have it subtracted from the injured party's damages.").

[41] *See, e.g.*, Cumbest v. Harris, 363 So. 2d 294, 297 (Miss. 1978) ("The tests to determine whether or not specific performance of a contract should be granted are the same in case of contracts for the sale of personalty as in the case of contracts for the sale of realty, namely, whether the damages for the breach are the equivalent of the promised performance, and whether the remedy at law is inadequate." (quoting 81 C.J.S. Specific Performance § 80 (1977))).

(e.g., 100 widgets of the same quality from a different manufacturer).[42] Where this is true, the compensatory remedy has made it "as though" the promisee were never injured.[43] Of course, to focus on compensation as one of the main goals of contract remedies is too obvious to merit serious discussion. Less obvious, but perhaps of equal importance (especially in cases where promisors have acted in a particularly egregious fashion towards promisees), is the fact that contract law's preoccupation with compensatory damages[44] tends to obfuscate the fact that courts can (and do), and perhaps even should, pursue other important remedial goals. One such goal, which has been more and more frequently acknowledged in the literature, is that of deterrence.

B. Deterrence

Other commentators, largely influenced by the work of law and economics scholars since the 1960s,[45] have argued that contract remedies should focus less on compensation than on achieving optimal levels of deterrence by preventing inefficient (and encouraging

[42] *See* MODERN AMERICAN REMEDIES, 3d ed., *supra* note 37, at 22 ("In functioning markets, giving plaintiffs the value of what they lost implements the rightful position by enabling plaintiffs to replace the thing they lost. Plaintiffs may choose to spend the money some other way, but so long as the choice is theirs, there is no reason to doubt that they have been made whole.").

[43] *See* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 490-91 (5th ed. 2008). A perfect compensatory remedy would make the victim indifferent between the preservation of the right at issue, on the one hand, and the deprivation of the right at issue plus a specific compensatory sum, on the other. *Id.* In the real world, this would seem to require that, in addition to the compensatory component of the award, courts would also award costs and attorney's fees, in addition to the promisee's lost time — a principle more often honored in the breach than in the observance.

[44] *See, e.g.*, The Path of the Law, *supra* note 9 ("The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, — and nothing else. If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference."); *see also* FARNSWORTH, *supra* note 15, § 12.3, at 736-37 (stating that, according to standard economic analysis, the goal of contract remedies should be "compensation and not compulsion").

[45] *See* ECONOMIC ANALYSIS, *supra* note 11, at 23 (noting that only "since about 1960" has modern law and economics attempted to make sense of "the legal system across the board: to common law fields such as torts, contracts, restitution, and property; to statutory fields such as environmental regulation and intellectual property; to the theory and practice of punishment; to civil, criminal, and administrative procedure; to the theory of legislation and regulation; to law enforcement and judicial administration; and even to constitutional law, primitive law, admiralty law, family law, and jurisprudence").

efficient) breaches of legal duties.[46] So, for example, in the eyes of a law and economics scholar, "[t]he basic aim of contract law . . . is to deter people from behaving opportunistically toward their contracting parties."[47] This deterrence, in turn, can be accomplished by awarding the promisee an amount sufficient to compensate it for the amount of harm caused by the wrongdoer, multiplied by the inverse of the probability of detection.[48]

One supporter of this view, Richard Craswell, has maintained that looking at the parties' economic incentives, rather than at the traditional damage interests (e.g., expectation, reliance, and restitution damages) is a much better way of thinking about contract law remedies. As he explains:

> Economic analysis is consequentialist: it asks what consequences will follow from adopting this remedy or that. Moreover, to economists, the best way to predict the likely consequences is to understand the incentives that a given remedy creates. The steady expansion of the economic analysis of contract remedies has thus come from the identification of more and more incentives that might be affected by the law's choice of remedy, and which thus would have to be considered in any normative evaluation.[49]

Specifically, Craswell suggests that we adjust the size of the remedy to give the promisor and promisee the proper incentives, rather than require the promisor to pay to the promisee the amount of money "owed" by way of compensation. As he explains:

> For example, the size of the remedy may also affect a promisor's incentive to take precautions against accidents that might leave her unable to perform her contract, as when stiffer penalties for breach of warranty give manufacturers an

[46] *See id.* at 94. Scholars have also applied optimal deterrence to other areas of law arguing that "optimal deterrence occurs at the point where the marginal social cost of reducing crime further equals the marginal social benefit." COOTER & ULEN, *supra* note 43, at 512.

[47] ECONOMIC ANALYSIS, *supra* note 11, at 94 (footnote omitted).

[48] Multiplying damages by the inverse of the probability of detection would help ensure that the numerous undetected future wrongdoers would also be optimally deterred. *Cf.* COOTER & ULEN, *supra* note 43, at 396-97. This is because "deterrence," as it is usually understood, refers to both the specific deterrence of the wrongdoer, and the general deterrence of other potential wrongdoers who are able to act with the benefit of the defendant's example. *See, e.g.*, JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE 2-3 (1990).

[49] Richard Craswell, *Against Fuller and Perdue*, 67 U. CHI. L. REV. 99, 107 (2000).

> incentive to build more reliable products. The remedy may also affect the promisee's incentives to avoid relying too much (or too little) on the promised performance, or to take other precautions to protect himself against the effects of breach. The damage rules may also affect the promisee's incentive to take steps to mitigate his losses after a breach by the promisor. More broadly, the damage rules may affect both parties' incentives to think carefully about a contract before signing it, or to think differently about which parties to contract with (and at what price), or to spend more time searching for other parties who might be willing to contract. The damage rule can also affect the degree of risk to which each party is exposed, an important consideration whenever the parties are not risk-neutral.[50]

Notably, however, awarding expectation damages may still be appropriate, but not for the traditional reason offered, which is that such damages fully compensate the injured promisee for the harms suffered at the hands of the promisor's breach. Rather, expectation damages are often appropriate because they frequently do the best job of lining up the parties' incentives with economic efficiency. As Craswell explains:

> Interestingly, a few of these effects may support the expectation remedy, thus coinciding with one of Fuller and Perdue's "interests." For example, expectation damages may give promisors just the right incentive to choose between performing and breaking a contract (the "efficient breach" effect), at least when subsequent renegotiation between the parties is unlikely. Expectation damages may also provide the right incentive to take precautions against any contingencies that would leave the promisor unable to perform. And if the promisee is risk-averse while the promisor is risk-neutral or risk-preferring, expectation damages can also provide the best allocation of risk between the two parties.[51]

Despite their differences, however, both compensation and deterrence seem to be in complete agreement about one thing: there appears to be no place for either retribution or punishment in contract law. According to the first approach, punishment should be rejected as a remedial goal because it has nothing to do with compensation, and

[50] *Id.* at 108-09 (footnotes omitted).

[51] *Id.* at 109 (footnotes omitted).

according to the second approach, punishment should be rejected because it has nothing to do with properly aligning the parties' incentives. And this agreement is not merely theoretical: judges, too, frequently state in their opinions that punishment has little to no place in contract law, outside of a few well-recognized exceptions. But is this right? Are judges really as immune as they say they are to taking retributive considerations into account when they decide cases? Do they really not care about why a wrongdoer breaches his or her contract, or about the vulnerability of the injured party, or, in short, about the same sorts of things they tend to care about when they shed their robes in their private lives? Certainly not. In the following section, this Article argues that the idea of retribution plays a not insignificant role in contract law remedies. Specifically, the cases discussed in the following section show that the principle of retribution often compels promisors who wrongfully breach their contracts (e.g., those who breach their contracts willfully, or behave culpably, or otherwise exploit the vulnerability of a promisee by betraying the very trust they have invited) to pay more "compensatory" damages than promisors who breach their contracts for less nefarious reasons.

C. Retribution

> *Punishment is punishment, only where it is deserved. We pay the penalty, because we owe it, and for no other reason; and if punishment is inflicted for any other reason whatever than because it is merited by wrong, it is a gross immorality, a crying injustice, an abominable crime, and not what it pretends to be.*[52]
>
> - F.H. Bradley

Yet another principle by which the law of contract remedies might be organized is the principle of retribution, which takes a backward-looking, wrongdoer-centered approach and focuses not on what a court should award a promisee by way of compensation, or what it should assess against the promisor by way of deterrence, but rather on what should be taken from the wrongdoer by way of retributive punishment.

At first glance, it may seem odd to talk about retributive punishment as being a goal with which contract law should be concerned. As J.D. Mabbott once observed, retributivism seems to be "the only moral theory except perhaps psychological hedonism which has been

[52] F.H. BRADLEY, ETHICAL STUDIES 26-27 (2d ed. 1952) (1927).

definitely destroyed by criticism."[53] Indeed, many of us, when we hear the word "retribution," tend to think of such benighted concepts as vengeance,[54] revenge,[55] and other barbaric behavior practiced by those who seek to "get even" with those who have wronged them.[56] Additionally, even among those who do not reject retribution outright, the entire concept seems to suggest itself to criminal law much more than to a civil law subject like contracts. Therefore, one might argue, the mere thought that retribution might play a role in contract law remedies seems to not only cut against modern sensibilities, but, more significantly, seems to be directly contradicted by the countless instances in which judges have gone out of their way to deny the normative and descriptive significance of retribution while reaffirming their commitment to compensatory damages.[57]

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[53] J.D. Mabbott, *Punishment*, 48 MIND 152, 152 (1939). Over the past eighty years, Mabbott's article has helped contribute to a bit of a comeback for retribution, but mostly in public law realms such as criminal law. *See, e.g.*, D.J. Galligan, *The Return to Retribution in Penal Theory*, *in* CRIME, PROOF AND PUNISHMENT: ESSAYS IN MEMORY OF SIR RUPERT CROSS 144, 144 (1981). Although the role of retributivism is largely ignored in the realm of private law remedies, I hope this Article will help convince the reader that it does not play an insignificant role.

[54] *See* THE COMMON LAW, *supra* note 9, at 40 ("It certainly may be argued, with some force, that it has never ceased to be one object of punishment to satisfy the desire for vengeance."); *see also id.* at 45 (describing retribution as "vengeance in disguise").

[55] *See* KARL A. MENNINGER, THE HUMAN MIND 448 (3d ed. 1947) ("The reasons usually given to justify punishment do not explain why it exists. They serve only to conceal the truth, that the scheme of punishment is a barbarous system of revenge, by which society tries to 'get even' with the criminal."); EDMUND L. PINCOFFS, THE RATIONALE OF LEGAL PUNISHMENT 45 (1966) ("To give as one's *reason* for inflicting pain or deprivation on a man that he has done a certain thing is an all too familiar way of talking. This is the language of revenge."). *But see* IMMANUEL KANT, LECTURES ON ETHICS 214 (Louis Infield trans., Hackett Publ'g Co. 1981) (1930) (distinguishing between retributive punishment and revenge, insisting that retribution requires a principle of equality between the crime and the punishment, whereas revenge is marked by an "insist[ence] on one's right beyond what is necessary for its defence . . . .").

[56] *See, e.g.*, PINCOFFS, *supra* note 55, at 1 ("Legal punishment is viewed by some of the most sensitive and well-educated people of our time as a survival of barbarism, bereft of rational foundation, supported only by inertia and the wish to have vengeance on criminals.").

[57] *See* ECONOMIC ANALYSIS, *supra* note 11, at 127-29. Standard economic analysis suggests that the goal of contract remedies is "compensation and not compulsion." FARNSWORTH, *supra* note 15, §12.3, at 737. Because of this, promisors who breach "should not be dealt with harshly," meaning that concepts like punitive damages, or focusing on the willfulness of a party's breach, should have little to no place in contract law because they will tend to "encourage performance when breach would be socially more desirable." *Id.*

However, as will be argued in greater detail below, retribution plays an important (though frequently unrecognized) role in how courts think about and award contract law remedies, and the failure to acknowledge this renders incomprehensible a number of contracts remedies issued daily by courts around the country. Indeed, as the cases discussed below will show, courts (whether intentionally or otherwise) frequently exercise their discretion to implement remedies with a retributive flavor on a much more regular basis in contract law than is frequently acknowledged. Therefore, given the claim that retribution plays an important role in contract law remedies, it is important to take a brief moment to sketch out precisely how the terms "retribution" and "retributive punishment" will be used throughout the remainder of this Article.

Although retribution is a particularly difficult concept to define, due in no small part to the fact that it has been defined in numerous ways by numerous individuals over the years,[58] in this Article the term "retribution" will be used to refer specifically to a theory of legal punishment requiring: (1) that a wrongdoer should only be punished for breaching a legally recognized duty,[59] (2) that the punishment should be doled out in proportion to the grievousness of the wrong committed,[60] and (3) that courts should give at least some weight to

[58] John Cottingham offered at least nine separate versions of retributivist theories, including repayment theory, desert theory, penalty theory, minimalism, satisfaction theory, fair play theory, placation theory, annulment theory, and denunciation theory. John Cottingham, *Varieties of Retribution*, 29 PHIL. Q. 238, 238-45 (1979).

[59] *See, e.g.*, IMMANUEL KANT, THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT 195 (W. Hastie, trans., T&T Clark 1887) (1796) [hereinafter EXPOSITION] ("Juridical [p]unishment . . . must in all cases be imposed only because the individual on whom it is inflicted *has committed a Crime*."); *see also* Hugo Adam Bedau, *Concessions to Retribution in Punishment*, *in* JUSTICE AND PUNISHMENT 51, 52 (J.B. Cederblom & William L. Blizek eds., 1977) ("[A] retributivist holds that a punishment is just if and only if the offender deserves it."); MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 88 (1997) ("The distinctive aspect of retributivism is that the moral desert of an offender is a *sufficient* reason to punish him or her . . . .").

[60] *See, e.g.*, EXPOSITION, *supra* note 59, at 196 ("[T]he mode and measure of Punishment which Public Justice takes as its Principle . . . is just the Principle of Equality, by which the pointer of the Scale of Justice is made to incline no more to the one side than the other."); *see also* Tison v. Arizona, 481 U.S. 137, 149 (1987) ("The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."); Stanley I. Benn, *Punishment*, *in* 7 THE ENCYCLOPEDIA OF PHILOSOPHY 29, 32 (Paul Edwards ed., 1967) (noting that retributivism "insists that the punishment must fit the crime"); Joel Feinberg, *What, If Anything, Justifies Legal Punishment?: The Classic Debate*, *in* PHILOSOPHY OF LAW 727, 728 (Joel Feinberg & Jules Coleman eds., 6th ed. 2000) ("The proper amount of

the "wrongfulness" of the breaching party's behavior (rather than merely to the consequences of the breaching party's act).

The first prong of this definition is concerned with the *justification* for punishing the breaching party and holds that the breaching party should not be punished merely to compensate the promisee or, as the law and economics view would hold, to deter a future breaching party. Rather, retributive punishment requires that a breaching party should only be punished for violating some legally-recognized duty — here, breaching a contract — that results in an injury to another party. The second prong focuses on the *amount* of punishment needed in an individual case, and states that the wrongdoer should only be punished in *proportion* to the injury caused by the breach, so that breaches that cause the promisee to suffer a lot of harm will be punished more severely than breaches that cause the promisee to suffer a little harm. Finally, the third prong suggests that the remedies awarded by judges will often vary along with the culpability or wrongfulness of the promisor's breach. This means that judges will tend to calibrate the remedy according to the wrongfulness of the promisor's breach, not only (a) being careful to not treat a wrongdoer too leniently where its breach was particularly wrongful (which could happen, for example, where a judge who has the choice between awarding two legally equivalent compensatory remedies, such as cost of completion or diminution in value damages, and awards the lesser of the two), but (b) being careful to not treat a breaching party too harshly, even for wrongful breaches (which could happen, for example, under a law and economics approach, which would sometimes require sacrificing a particular wrongdoer for the sake of deterring other potential future wrongdoers from engaging in similar actions in the future).

By keeping this working definition of retributive punishment in mind, I hope to show, by way of example, that the principle of retribution is quite pervasive in contract law, an idea that may well surprise those who focus more on what courts say than on what courts do.

Like compensatory damages, these retributive remedies can also take one of two forms: in-kind and substitutionary. Many of us, when

punishment to be inflicted upon the morally guilty offender is that amount which fits, matches, or is proportionate to the moral gravity of the offense."); IGOR PRIMORATZ, JUSTIFYING LEGAL PUNISHMENT 12 (1989) (listing the principle that "[p]unishment ought to be *proportionate* to the offense" as one of the five fundamental tenets of retributivism); Kent Greenawalt, Commentary, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343, 347-48 (1983) (observing that for retributivism, "the severity of punishment should be proportional to the degree of wrongdoing").

we think about punishment, tend to think about the sorts of in-kind, eye-for-an-eye, talionic punishments sanctioned by numerous ancient societies[61] but condemned by modern ones. But to only think of in-kind retributive punishments is to ignore the most important type of punishment in the contract law, which is substitutionary retributive punishments, requiring a promisor, *because* it has breached its duty of performance to the promisee, to pay an amount of money substituting both for the harm caused to the promisee and for the wrongfulness of the breaching party's behavior.

Perhaps punitive damages are the most obvious instance of a remedy used to retributively punish a party for breaching a legally-recognized duty.[62] When courts award punitive damages, they are recognizing a

[61] *See, e.g.*, *Deuteronomy* 19:21 (King James) ("And thine eye shall not pity; *but* life *shall go* for life, eye for eye, tooth for tooth, hand for hand, foot for foot."); *Exodus* 21:23-25 (King James) ("And if *any* mischief follow, then thou shalt give life for life, Eye for eye, tooth for tooth, hand for hand, foot for foot, Burning for burning, wound for wound, stripe for stripe."); *id.* at 21:31 ("Whether he have gored a son, or have gored a daughter, according to this judgment shall it be done unto him."); *Leviticus* 24:19-20 (King James) ("And if a man cause a blemish in his neighbour; as he hath done, so shall it be done to him; Breach for breach, eye for eye, tooth for tooth: as he hath caused a blemish in a man, so shall it be done to him *again*."); *The Laws of the Twelve Tables* (c. 450 B.C.E.), *reprinted in* S.P. SCOTT, 1 THE CIVIL LAW 57, 70 (AMS Press 1973) (1932) ("When anyone breaks a member of another, and is unwilling to come to make a settlement with him, he shall be punished by the law of retaliation."); THE CODE OF HAMMURABI para. 196, at 25 (L.W. King trans., 2011), http://www.general-intelligence.com/library/hr.pdf ("If a man put out the eye of another man, his eye shall be put out. [An eye for an eye]." (alteration in original)); *id.* para. 197, at 25 ("If he break another man's bone, his bone shall be broken."); *id.* para. 200, at 25 ("If a man knock out the teeth of his equal, his teeth shall be knocked out. [A tooth for a tooth]." (alteration in original)); *id.* para. 229-31, at 27 ("If a builder build a house for some one, and does not construct it properly, and the house which he built fall in and kill its owner, then that builder shall be put to death. If it kill the son of the owner the son of that builder shall be put to death. If it kill a slave of the owner, then he shall pay slave for slave to the owner of the house.").

[62] In addition to punishing a party for breaching a legal duty owed to a right holder, the other acknowledged purpose of punitive damages is to deter. *E.g.*, Exxon Shipping Co. v. Baker, 554 U.S. 471, 492 (2008) ("[T]he consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct."); Philip Morris USA v. Williams, 549 U.S. 346, 359 (2007) (Stevens, J., dissenting) ("[A] punitive damages award, instead of serving a compensatory purpose, serves the entirely different purposes of retribution and deterrence that underlie every criminal sanction."); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003) ("[P]unitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence. (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996)) ; BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996) (citations omitted)

judicial interest in punishing wrongdoers who behave in a reprehensible manner by acting "in reckless disregard of the consequences" of their breach when the wrongdoer "likely knew or ought to have known . . . that his conduct would naturally or probably result in injury,"[63] or by showing, for example, that the wrongdoer acted with a "willful and conscious disregard of the rights or safety of others,"[64] a "'conscious disregard . . . that has a great probability of causing substantial harm,'"[65] or "ill will" toward the victim, or behavior "so outrageous that malice toward a person injured as a result of that conduct can be implied."[66]

But punitive damages are only one of many tools that courts use to punish parties who breach their duties, and too narrow a focus on punitive damages — which are not typically available for most contract breaches[67] — would obscure the other important ways in which retributive punishment often plays an important role in the way courts think about contract remedies. Indeed, the very notion of retributive punishment in contract law might sound strange at first, because, perhaps more so than in any other substantive area of the law, the role of punishment has long been thought to have no place in contract law[68] for at least two separate reasons. First, because it is

("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."); Carey v. Piphus, 435 U.S. 247, 266 (1978) ("[S]ubstantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights.").

63 Union Pac. R.R. v. Barber, 149 S.W.3d 325, 343 (Ark. 2004) (citations omitted).

64 Simon v. San Paolo U.S. Holding Co., 113 P.3d 63, 76 (Cal. 2005) (quoting CAL. CIV. CODE § 3294(c)(1)-(2) (2018)).

65 Calmes v. Goodyear Tire & Rubber Co., 575 N.E.2d 416, 419 (Ohio 1991) (quoting Preston v. Murty, 512 N.E.2d 1174, 1174 (Ohio 1987)).

66 Tuttle v. Raymond, 494 A.2d 1353, 1361 (Me. 1985).

67 Some commentators, however, believe punitive damages should be more prominent in contract law than they are at present. *See, e.g.*, William S. Dodge, *The Case for Punitive Damages in Contracts*, 48 DUKE L.J. 629, 651-57 (1999).

68 *See, e.g.*, Evra Corp. v. Swiss Bank Corp., 673 F.2d 951, 956 (7th Cir. 1982) ("[C]ontract liability is strict. A breach of contract does not connote wrongdoing; it may have been caused by circumstances beyond the promisor's control — a strike, a fire, the failure of a supplier to deliver an essential input." (citing Globe Ref. Co. v. Landa Cotton Oil Co., 190 U.S. 540, 543-44 (1903))); RESTATEMENT (SECOND) OF CONTRACTS ch. 16, intro. note (1981) ("'Willful' breaches have not been distinguished from other breaches . . . ."); THE COMMON LAW, *supra* note 9, at 301 ("The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves him free from interference until the time for fulfilment has gone by, and therefore free to break his contract if he chooses."); E. Allan Farnsworth, *Legal*

frequently understood that the "duty to keep a contract" is merely "a prediction that you must pay damages if you do not keep it, — and nothing else,"[69] it seems logical to conclude that so long as the

Remedies for Breach of Contract, 70 COLUM. L. REV. 1145, 1147 (1970) ("In its essential design . . . our system of remedies for breach of contract is one of strict liability and not of liability based on fault . . . ."). *But see* Dodge, *supra* note 67, at 652-54 (dividing willful breaches into opportunistic and efficient breaches and arguing that punitive damages should be available for both kinds of breaches). In support of his claim, Professor Dodge discusses several cases where courts have, in fact, expanded the reach of punitive damages in contract law throughout the 1970s and 1980s, including Clarendon Mobile Home Sales, Inc. v. Fitzgerald, 381 A.2d 1063, 1065 (Vt. 1977) (holding that where "the breach has the *character* of a wilful and wanton or fraudulent tort, punitive damages may be allowed" (emphasis added)); Dold v. Outrigger Hotel, 501 P.2d 368, 372 (Haw. 1972) ("[W]here a contract is breached in a wanton or reckless manner as to result in a tortious injury, the aggrieved person is entitled to recover in tort."); Boise Dodge, Inc. v. Clark, 453 P.2d 551, 553-56 (Idaho 1969) ("[P]unitive damages may be assessed in contract actions where there is fraud, malice, oppression or other sufficient reason for doing so."). Dodge, *supra* note 67, at 639. Notably, as pointed out by Professors Tess Wilkinson-Ryan & David A. Hoffman, these punitive damages are probably driven by the moral outrage resulting from the feeling that a promisee has been exploited by the promisor. Wilkinson-Ryan & Hoffman, *supra* note 13, at 1034 (first citing Daniel Kahneman et al., *Shared Outrage and Erratic Awards: The Psychology of Punitive Damages*, 16 J. RISK & UNCERTAINTY 49, 51-53 (1998); and then citing Kathleen D. Vohs et al., *Feeling Duped: Emotional, Motivational, and Cognitive Aspects of Being Exploited by Others*, 11 REV. GEN. PSYCHOL. 127, 134 (2007)).

[69] The Path of the Law, *supra* note 9, at 462; *see also* Norcia v. Equitable Life Assurance Soc'y, 80 F. Supp. 2d 1047, 1048 (D. Ariz. 2000) ("[The] 'bad man' theory of contracts permeates American common law. That is, a contracting party usually cannot demand performance of a valid contract; rather, the defaulting party must either perform or pay damages equivalent to the value of the promised performance. Under this approach to contract theory, it follows that when performance becomes uneconomic, a contracting party will not infrequently break a contract, preferring instead to pay damages."); Estate of Murrell v. Quin, 454 So. 2d 437, 440 (Miss. 1984) (Robertson, J., concurring in part and dissenting in part) ("Fuzzy moral notions of right and wrong, good and bad are irrelevant. That persons not parties to the contract may suffer loss is of no concern of the law . . . . Persons potentially affected who have failed to act to protect their interests sit idle at their peril. The law is wholly indifferent to non-legal consequences. It would allow one to think and behave as the proverbial Holmesean bad man to his heart's content." (first citing Grant Gilmore, THE DEATH OF CONTRACT 16-17 (1974); and then citing The Path of the Law, *supra* note 9, at 459)); Remington, *supra* note 20 ("The law has come to regard the obligation to perform a contract as being generally equivalent to an option to perform or pay damages. Holmes saw the matter this way more than one hundred years ago."). Redgrave v. Bos. Symphony Orchestra, Inc., 602 F. Supp. 1189, 1194 (D. Mass. 1985) (recognizing that "[t]he suggested freedom to break a contract and suffer liability only for the legally recognized damages is within the scope of the idea often referred to as Holmes' bad man theory of contract law — that one who is willing to pay the penalty of such damages as the law assesses is free to break the contract and pay" (citing The Path of the Law, *supra* note 9, at 461-62)), *aff'd in part and vacated in part*, 855 F.2d

promisee is awarded compensatory damages (usually in the form of expectation damages) in the event of a breach, then the promisor has fulfilled its contractual duty, and there remains no justification for retributively punishing a promisor who has made good the promisee's losses. Furthermore, if we assume that the promisee has been fully compensated for the harm suffered due to a promisor's breach, then the principle of retributive punishment would also seem to have the unfortunate consequence, from an economic perspective, of "deter[ring] efficient . . . breaches, by making the cost of the breach to the contract breaker greater than the cost of the breach to the victim."[70]

Nevertheless, even in contract law, this Article argues that the principle of retributive punishment plays an important role and is often needed to make sense of many contract remedies awarded by courts. Therefore, to test whether contract remedies are merely about compensating promisees, on the one hand, or optimally incentivizing promisors to efficiently allocate resources, on the other hand, or whether they might instead also be about retributively punishing wrongdoers for breaching legally recognized duties in proportion to the grievousness and wrongfulness of their breach, this Article will examine a number of cases in which a court had the choice of selecting between two or more remedies that would both satisfy the principle of compensation (e.g., cost of completion or diminution in value damages), or where the court had flexibility in limiting (or not limiting) such damages by applying with particular rigor (or laxity) the traditional limitations of certainty, avoidability, and foreseeability, to examine whether the breaching party's behavior made a difference in the remedy the court awarded. In doing so, this Article will not be concerned with how contract treatises describe the way in which courts award damages, or even with the way judges describe what they are doing. Instead, this Article will focus on what judges actually do whenever they decide cases in which (a) there is more than one remedy to choose from, or more than one way to apply the traditional limitations on remedies, and (b) where the breaching party has acted

888 (1st Cir. 1988) (en banc).

[70] ECONOMIC ANALYSIS, *supra* note 11, § 4.12, at 127-28. Standard economic analysis suggests that the goal of contract remedies is "compensation and not compulsion." FARNSWORTH, *supra* note 15, §12.3, at 737. Because of this, promisors who breach for financial reasons "should not be dealt with harshly," concepts like punitive damages have no place in contract law because they will "encourage performance when breach would be socially more desirable," and "'[w]illful' breaches should not be distinguished from other breaches." *Id.*; *see also* ECONOMIC ANALYSIS, *supra* note 11, § 4.10, at 119-26.

in a particularly culpable (i.e., wrongful, willful, intentional) manner. If the traditional view of contract law remedies is correct, then the reason for a promisor's breach should not matter — breaching a contract is a strict liability wrong.[71] However, as this Article will argue in greater detail below, when we look at the cases, what we see is that concepts like "wrongfulness" tend to play a not insignificant role in the court's awarding a remedy to the injured party.[72] For the purpose

[71] *See, e.g.*, Globe Ref. Co. v. Landa Cotton Oil Co., 190 U.S. 540, 544 (1903) (Holmes, J.) ("If a contract is broken the measure of damages generally is the same, whatever the cause of the breach."); RESTATEMENT (SECOND) OF CONTRACTS ch. 16, intro. note (AM. LAW INST. 1981) ("The traditional goal of the law of contract remedies has not been compulsion of the promisor to perform his promise but compensation of the promisee for the loss resulting from breach. 'Willful' breaches have not been distinguished from other breaches, punitive damages have not been awarded for breach of contract, and specific performance has not been granted where compensation in damages is an adequate substitute for the injured party. In general, therefore, a party may find it advantageous to refuse to perform a contract if he will still have a net gain after he has fully compensated the injured party for the resulting loss."); FARNSWORTH, *supra* note 15, §12.8, at 761 ("[C]ontract law is, in its essential design, a law of strict liability, and the accompanying system of remedies operates without regard to fault."); GRANT GILMORE, THE DEATH OF CONTRACT 16 (Ronald K.L. Collins ed., 2d ed. 1974) ("Money damages for breach of contract were to be 'compensatory,' never punitive; the contract-breaker's motivation, Holmes explained, makes no legal difference whatever and indeed every man has a right 'to break his contract if he chooses' — that is, a right to elect to pay damages instead of performing his contractual obligation. Therefore the wicked contract-breaker should pay no more in damages than the innocent and the pure in heart." (footnote omitted)); *Fault Lines*, *supra* note 13, at 1227 ("Traditional theories have not questioned the strict liability view of contract damages because they have focused on the goal of compensating the victim of the breach. The goal of compensation implies strict damage liability because if damages are to be measured by the plaintiff's loss, the reason for the breach must be irrelevant."); George M. Cohen, *The Fault that Lies Within Our Contract Law*, 107 MICH. L. REV. 1445, 1446 ("If the doctrinal irrelevance of fault is the touchstone of strict liability, then the other main areas of contract law — formation and damages — seem to fit that paradigm as well. With respect to damages, Holmes long ago articulated the strict liability view: just as the reason for nonperformance does not matter in determining breach, the reason for the breach does not matter in determining damages. An aggrieved party who can prove breach is entitled to "compensation," which contract law generally defines as protecting the expectation interest. Fault seems irrelevant to determining compensation." (footnotes omitted)).

[72] Indeed, Professor Farnsworth once promisingly asked, after discussing the long-standing principle that the measure of damages should generally be the same regardless of the cause of the wrongdoer's breach, whether the skeptical reader should not look askance at a "judicial temperament [that is] immune from the temptation to depart from a rule oblivious to blame." FARNSWORTH, *supra* note 15, § 12.8, at 760. While acknowledging a few exceptions to the rule, he essentially dismissed these concerns, doubling down on his claim that, at its core, "contract law is, in its essential design, a law of strict liability, and the accompanying system of remedies operates without regard to fault." *Id.* § 12.8, at 761.

of organization, this Article will look at cases in a number of different areas of contract law where the court has a clear choice between two (or more) different remedies (i.e., cost of completion v. diminution of value, actual lost profits or lost profits measured by the market-contract differential), and then will examine the way in which courts apply the traditional limitations of certainty, avoidability, and foreseeability, and argue that, more often than not, the court's remedy will be calibrated to the wrongfulness, willfulness, or intentionality of the wrongdoing party, awarding a higher remedy where the breaching party is perceived as blameworthy, and a lower remedy where it is not, despite the frequent insistence that the reasons for a wrongdoer's breach are supposed to be irrelevant.

II. RETRIBUTIVE PUNISHMENT IN CONTRACT REMEDIES[73]

A. Cost of Completion v. Diminution in Value

If this Article's thesis is correct, and courts do frequently take into account retributive considerations when awarding remedies for breach of contract, then there should be instances in which courts, when faced with a choice between two or more compensatory remedies, decide on which remedy to award on retributive grounds by "punishing" more severely those promisors who intentionally breached their contracts, or otherwise behaved wrongfully towards those with whom they have contracted. The best evidence, it would seem, could be found in those cases where a judge, when given a choice between two or more ostensible compensatory remedies, awards the higher amount where the breach is intentional (especially if it is both trivial and incidental to the main purpose of the contract) and the lower amount where the breach is not intentional (especially where it is neither trivial nor incidental to the main purpose of the contract). Even more conclusive still would be a case in which a court, confronted with a willful breach, awards cost of completion damages even where they are grossly disproportional to the diminution in value damages. The law, it turns out, is replete with such cases,[74] many of which we shall consider below.

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[73] *See generally Remedial Consilience*, *supra* note 11 (discussing the four distinct remedial interests, the relationship between and among these interests, and the importance of the protective interest).

[74] In addition to numerous material breach cases with fact patterns similar to *Jacob & Youngs, Inc. v. Kent*, section 39 of the Restatement (Third) of Restitution and Unjust Enrichment would go even further toward punishing intentional breaches by forcing

Consider, for instance, *Jacob & Youngs, Inc. v. Kent*,[75] in which the parties entered into a contract in which the plaintiff-builder, Jacob & Youngs, agreed to build a house for the defendant-homeowner, Kent.[76] In their contract, Jacob & Youngs promised to install no other pipe except pipe that was manufactured by the Reading Pipe Company.[77] Jacob & Youngs completed the house, but accidentally installed Cohoes pipe throughout much of the house. Although Cohoes pipe was of the same quality, appearance, market value, and cost as Reading pipe, it was still a technical breach of the contract.[78] After Kent took possession of the residence, he learned that some of the pipe did not conform to the contract, and refused to pay the balance due.[79]

The court agreed with Kent that Jacob & Youngs breached the contract by failing to install Reading pipe throughout the house, but went on to note that its mistake was both unintentional and harmless.[80] Therefore, according to court, the real issue was whether

promisors to disgorge any profits from their opportunistic breaches. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 39 (AM. LAW INST. 2011) ("If a deliberate breach of contract results in profit to the defaulting promisor and the available damage remedy affords inadequate protection to the promisee's contractual entitlement, the promisee has a claim to restitution of the profit realized by the promisor as a result of the breach.").

[75] 129 N.E. 889 (N.Y. 1921).

[76] *Id.* at 890.

[77] *Id.* Specifically, the contract said that "[a]ll wrought-iron pipe must be well galvanized, lap welded pipe of the grade known as 'standard pipe' of Reading manufacture." *Id.* Another provision in the contract specifically required that "[a]ny work furnished by the Contractor, the material or workmanship of which is defective or which is not fully in accordance with the drawings and specifications, in every respect, will be rejected and is to be immediately torn down, removed, and remade or replaced in accordance with the drawings and specifications, whenever discovered." RANDY E. BARNETT, CONTRACTS: CASES AND DOCTRINE 888 (4th ed. 2008).

[78] *Jacob & Youngs, Inc.*, 129 N.E. at 890-91. As noted by Carol Chomsky: "Some manufacturers used names for their pipe that makers of 'genuine wrought iron pipe' thought misleading. In order to avoid confusion, trade publications suggested specifying a particular manufacturer that was known to produce pipe of the quality desired so that only pipe of that standard would be used. The contract between Kent and Jacob & Youngs also contained language suggesting that the specification of Reading pipe was meant only to specify a standard, not to require absolutely that no other brand be used." Carol Chomsky, *Of Spoil Pits and Swimming Pools: Reconsidering the Measure of Damages for Construction Contracts*, 75 MINN. L. REV. 1445, 1447 n.11 (1991) (citing RICHARD DANZIG, THE CAPABILITY PROBLEM IN CONTRACT LAW 122 (1978)).

[79] *Jacob & Youngs, Inc.*, 129 N.E. at 890.

[80] *Id.* Further bolstering the builder's claim was the fact that the Cohoes pipe that was installed was of the same quality, appearance, market value, and cost as Reading pipe. *See id.*

the court should hold that Jacob & Youngs' action resulted in a complete forfeiture of the money owed it by Kent, or whether they were allowed to recover the money owed by Kent after paying Kent any compensatory damages that resulting from their breach. In a memorable passage, Cardozo wrote:

> The courts never say that one who makes a contract fills the measure of his duty by less than full performance. They do say, however, that an omission, both trivial and innocent, will sometimes be atoned for by allowance of the resulting damage, and will not always be the breach of a condition to be followed by a forfeiture. The distinction is akin to that between dependent and independent promises, or between promises and conditions.[81]

Stated this way, the issue that now confronted the court was whether the language in the contract requiring Reading pipe should be interpreted as constituting: (a) a condition that had not been satisfied, in which case Jacob & Youngs would not be entitled to recover the balance due under the contract unless it replaced the nonconforming pipe with Reading pipe, or (b) a promise that had been breached, in which case Jacob & Youngs could recover the balance due under the contract, but would be liable to Kent for any compensatory damages he might have suffered due to the installation of nonconforming pipe. In making this determination, Cardozo set forth the following rubric for distinguishing conditions from promises:

> Some promises are so plainly independent that they can never by fair construction be conditions of one another. Others are so plainly dependent that they must always be conditions. Others, though dependent and thus conditions when there is departure in point of substance, will be viewed as independent and collateral when the departure is insignificant. Considerations partly of justice and partly of presumable intention are to tell us whether this or that promise shall be placed in one class or in another.[82]

In this case, because Cardozo found that considerations of justice (e.g., the departure was insignificant in point of substance, the nonconforming pipe was insignificant in its relation to the project, and the cost of replacing the nonconforming pipe was significant) and

[81] *Id.* (citations omitted).

[82] *Id.* (citations omitted).

presumable intention (the breach was unintentional rather than willful) favored Jacob & Youngs rather than Kent, the court held that the language used in the contract requiring Reading pipe should be interpreted as a promise, rather than a condition, and that Jacob & Youngs was therefore entitled to payment of the balance due under the contract.[83] Because Jacob & Youngs breached, however, they were still liable to Kent for compensatory damages, if any. In determining the measure of those damages, Cardozo wrote:

> [T]he measure of the allowance is not the cost of replacement, which would be great, but the difference in value, which would be either nominal or nothing . . . . The owner is entitled to the money which will permit him to complete, unless the cost of completion is grossly and unfairly out of proportion to the good to be attained.[84]

In this case, because the breach was itself insignificant, and because the difference between the cost of replacement and diminution in value measures of damages were disproportional, Kent was only allowed to recover diminution in value damages (i.e., the difference in value between the house with Reading pipe and the house with Cohoes pipe) rather than the more generous cost of completion damages (i.e., the amount it would cost Kent to rip out the nonconforming Cohoes pipe and replace it with Reading pipe).[85] Of course, because Cohoes and Reading pipe were of the same quality, appearance, value, and cost, this meant that the expectation damages awarded by the court "would be either nominal or nothing."[86]

Commentators typically explain this case, along with other like it,[87] as presenting the court with a choice between two different measures of expectation damages — cost of completion and diminution in value damages — both of which are said to be compensatory in that they attempt to award a remedy that would put the injured party in the position he or she would have occupied but for the breach.[88] Seen in

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[83] *See id.* at 891-92.

[84] *Id.* at 891.

[85] *Id.* at 891-92.

[86] *Id.* at 891.

[87] *See, e.g.*, Groves v. John Wunder Co., 286 N.W. 235, 238 (Minn. 1939); Peevyhouse v. Garland Coal & Mining Co., 382 P.2d 109, 114 (Okla. 1962); Eastlake Constr. Co. v. Hess, 686 P.2d 465, 474-75 (Wash. 1984) (en banc).

[88] *See, e.g.*, Eric G. Andersen, *A New Look at Material Breach in the Law of Contracts*, 21 UC DAVIS L. REV. 1073, 1095 n.71 (1988) (describing *Jacob & Youngs, Inc.*, *Groves*, and *Peevyhouse* as cases in which "the issue is not whether to award damages sufficient to put the victim of the breach in the same position as if the

this light, such cases seem to read like many other contracts cases in which the court is given a policy choice between two different compensatory remedies, both of which are entirely within the court's discretion,[89] to be determined as a matter of policy.[90] Thus, according to some commentators, where the "[l]oss in value to the owner is likely to be only a small fraction of the cost to complete," then "diminution in market price [is] probably the better approximation of this loss."[91] Not only is it frequently said that a cost of completion remedy might lead to "economic waste,"[92] but even where it does not, such a remedy could still be criticized as "result[ing] in a 'windfall' to the injured party."[93]

On the other hand, many of these same commentators also recognize that where diminution in value damages do not fully reflect the loss suffered by the promisee, it could result in undercompensation to the injured party.[94] Like the notion of "windfall" discussed above, this too is unacceptable if the goal of remedies should be compensation. And this brings us to the problem with both cost of completion and diminution in value cases: both constitute compensatory remedies, but the court is provided with little guidance in choosing between these two very different ways of

contract had been performed," for this is a given, but rather determining "how to measure or define that position"); Chomsky, *supra* note 78, at 1448-51 ("When choosing a remedy, a court aims primarily to compensate the injured party adequately — to place her in as good a position as if the contract had been performed — while avoiding overcompensation." (footnote omitted)). *But see* Hillman, *supra* note 13, at 509 ("[I]n construction contracts, the degree of willfulness of a contractor's breach helps courts determine whether to grant expectancy damages measured by the cost of repair or the diminution in value caused by the breach, the latter often a smaller measure." (footnote omitted)).

89 *See, e.g.*, *Groves*, 286 N.W. at 238; *Peevyhouse*, 382 P.2d at 114; *Eastlake Constr. Co.*, 686 P.2d at 470-73, 475.

90 *See, e.g.*, *Willfulness*, *supra* note 13, at 1517-18 ("Commentators have typically sought to explain this tension by suggesting that while the promisee's expectation is not affected by the willfulness of the breach, expectation can often be measured or interpreted in many ways, and when a breach is found to be willful, the defendant's bad behavior grants license to pick the most generous definition of the plaintiff's expectation.").

91 FARNSWORTH, *supra* note 15, § 12.13, at 789-90.

92 *See, e.g.*, Cty. of Maricopa v. Walsh & Oberg Architects, Inc., 494 P.2d 44, 46-47 (Ariz. Ct. App. 1972) ("The conceptual defense of economic waste has been recognized in Arizona." (citation omitted)).

93 FARNSWORTH, *supra* note 15, § 12.13, at 790.

94 *See, e.g.*, *id.* ("On the other hand, the less generous measure may deprive the injured party of compensation for some of the *loss in value* if that loss is not fully reflected in the diminution in market price.").

"compensating" the injured party. This has led at least one commentator to suggest that we might resolve the issue by splitting the difference between these two remedies:

> Rather than accept the draconian choice between overcompensation through cost [of completion] and undercompensation through diminution in market price, the trier of the facts ought to be allowed at least to fix an intermediate amount as its best estimate, in the light of all the circumstances, of the loss in value to the injured party.[95]

This approach, however, seems to advocate awarding a remedy between two principled amounts for the sake of awarding a remedy, rather than forcing courts to grapple with the underlying justification behind the remedy itself. Such an approach is not only theoretically incoherent, but it arguably results in injustice as well because it would seem to give to one party only half as much as that party deserved while leaving the other party with a half share too much. Might there be a better solution?

If we continue to insist that the problem be viewed exclusively through a compensatory lens, the answer is probably no. But if we consider the possibility that cases like *Jacob & Youngs* might be made better sense of when viewed through other remedial lenses (such as retribution), then the answer is a resounding yes. To see how this is so, let us consider how one might analyze the remedial problem set forth in *Jacob & Youngs* through a retributive lens. First of all, viewing this case through a retributive lens would invite the judge to consider, for instance, the fact that a cost of completion remedy, rather than overcompensating a victim, may be necessary to take ill-gotten gains from a wrongdoing party; or perhaps that a diminution in value remedy, instead of undercompensating a victim, may be a tool the court can use to ensure that no more is taken from a relatively innocent wrongdoing party than what is absolutely necessary. Indeed, I would submit that only by viewing such a case through a retributive (rather than compensatory) lens can we make sense of Cardozo's rhetoric inquiring into the cause of the builder's default, the willfulness of their breach, and the builder's insistence to exercise its own discretion by installing pipe it perceived to be "just as good,"[96] — considerations that would be out of place for a judge concerned

[95] *Id.* (footnote omitted).

[96] Jacob & Youngs, Inc. v. Kent, 129 N.E. 889, 891 (N.Y. 1921) (quoting Easthampton Lumber & Coal Co. v. Worthington, 79 N.E. 323, 325 (N.Y. 1906)).

exclusively with compensation. But not only are these considerations not out of place when the case is viewed through the lens of retribution, they are actually necessary if we are to unlock the court's understanding of the remedies involved in such a case. For instance, words that seemed strange and obtuse in the context of compensatory damages,[97] such as Cardozo's refusal to visit this particular builder's "venial faults with oppressive retribution" while admonishing others that "[t]he willful transgressor must accept the penalty of his transgression,"[98] are perfectly consistent with a retributive reading of the case, and suggest a new dimension to how cases can be (and often are) decided.[99] Indeed, by reconceptualizing *Jacob & Youngs* as a case not only (or even primarily) about compensation, but also about retribution, it reveals that punishing the breaching party by taking from it what the wrongdoer himself took from the injured party (i.e., Reading pipe, measured by the cost of completion remedy) is not warranted where the breach was both unintentional and trivial.

Although *Jacob & Youngs* could be said to stand for the proposition that a smaller compensatory remedy (i.e., diminution in value damages) will be awarded where a breach is unintentional and the performance is substantial, does this mean that a larger compensatory

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[97] *See* FARNSWORTH, *supra* note 15, § 12.3, at 737 (noting that standard economic analysis suggests that the goal of contract remedies is "compensation and not compulsion"). Because of this, promisors who breach for financial reasons "should not be dealt with harshly." *Id.* Concepts like punitive damages have no place in contract law because they will "encourage performance when breach would be socially more desirable," and "'[w]illful' breaches should not be distinguished from other breaches." *Id.*; *see also* ECONOMIC ANALYSIS, *supra* note 11, at 119-20.

[98] *Jacob & Youngs, Inc.*, 129 N.E. at 891.

[99] *See, e.g.*, Oren Bar-Gill & Omri Ben-Shahar, *An Information Theory of Willful Breach*, 107 MICH. L. REV. 1479, 1481 (2009) ("Even within mainstream contract law, there are various ways in which the fault and willfulness of breach matter for the magnitude of damages. One need only recall Cardozo's famous dicta: 'The willful transgressor must accept the penalty of his transgression. For him there is no occasion to mitigate the rigor of implied conditions. The transgressor whose default is unintentional and trivial may hope for mercy if he will offer atonement for his wrong.'" (footnotes omitted)); *see also id.* at 1495 ("In practice, contract doctrine allows much flexibility in measuring expectation damages, and courts choose higher measures when they consider the breach willful or in bad faith. These questions arise most often in construction contracts and other service contracts, when the court is required to choose between the lower, diminution-in-market-value measure of the defective service and a higher measure based on the cost of completing the performance . . . . Judge Cardozo, in the passage quoted in the Introduction, emphasized the role of willfulness. Since the nonconformity was considered unintentional, the lower measure of damages applied. Had it been deliberate, the contractor would have been liable for the full cost of repair. Many courts follow this heuristic." (footnote omitted)).

remedy (i.e., cost of completion damages) *would have* been justified where the breach was wrongful, intentional, or willful? Although the language of *Jacob & Youngs* suggests this, it is difficult to know what Cardozo himself would have done in practice. Fortunately, there are numerous cases dealing with such problems, and the judges in those cases have been called upon to determine whether cost of completion versus diminution in value damages should be awarded. In such cases, in turns out, many judges do take into account retributive considerations, in both word and deed, and award the larger compensatory remedy where the breaches are willful or particularly wrongful, suggesting that courts seem to be concerned not only with compensating the injured party, but also with punishing the breaching party for wrongful breaches.[100]

Consider, for instance, *Groves v. John Wunder Co.*[101] Here, the plaintiff owned a tract of land on which there were "deposit[s] of sand and gravel" and "a plant . . . for excavating and screening the gravel."[102] The defendant leased the land from the plaintiff for $105,000 "to remove the sand and gravel" and promised "to leave the property 'at a uniform grade.'"[103] After removing the richest gravel, however, the defendant deliberately breached the contract by refusing to restore the land to a uniform grade (which would have cost $60,000) when it realized that the value of the land if restored would only be $12,160.[104] Not surprisingly, the case drew comparisons to *Jacob & Youngs*, stating that a cost of completion remedy should not be awarded where it was disproportionate to a diminution in value award.[105]

As in *Jacob & Youngs*, the court in *Groves* was ostensibly confronted with a choice between two different measures of compensatory damages. However, unlike the builder in *Jacob & Youngs*, whom Cardozo found to have acted unintentionally, the Supreme Court of Minnesota found the defendant's breach in *Groves* to be "wilful,"[106]

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[100] *See Willfulness*, *supra* note 13, at 1518 ("[I]n reality, courts frequently award promisees more than their expectation when they find that a breach is willful, and thus act to deprive willful breachers of any gains from breach.").

[101] 286 N.W. 235 (Minn. 1939).

[102] *Id.* at 235.

[103] *Id.*

[104] *See id.* at 236.

[105] *Id.* at 242 (Olson, J., dissenting).

[106] *Id.* at 236; *see* FARNSWORTH, *supra* note 15, § 12.13, at 790-91 ("Some courts have suggested that the measure of recovery in [cases like *Groves*] turns on whether the breach is inadvertent or intentional . . . . The court's emphasis of the willful character of the breach as a basis for allowing the larger amount is of special

and therefore opted to restore the plaintiff to its rightful position through the more generous "compensatory" remedy — cost of completion damages.[107] Of course, in attempting to explain such a case on compensatory grounds, the problem, as previously suggested, becomes intractable: we can either pretend that both cost of completion and diminution in value damages are equally (and fully) compensatory and ignore the (typically large) differences between them, or we can recognize that the courts in such cases are being confronted with a difficult choice between overcompensation and undercompensation[108] without any (compensatory) way of choosing

interest."); Patricia H. Marschall, *Willfulness: A Crucial Factor in Choosing Remedies for Breach of Contract*, 24 ARIZ. L. REV. 733, 735 (1982) ("The willfulness factor stressed in *Groves* and in many less well-known cases, was ignored by the restaters."); *id.* at 752, n.96 (noting that the case in *Jacob & Youngs* involved a "non-willful breach"); *see also id.* at 734 (arguing not only that courts *should* distinguish between willful and non-willful breaches when selecting among various remedies available for breach of contract, but that courts *do* make these distinctions, drawing examples from both case law and the Restatement (Second) of Contracts in which the willfulness of the breach is an important factor); *id.* at 741 ("The courts have not been doctrinally consistent in their treatment of the willfully breaching building, grading, or mining contractor. Some courts have distinguished willful breaches from nonwillful breaches in fashioning remedies and others have not. Most courts favor granting the aggrieved owner damages measured by the cost of completing performance if the contractor has stopped in midstream, or by the cost of repair if the contractor completed the job but deviated from the contract specifications."). *But see* FARNSWORTH, *supra* note 15, § 12.13, at 791 ("Other courts have declined to follow the decision in *Groves v. John Wunder Co.*, even when the breach might be characterized as 'willful' . . . . " (citing Peevyhouse v. Garland Coal & Mining Co., 382 P.2d 109 (Okla. 1963))).

107 *Groves*, 286 N.W. at 236, 238.

108 *See, e.g.*, ECONOMIC ANALYSIS, *supra* note 11, at 121 ("It is true that not enforcing the contract would have given the defendant a windfall. But enforcing the contract gave the plaintiff an equal and opposite windfall . . . ."); *see also* Gypsum Carrier, Inc. v. Handelsman, 307 F.2d 525, 534-35 (9th Cir. 1962) ("The question [regarding the collateral source rule] is not whether a windfall is to be conferred, but rather who shall receive the benefit of a windfall which already exists. As between the injured person and the tortfeasor, the former's claim is the better. This may permit a double recovery, but it does not impose a double burden. The tortfeasor bears only the single burden for his wrong. That burden is imposed by society, not only to make the plaintiff whole, but also to deter negligence and encourage due care . . . . Collateral source funds are . . . intended for the benefit of the injured person, and not for that of the person who injures him. That intention should be effectuated."). In Gypsum Carrier, the court's concern with retribution is clear, both in terms of making sure that, as between an innocent and wrongdoing party, the wrongdoer pays for his wrong ("[c]ollateral source funds are . . . intended for the benefit of the injured person, and not for that of the person who injures him"), and in terms of ensuring that the wrongdoer does not pay either too much or too little for his wrong ("[t]he tortfeasor bears only the single burden for his wrong"). *Id.* Remarkably, the court seemed to be confronted with a choice between a compensatory or retributive remedy, and came

between the two different measures. We can also, I suppose, try to attribute the court's decision to remedial discretion. This, too, seems unsatisfactory, and reminds one of the unprincipled "split the baby" approach discussed above.[109] However, if we allow for the possibility that retribution is playing a not insignificant role here, and take seriously the suggestion that courts are moved by the fact that the defendant's breach ought to be punished more severely when it is willful and in bad faith,[110] then this case,[111] and other similar cases,[112] seem to fall into place.[113]

Not only do such cases fall into place under the retributive lens, but they also seem to strike at the very core of the dominant "Holmesian" view of contracts,[114] which holds that "[t]he duty to keep a contract at

down on the side of the latter ("[a]s between the injured person and the tortfeasor, the former's claim is the better"), even where this leads to over-protection of the restorative interest (i.e., a "windfall"). *Id.*

109 *See* discussion *supra* note 95.

110 *See, e.g.*, *Groves*, 286 N.W. at 236 (defendant's willful breach was subject to a more severe damages penalty than it would have been had the breach been of good faith); *see also* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 39 (AM. LAW INST. 2011).

111 *See, e.g.*, Charles Alan Wright, *The Law of Remedies as a Social Institution*, 18 U. DET. L.J. 376, 380 (1955) (footnotes omitted) ("In theory punitive damages may not be allowed in a contract case. But what of the case where defendant breached a contract to level land, and the court awarded damages of $60,893, the cost of doing the work, in the face of a finding that the value of the land, if levelled, would be but $12,160? It is hard to avoid concluding that the court was motivated by the desire to punish the defendant, and the frequent reference in the opinion to the 'wilfulness' and 'bad faith' of defendant's conduct does little to dispel that conclusion.").

112 *See, e.g.*, Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 263, 265 (1946) (awarding compensatory damages that were "speculative and uncertain" because "the wrongdoer shall bear the risk of the uncertainty which his own wrong has created"); Campbell Soup Co. v. Wentz, 172 F.2d 80, 82 (3d Cir. 1948) (paying homage to the traditional rule that "[a] party may have specific performance of a contract for the sale of chattels if the legal remedy is inadequate . . . ." but noting that there is "no reason why a court should be reluctant to grant specific relief when it can be given without supervision of the court or other time-consuming processes against one who has deliberately broken his agreement . . . ." and denying specific performance on other grounds).

113 *See, e.g.*, *Willfulness*, *supra* note 13, at 1529 ("Peevyhouse and Groves are typically taken as presenting two answers to the question of what it takes to protect the promisee's expectation interest. In choosing between these measures, which is notoriously difficult, both courts relied on willfulness to some extent.").

114 There is some debate as to whether this was actually Holmes's view or not. As I have argued elsewhere, Holmes should probably be understood as making a descriptive point, rather than a normative one, and was merely describing what contract law looks like when viewed through the bad man's eyes. *See* Marco Jimenez, *Finding the Good in Holmes's Bad Man*, 79 FORDHAM L. REV. 2069, 2069 (2011).

common law means a prediction that you must pay damages if you do not keep it, — and nothing else."[115] The actual cases that are decided by judges, it seems, suggests something quite different: although it is true that the breach of a legal duty will typically invoke society's interest in compensating a victim by restoring him or her to their rightful position, where the wrongdoer's act is particularly egregious, society's interest in proportional retribution[116] will sometimes outweigh society's interest in compensation, even in a field as seemingly divorced from punishment as contract law.[117]

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[115] *The Path of the Law*, *supra* note 9; *see also* THE COMMON LAW, *supra* note 9, at 236, 300-01 ("It is true that in some instances equity does what is called compelling specific performance . . . . [But t]his remedy is an exceptional one. The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves him free from interference until the time for fulfilment has gone by, and therefore free to break his contract if he chooses.").

[116] I.e., retribution that varies in proportion to the wrongfulness of the wrongdoer's breach.

[117] *See Fault Lines*, *supra* note 13, at 1226 ("The fundamental premise of most theories of contract damages has been that contract damage law is a 'strict liability' system; that is, the reason the breach occurs does not matter in determining the measure of damages. That premise is wrong. In fact, the reason the breach occurs has always influenced courts' determination of the proper measure of damages." (footnote omitted)). But if punishment is sometimes appropriate in contract law, how is one to explain the reluctance of courts to award punitive damages for ordinary contract breaches? In fact, is not the purpose of punitive damages to punish and deter wrongdoers, rather than compensate victims, whereas the stated purpose of contract damages is the exact opposite: to compensate the injured party, but not to punish or deter?

Even here, where it is hard to imagine the remedial "rules" being any clearer, things are not what they seem. Where a wrongdoer's conduct is particularly egregious, courts will often find ways to punish the wrongdoing party, either by "adjusting" the amount of "compensation" due, as discussed above, or by "breaking the rules" of contract damages and awarding punitive damages where the breaches are particularly egregious. *See, e.g.*, Thomas v. Med. Ctr. Physicians, P.A., 61 P.3d 557, 568 (Idaho 2002) ("[I]n breach of contract cases . . . punitive damages might be appropriate if the defendant's conduct is sufficiently egregious."); Brown v. Fritz, 699 P.2d 1371, 1377 (Idaho 1985) ("[W]hen damages are sought for breach of a contractual relationship, there can be no recovery for emotional distress suffered by a plaintiff. If the conduct of a defendant has been sufficiently outrageous, we view the proper remedy to be in the realm of punitive damages."); Paiz v. State Farm Fire & Cas. Co., 880 P.2d 300, 307 (N.M. 1994) ("[A]n award of punitive damages in a breach-of-contract case must be predicated on a showing of bad faith, or at least a showing that the breaching party acted with reckless disregard for the interests of the nonbreaching party.").

While a mere breach of conduct will not imply a basis for punitive damages, "[a] mental state sufficient to support an award of punitive damages will exist when the defendant acts with 'reckless disregard' for the rights of the plaintiff — i.e., when the defendant *knows* of potential harm to the interests of the plaintiff but nonetheless

A few cases should help illustrate this point, but before examining those cases, there is an important point that must be made at the outset. Given the common law's stated preference for compensating rather than punishing, frequently encapsulated in the oft-repeated maxims of lawyers, academics, and judges alike to the effect that a wrongdoer's blameworthiness is (and ought to be) irrelevant to the calculation of damages in contract law, we should not be surprised that, if the thesis put forward in this Article is correct, we should expect at least some judges to hide their craft. For this reason, in examining the cases that follow, this Article will be much more concerned with what judges *do* when confronted with a choice between two very different measures of damages to choose from, *especially* where the law suggests the lower of two amounts *ought* to be awarded, rather than with what judges *say* they are doing, which may constitute but a judge's rhetorical act of persuasion as the author of a judicial opinion.[118] So, with these caveats in mind, let us consider some additional cases.

In *Willie's Const. Co. v. Baker*,[119] the Bakers (plaintiffs) contracted with Willie's Construction Co. (defendant) to build a home, and in their contract, specifically required their basement walls to be twelve inches higher than the industry standard for an additional price of $414.00, bringing the total purchase price to $54,401.95, due in four installments. During construction, the defendant, contrary to the

'utterly fail[s] to exercise care' to avoid the harm." *Id.* at 308 (alteration in original). The court in *Paiz* went on to emphasize that while the general rule is that breach-of-contract damages are limited to compensatory damages, courts have employed "a narrow exception . . . by penalizing conduct that constitutes a 'wanton disregard' for the nonbreaching party's rights, or 'bad faith,' with an award of punitive damages." *Id.* at 309. A breach of the implied covenant of good faith and fair dealing will be found if "one party wrongfully and intentionally used the contract to the detriment of the other party. . . where the breaching party is consciously aware of, and proceeds with deliberate disregard for, the potential of harm to the other party." *Id.* at 309-10 (citation omitted). Although the court ultimately found that punitive damages were not proper in this case because there was a finding of only negligence, there is a wonderful discussion of when punitive damages for breach of contract would be appropriate. *See id.* at 306-07. *See generally* Grynberg v. Citation Oil & Gas Corp., 573 N.W.2d 493, 500-01 (S.D. 1997) (explaining the emergence of circumstances where punitive damages are permitted, including where a "complaining party can prove an independent tort that is separate and distinct from the breach of contract.").

118 *See, e.g.*, Robert M. Lloyd, *The Reasonable Certainty Requirement in Lost Profits Litigation: What It Really Means*, 12 TRANSACTIONS: TENN. J. BUS. L. 11, 13-14 (2010) [hereinafter *Reasonable Certainty*] ("On the opinion-writing level, the judge does not explain the intuitive processes that led her to the decision. Instead, she seeks authority that makes it seem the decision was a foregone conclusion.").

119 596 N.E.2d 958 (Ind. Ct. App. 1992).

contract, only built the basement walls to the standard height. Several months later, the Bakers discovered this error and, with the other party's consent, withheld the second payment installment until "the problem could be resolved and the house completed." Unpleased with the Bakers' actions, the defendant "was hesitant to continue work because they feared the Bakers would refuse to pay for the house," ultimately taking eight months to complete a home that was originally scheduled to take 120 days. The height of the basement walls, however, was never fixed.[120] Although the cost of fixing the walls would have been "substantially less" when the breach was first discovered, once the entire house was completed, it would have cost the builders an additional $24,000 to raise the height of the basement walls, which could only be done by "lifting the house off its foundation and then adding to the top of the basement walls."[121] Plaintiff sued for the cost of repairing the defect, or roughly $24,000, while the defendant argued "that increasing the height of the walls would have no effect on the fair market value of the home," and that the measure of damages should therefore be diminution in value.[122] Indeed, the defendant even cited precedent[123] to the effect that "the court should never award the cost of repair if it is more than the difference in market value of the property before repairs compared to the value of the property after repairs."[124] Defendant also argued that spending $24,000 to tear down and reconstruct a substantial part of the home, for no increase in the home's market value, would result in economic waste.

These arguments, however, were squarely rejected by the trial court and upheld on appeal. Specifically, the trial court awarded plaintiff $25,253.32 as a cost of completion remedy, which the appellate court upheld, despite the fact that the house did not diminish in value at all due to the contractor's breach. In upholding the trial court's decision, the court of appeals specifically noted that although the defendant's experts claimed that remedying the defect "would have no effect on the fair market value of the home,"[125] "[t]he fair market value of a

120 *See id.* at 960.

121 *Id.*

122 *Id.*

123 *See generally* City of Anderson v. Sailing Concrete Corp., 411 N.E.2d 728 (Ind. Ct. App. 1980) (finding that the shortfall in the fair market value of the land is the proper measure of damages, rather than the cost of repair).

124 *Willie's Const. Co.*, 596 N.E.2d at 962.

125 *Id.* at 960.

home does not necessarily reflect the value to the homeowner."[126] Notably, in its opinion, the court described the Bakers as "innocent home buyer[s]"[127] who not only "felt that they were wronged," but "then proved in court that Willie's had wronged them."[128] One cannot prove that these considerations swayed the court to award the higher of the two remedies on retributive grounds, of course, but given that considerations such as the "innocence" of the promisee, or the "wrongfulness" of the promisor's breach are supposed to be irrelevant factors in the court's computation of compensatory damages, it is difficult to explain the court's use of such terms except on retributive grounds.

A similar case, *Kangas v. Trust*,[129] also highlights the role of the willfulness of the promisor's breach in choosing to award cost of completion over diminution in value damages. Here, the homeowners, the Trusts, contracted with the contractor, Kangas, to build a house.[130] The homeowners specifically noted their desire for a high basement ceiling as they had in their previous house.[131] Kangas did not complete the home within time specified in the contract,[132] "there was bad workmanship,"[133] and the basement height was four inches lower than the specifications.[134] The Trusts terminated the contract, hired another contractor to complete and correct the construction, and brought suit against Kangas.[135] The trial court found that the contractor had breached the contract and the homeowners were entitled to expenditures for finishing and correcting the building less one-half of the basement finishing cost and the price for which the premises was sold on completion.[136]

Kangas appealed from the Circuit Court, and the Appellate Court affirmed, holding that because the damages resulted from a willful violation of the building contract, and because the basement height was of "special value" to the homeowners, the homeowners were not limited to the diminution in value of the house, but could recover the

126 *Id.* at 961.
127 *Id.* at 963.
128 *Id.* at 964.
129 441 N.E.2d 1271 (Ill. App. Ct. 1982).
130 *Id.* at 1273.
131 *Id.* at 1275.
132 *Id.* at 1274.
133 *Id.*
134 *Id.* at 1273.
135 *See id.* 1273-74.
136 *Id.* at 1274.

full cost of repair from the builder because the basement was four inches shorter than contracted for.[137] According to the court:

> We do not believe that the circumstances of this case appropriately call for application of the diminution in value rule. Granted, the cost of remedying the defect is substantial, but it is evident that the damage arose from a wilful violation of the building contract. The trial court found as a fact that failure to conform was because Kansas "didn't pay any attention to the plans and specifications," and "built it the way he usually builds a house."[138]

The court went on to say in no uncertain terms that "Cases in other jurisdictions, however, have directly confronted this issue and appear to have qualified the diminution of value rule by holding that it applies only if the breach is not wilful."[139] The court might have also been influenced by the vulnerable position of the homeowners when compared to the expertise possessed by the contractor, which moved the contractor in a position of trust due to their knowledge and experience. For instance, the court noted that "it was intended as a home that they planned to live in as a retirement home" and that Mrs. Trusts' (presumably elderly) parents would be living with them, presumably making the dangerous state of the house especially hazardous.[140]

For a different example, consider *Meyers v. Woods*.[141] In this case, Meyers (plaintiff) paid $6,000 to Woods (defendant), the owner of a plumbing and heating business, to install an in-floor heating system in plaintiff's outdoor shed. The defendant installed the system, but failed to put any antifreeze in the system when it was installed, causing the system to freeze and become completely inoperable.[142] The defendant noted that antifreeze was not used "because of cost," and that the plaintiff was never asked about the issue of antifreeze.[143] At trial, based on expert testimony that it was "standard operating practice to put

[137] *Id.* at 1276-77.

[138] *Id.* at 1276.

[139] *Id.*

[140] *See id.* at 1273.

[141] 871 N.E.2d 160 (Ill. App. Ct. 2007).

[142] *Id.* at 165. The plaintiff was in Florida at the time, so the problem was not detected until her grandson visited the property. *Id.* ("Plaintiff's grandson Trevor Meyers testified that sometime in December 1999/January 2000 he went to plaintiff's building and saw icicles hanging from the copper pipes that fed into the heating system. On the day he went to the building, it was five degrees below zero.").

[143] *Id.*

antifreeze in this type of building,"[144] the trial court awarded plaintiff $33,150.00 as the cost of repair,[145] and the appellate court affirmed.

Here, again, the court was presented with a choice between awarding the cost of repair damages sought by the plaintiff and the diminution in value damages the defendant would have preferred. In choosing between these two measures, the court stated that cost of completion or cost of repair damages constitute the standard remedy in a breach of contract based on defective workmanship *unless* (1) there would be substantial or unreasonable "tearing down of the builder's work," or (2) "the costs [would be] unreasonably disproportionate to the benefit of the purchaser."[146] If either of these exceptions existed, the court stated, diminution in value would be the proper remedy.[147] Nevertheless, the court awarded the greater of two remedies, even though the court found that neither of these two exceptions existed, even though the damage was to an outdoor shed, rather than a home, and even though cost of repair damages were five times the cost of the contract. The fact that the wronged party was elderly and suffering from dementia,[148] and the fact that the breaching party seemed to have been in a position to take advantage of that fact, especially as the plaintiff was out of state when the heating system was installed, might have played a role in the court's choosing this measure of damages.

Or consider *St. Louis, LLC. v. Final Touch Glass & Mirror, Inc.*[149] Here, plaintiffs Mr. and Mrs. Boulton, through their entity St. Louis, LLC, bought forty-eight acres to build a 36,000 square foot house that would be both a residence and part of plaintiffs' child advocacy foundation.[150] The home cost $8.5 million to construct, and the house was to have glass exterior walls, which defendant Final Touch Glass & Mirror, Inc. was hired to install. During installation, defendant "punctured nearly all of the pipes" inside the home's support columns.[151] These pipes had been marked by plaintiffs so that

144 *Id.* at 166. Expert opinion also testified to that fact that the "[f]ailure to put antifreeze in a system such as this would be 'taking a chance' and defendant would have done a more workmanlike job if he had included antifreeze." *Id.*

145 *Id.* at 167.

146 *Id.* at 172.

147 *Id.*

148 *Id.* at 166.

149 899 A.2d 1018 (N.J. Super. Ct. App. Div. 2006).

150 *Id.* at 1019.

151 *Id.*

defendant knew to use shorter screws to avoid damaging them.[152] Plaintiffs warned defendant during project meetings "to be careful of the columns containing pipes,"[153] but defendant did not alter their installation methods to avoid damaging the pipes.[154] Because of the damage, rainwater leaked into the house, and, upon discovery of the damage, plaintiffs filed suit and sold the property.[155] The trial court awarded plaintiffs $737,500 as the cost of repair, even though plaintiffs no longer owned the property,[156] and even though the diminution in value was only $300,000.[157] This award, in turn, was affirmed by the appellate court.

In justifying its decision, the court wrote that "damages standards should be flexible, so as to present a 'common sense solution' that is 'fair to the litigants.'"[158] Notably, however, because the house had already been sold, a court concerned with compensating the injured party by putting it in the position it would have occupied but for the breach should have dismissed cost of completion damages outright, as it was now impossible for the injured party to be put in its rightful position by using (even hypothetically) such damages to remedy the breach. In its award of cost of repair damages, however, the court seemed to brush aside such concerns, citing the seemingly irrelevant point that, as a general matter, injured parties do not have to use the damages award to actually repair their property,[159] because here, the injured party had no such choice. To explain the court's decision on compensatory grounds, therefore, is a bit of a stretch, although they readily fit into a retribution-based paradigm. Indeed, this is suggested by the fact that the court seemed to focus not only on the wrongdoing of the breaching party (the court mentioned how the plaintiffs were heavily involved in monitoring development of their property and repeatedly warned defendant to be careful), but on the worthiness of the non-breaching party, focusing on facts that seemingly had nothing to do with the calculation of damages (but relevant for highlighting

152 *See id.* at 1021-22.

153 *Id.* at 1022.

154 *Id.*

155 *Id.* at 1021-22.

156 *Id.* at 1019.

157 *Id.* at 1026.

158 *Id.* at 1027 (citing 525 Main St. Corp. v. Eagle Roofing Co., 168 A.2d 33, 34, 36 (N.J. 1961)).

159 *See id.* at 1026-28 ("[I]n a claim for cost of repair as the result of faulty construction, a plaintiff is not required to spend the damages award to actually repair the property.").

the wrongfulness of defendant's conduct).[160] The court thought that "cost of repair damages" were superior not only because these damages "give[] plaintiff what it bargained for," but because they do "not reward defendant for its faulty construction."[161] Citing *Mayfield v. Swafford*,[162] the court emphasized that the damage should be calibrated not only to prevent "reward[ing the] contractor for faulty performance," but to ensure that the "innocent owner" was not "penalize[d]."[163]

Other cost of completion versus diminution in value cases tell a similar story. For instance, in *City Sch. Dist. of Elmira v. McLane Const. Co., Inc.*,[164] the court once again emphasized the deliberateness of the promisor's breach in deciding to award cost of completion rather than diminution in value damages. In this case, the school district hired a construction company to build "a swimming pool building which was to feature a roof consisting of natural wood decking supported by laminated wood beams."[165] The beams installed, however, were defective, and the school district brought a claim for breach of contract.[166] The jury awarded damages equaling the cost of replacing the beams, and the defendant appealed, arguing that diminution in value damages were more appropriate, and that they should only have to pay to plaintiff "the difference between the value of the structure as [it was] built and its value if the beams had been built as originally planned."[167]

On appeal, plaintiff argued that diminution in value damages should not be awarded here because the contractor acted in bad faith, and because their "intentional deviation from the specifications was significant."[168] The court rejected the defendant's argument and upheld the jury's verdict, awarding damages equal to the cost of replacing the beams.[169] As the court explained, diminution in value damages would have been appropriate had the contractor performed its obligations in good faith:

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160 *See, e.g.*, *id.* at 1022 (mentioning that one of the plaintiffs, Mrs. Boulton, "developed serious health problems that confined her to a wheelchair.").

161 *Id.* at 1028.

162 435 N.E.2d 953 (Ill. App. Ct. 1982).

163 *St. Louis, LLC*, 899 A.2d at 1028.

164 445 N.Y.S.2d 258 (N.Y. App. Div. 1981).

165 *Id.* at 259.

166 *See id.* at 260.

167 *Id.*

168 *Id.*

169 *Id.* at 260-61.

> Where the contractor's performance has been incomplete or defective, the usual measure of damages is the reasonable cost of replacement or completion (*American Std. v. Schectman*, 80 A.D.2d 318, 321[, 439 N.Y.S.2d 529, 531-32]). That rule does not apply if the contractor performs in good faith but defects nevertheless exist and remedying them could entail economic waste. Then, diminution in value becomes the proper measure of damages.[170]

Here, however, due to wrongfulness of the promisor's breach, the diminution in value exception did not apply here. As the court explained:

> But Weyerhaeuser does not come within this exception, for here the defect, in relation to the entire project, was not of inappreciable importance. One of the school district's principal objectives was to have an aesthetically prepossessing structure, and that goal has by all accounts been frustrated. Moreover, as the facts already recited indicate, Weyerhaeuser's conduct cannot be said to be innocent oversight or inattention.[171]

Significantly, in reaching its decision, the court not only focused on the blameworthiness of the breaching party, but also seemed to give special attention to the vulnerability of the non-breaching party. Here, the court noted the school district's "severe need of the beams to complete construction and thus protect against further loss from freezing temperatures," and it was their vulnerability that led the school district to accept the defective beams.[172]

In a similar case, *American Standard, Inc. v. Schectman*,[173] the court once again decided to award cost of completion over diminution in value due to a bad faith breach of contract. Here, American Standard Inc. ("American") agreed to convey buildings on their property to the contractor Schectman for a payment of $275,000 plus Schectman's promise to excavate the site, demolish the structures on the property, and grade the property as specified in the contract.[174] Schectman failed to complete the work, and there was a "substantial deviation from the required grade lines" and certain subsurface structures that should

[170] *Id.* at 260.
[171] *See id.* at 260-61.
[172] *Id.* at 260.
[173] 439 N.Y.S.2d 529 (N.Y. App. Div. 1981).
[174] *See id.* at 530-31.

have been removed still existed.[175] American filed suit for contractual damages and the trial court entered a jury verdict in their favor. Schectman appealed, arguing that the trial court should have charged the jury that the property owner suffered no loss, as there was "substantial performance" of the contract, and that the proper measure of damage was diminution in value because the cost of completion was out of proportion to the good to be attained.[176]

The Court held the contractor failed to perform as agreed and did not act in good faith to complete the work.[177] Therefore, the cost of completion, not the difference in value, was the proper measure of damages.[178] As the court explained:

> It is also a general rule in building and construction cases, at least under *Jacob & Youngs* in New York (see *Groves v. John Wunder Co.*, supra; Ann. 76 A.L.R.2d 805, § 6, pp. 823-826), that a contractor who would ask the court to apply the diminution of value measure "as an instrument of justice" must not have breached the contract intentionally and must show substantial performance made in good faith.[179]

Once again, the court had two different ways of compensating the injured promisee — cost of completion and diminution in value damages — and selected the highest measure of damages not because the court thought it would provide a better measure of compensation, but rather because the promisor *intentionally* breached its contract.

As a final example, consider *Kaiser v. Fishman*.[180] Kaiser entered into a contract with Fishman, the contractor, to build a dwelling, and Kaiser agreed to purchase the structure, which was to be financed in part by a mortgage payable to Fishman.[181] Shortly after the closing date, Kaiser moved in and began to notice numerous defects in the structure.[182] After attempting to work out these problems with Fishman, Kaiser brought an action to recover damages for breach of contract and breach of warranties, and Fishman brought an action to foreclose the mortgage.[183] The trial court found that Fishman was

175 *Id.* at 530-31.
176 *Id.* at 531.
177 *Id.* at 534.
178 *Id.* at 530-31.
179 *Id.* at 533 (citation omitted).
180 525 N.Y.S.2d 870 (N.Y. App. Div. 1988).
181 *Id.* at 871.
182 *Id.*
183 *Id.*

liable for breaching the contract and awarded diminution in value damages to the buyer.[184] Both the builder and the buyer appealed.

On appeal, the New York Supreme Court, Appellate Division upheld the trial court's determination of liability, but reversed the judgment as to the damages, holding that the applicable measure of damages was the cost to cure the breach rather than diminution in value.[185] Specifically, the Appellate Division held that the New York Supreme Court had failed to consider whether the contract was breached intentionally and whether the builder had acted in good faith.[186] According to the court:

> While we agree that these principles of law will generally be applied in circumstances where there has been substantial performance and the cost of completion or repair would be unreasonably wasteful, there are other factors which the courts must consider in determining what other measure of damages is to be applied, and that is, whether or not the contract was breached intentionally and whether or not the party acted in good faith.[187]

If courts only cared about compensation, on the one hand, or providing parties with the proper incentives, on the other, then there is no good reason for the courts above to have made the quantum of recovery dependent on the wrongfulness of the promisor's breach. The fact that judges, like other humans, *do* care about the reasons motivating the promisor to breach its contract, however, provides support for the contention that, at least with regard to cost of completion versus diminution in value cases, courts are trying to do more than just compensate or deter; they seem to be trying to calibrate the remedy to punish "wrongful" acts. Does this trend extend beyond the cost of completion versus diminution in value cases? Below, I argue that it does; and that courts taking into consideration the wrongfulness of the wrongdoer's actions is prevalent in contract law.

B. Actual Lost Profits v. Hypothetical Lost Profits (i.e., the Market-Contract Differential)

Another area where courts seem to take seriously the notion of retributive punishment in deed (if not in word) is where courts are

184 *Id.* at 872.

185 *Id.* at 871-72.

186 *Id.* at 872.

187 *Id.* (citation omitted).

called upon to decide whether an injured promisee should be awarded lost profits damages as measured by (a) their *actual* out-of-pocket losses or (b) their *hypothetical* losses. For instance, where goods are sold in fluctuating markets, it will frequently be the case that, due to a promisor's breach, an injured promisee will lose out on profits it would have made on a resell contract (also called "cover" damages), but seeks instead a higher amount of damages as measured by the difference between the contract price and the market price. As before, the question for the court in such cases is which of the two remedies it should award. Should it compensate the injured party by requiring the promisor to pay as damages the actual profits it would have made had the promisor performed its contract, or should it force the promisor to pay what often amounts to a much higher amount for the amount it hypothetically might have lost in a worst-case scenario? Once again, the court is being faced with a choice between what it considers to be two or more "compensatory" remedies, and if retribution plays a role here, then what we should see is that courts tend to award the larger remedy to punish more severely those defendants who intentionally breached their contracts, as measured by the market-contract differential, while allowing less culpable promisors to just pay the promisee's actual lost profits. There is plenty of evidence in the case law suggesting that this is exactly what courts are doing.

Consider, for instance, *TexPar Energy, Inc. v. Murphy Oil USA, Inc.*[188] Here, TexPar and Murphy entered into a contract whereby TexPar agreed to buy 15,000 tons of asphalt from Murphy for $53 per ton. On the same day, TexPar entered into a contract with a third party, Starry Construction Company, to sell the 15,000 tons of asphalt for $56 per ton, thereby expecting to make a profit of $3 per ton on the deal, or $45,000.[189] After the contract was entered, but before delivery was due, the price of asphalt began to rise rapidly in a very volatile market, and by June 5, had risen to $80 per ton. By this point, Murphy repudiated the contract, having only delivered 690 of the 15,000 tons required by the contract.[190] Unfortunately for TexPar, however, the third party, Starry, continued to insist that TexPar perform its contract and deliver the remaining portion of the 15,000 tons due at $56 per ton. Several weeks after Murphy's repudiation of the contract, the price of asphalt fell to $68.50 per ton, and TexPar agreed to pay Starry the difference between this new market price ($68.50 per ton) and the

188 45 F.3d 1111 (7th Cir. 1995).

189 *Id.* at 1113.

190 *Id.*

original contract price ($56 per ton), or $12.50 per ton. This market-contract differential came out to approximately $191,000 once incidental costs were taken into account.[191]

At this point, TexPar's actual damages could be approximated as the $191,000 it had to pay to Starry, plus the $45,000 it expected to make on the original deal, or about $236,000. Nevertheless, when TexPar sued Murphy for breach of contract, it did not seek its actual damages, but rather the difference between the original contract price in the TexPar-Murphy contract ($53 per ton) and the market price at the time of Murphy's repudiation ($80 per ton), multiplied by amount of undelivered asphalt (14,310 tons), for a total $386,370. The court agreed, and entered judgment for this amount, and Murphy appealed, arguing that "the general measure of damages in a breach of contract case is the amount needed to place the plaintiff in as good a position as he would have been if the contract had been performed,"[192] which here amounted to its out-of-pocket expenses $191,000, plus lost profits of $45,000. Any remedy exceeding this amount, Murphy argued, would constitute a "windfall."[193] The Seventh Circuit disagreed, however, finding that Murphy's argument, if accepted, could "create a windfall for the seller"[194] if, for example, the price of asphalt had fallen back to $56 per ton when TexPar agreed to make good Starry's losses, and Murphy sold the asphalt at the higher $80 per ton price prevailing in June.

Notably, in reaching its decision, the court suggested that contract remedies were about much more than simply compensatory damages, and explicitly rejected the traditional expectation measure of damages, which would have "place[d] the plaintiff in as good a position as he would have been if the contract had been performed" in favor of the much more generous contract-market differential prevailing at the time of Murphy's repudiation. Indeed, in justifying its decision, the court seemed less concerned with compensating the injured party than with achieving other important public policy goals, such as "discouraging sellers from repudiating their contracts"[195] and "encourag[ing] the honoring of contracts,"[196] both of which are far cries from the traditional Holmesian view that a promisor could fulfill

191 *Id.*
192 *Id.*
193 *Id.* at 1113-14.
194 *Id.* at 1114.
195 *See id.* at 1113-14.
196 *Id.* at 1114.

its duties by merely choosing between performance, on the one hand, and breach, on the other.[197]

Or consider *Tongish v. Thomas*.[198] Here, once again, is another case in which the court was presented with a stark choice between two very different measures of damages,[199] and in which the contract-market differential exceeded actual damages. In this case, Tongish had a contract to sell sunflower seeds to Coop. Tongish delivered a portion of the seeds, but when the market price of sunflower seeds doubled, he stopped delivering to Coop and sold the seeds to defendant buyer Thomas.[200] Thomas paid appellee for approximately one-half of the seeds and Tongish filed an action to collect the balance.[201] "Meanwhile, Coop intervened in the action, seeking damages for Tongish's breach of their contract."[202] The trial court awarded damages to Coop based on its loss of expected profits, which only amounted to $455.51.[203]

The intermediate appellate court reversed, holding that the difference between market price and contract price was the proper measure of damages pursuant to Kan. Stat. Ann. section 84-2-713, ostensibly because the latter statute was more specific than the general damages provision of Kan. Stat. Ann. section 84-1-106, upon which the $455.51 award had been based.[204] On appeal, the supreme court of Kansas affirmed the intermediate appellate court's decision, agreeing that the difference in market price and contract price was the correct method of measuring Coop's damages. Additionally, the court held that damages computed under section 84-2-713 encouraged the honoring of contracts and market stability.[205] Finally, the court

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197 *See The Path of the Law*, *supra* note 9, at 462 ("The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, — and nothing else.").

198 840 P.2d 471 (Kan. 1992).

199 "For over sixty years our courts have divided on the question of which measure of damages is appropriate for the supplier's breach of his delivery obligations. The majority view, reinforced by applicable codes, would award market damages even though in excess of plaintiff's loss. A persistent minority would reduce market damages to the plaintiff's loss, without regard to whether this creates a windfall for the defendant. Strangely enough, each view has generally tended to disregard the arguments, and even the existence, of the opposing view." *Id.* at 475.

200 *Id.* at 472.

201 *Id.*

202 *Id.*

203 *See id.*

204 *See id.* at 473-74.

205 *Id.* at 476.

suggested that this case should be distinguished from cases in which actual damages rather than damages measured by the contract-market differential were awarded, in large part due to the unsavory nature of Tongish's breach. For instance, the court emphasized the fact that "Tongish testified that he breached the contract because he was dissatisfied with dockage tests of Coop and/or Bambino," and that "Tongish took advantage of the doubling price of sunflower seeds and sold to Danny Thomas."[206] Although the trial court had no need to explicitly find whether Tongish breached the contract in bad faith, it came close by finding that there was no valid reason for the breach.

Therefore, although the court specifically disclaimed, one the one hand, the need to look into whether Tongish's breach was in bad faith, on the other hand, it suggested that the reasons behind Tongish's breach *did matter*, and, more importantly, backed up its language with a significant remedy that gave the injured promisee much more than the lost profits it would have received had the contract been performed. As with the previous case, *TexPar*, this suggests that the court was concerned not only with compensating the injured promisee, but with encouraging the performance of contracts[207] and punishing[208] the breaching promisor, both of which are frequently disclaimed as improper considerations for a court to take into account in contract law.

As another example, consider *KGM Harvesting Co. v. Fresh Network*.[209] Here, KGM Harvesting ("KGM") had a contract to deliver lettuce each week to Fresh Network ("Fresh").[210] When the price of lettuce rose dramatically, KGM refused to deliver the required

206 *Id.* at 475.

207 *See id.* at 476 ("If loss of actual profit pursuant to K.S.A. 84-1-106(1) would be the measure of damages to be applied herein, it would enable Tongish to consider the Coop contract price of $13 per hundredweight plus 55 cents per hundredweight handling fee as the 'floor' price for his seeds, take advantage of rapidly escalating prices, ignore his contractual obligation, and profitably sell to the highest bidder. Damages computed under K.S.A. 84-2-713 encourage the honoring of contracts and market stability.").

208 *See, e.g.*, *id.* at 475-76 ("Although [a law review article relied on by the court] discussed both sides of the issue, the authors came down on the side of market price/contract price as the preferred damages theory. *The authors admit that market damages fly in the face 'of the familiar maxim that the purpose of contract damages is to make the injured party whole, not penalize the breaching party.'* 92 HARV. L. REV. 1437. However, they argue that the market damages rule discourages the breach of contracts and encourages a more efficient market." (emphasis added)).

209 42 Cal. Rptr. 2d 286 (Ct. App. 1995).

210 *Id.* at 286.

quantity of lettuce at the contract price.[211] Fresh was then forced to purchase lettuce on the open market in order to fulfill its contractual obligations to a third party, Castellini Company ("Castellini"), and Castellini covered all of Fresh's extra expenses except for $70,000.[212] After KGM filed suit, Fresh cross-complained to recover damages incurred by KGM's breach.[213] At trial, the jury determined that KGM "breached the contract, that its performance was not excused, and that [Fresh] was entitled to $655,960.22, which represented the difference between the contract price of nine cents a pound and what it cost buyer to cover by purchasing lettuce in substitution in May and June 1991."[214] Specifically, the plaintiff was awarded damages in an amount equal to the difference between the contract price and the price plaintiff was forced to pay for substitute lettuce on the open market.[215] KGM appealed, arguing that these damages were excessive, and that the contract-cover differential of Uniform California Commercial Code section 2-712 was inappropriate where the injured party was able to pass on its extra expenses to the open market.[216] Specifically, KGM argued that, despite the language of the UCC, a buyer like Fresh who covers "should not necessarily recover the difference between the cover price and the contract price."[217] Specifically, KGM argues that because of Fresh's "cost plus" contract with Castellini, Fresh was "able to pass on the extra expenses (except for $70,000)" caused by KGM's breach.[218]

The appellate court, rejecting KGM's argument, affirmed the lower court's judgment in favor of Fresh. Interestingly, the court took great pains to make clear that taking into account "the good or bad faith of the breaching party is inappropriate in a commercial sales case," and that "courts should not differentiate between good and bad motives for breaching a contract in assessing the measure of the non-breaching party's damages."[219] Nevertheless, the appellate court concluded that where Fresh covered by making in good faith and without unreasonable delay any reasonable purchase of goods in substitution for those due from defendant, plaintiff could recover from defendant

211 *Id.* at 287.
212 *Id.*
213 *Id.*
214 *Id.*
215 *See id.*
216 *See id.* at 288.
217 *Id.*
218 *Id.*
219 *Id.* at 293.

as damages the difference between the cost of cover and the contract price in accordance with Uniform California Commercial Code section 2-712, ignoring KGM's argument that such an award would result in a "windfall" for Fresh.[220]

Here, then, is another example of a court specifically awarding a so-called compensatory remedy that exceeded the injured party's actual loss, although such an award is extremely difficult to justify on compensatory grounds, especially in light of the fact that "[w]hat the buyer chooses to do with that bargain is not relevant to the determination of damages."[221] Indeed, it is difficult to explain such a remedy on pure compensatory grounds, because in this case, as in *TexPar* and *Tongish*, the problem, "as everyone recognizes, is that the award of the contract-market price differential leaves the middleman in a better position than he would have occupied if the contract had been performed (in which case he would have realized only his markup)."[222] If, however, we instead focus on retributive considerations, such as the willful nature of the promisor's breach, these cases, and others like them, seem to fall into place, the court's language to the contrary notwithstanding.

A few more examples should solidify this point. In *Sun-Maid Raisin Growers v. Victor Packing Co.*,[223] Victor contracted to sell raisins to Sun-Maid. After the price of raisins rose dramatically, due to a shortage in the raisin crop, Victor breached.[224] Sun-Maid had to go into the open market to cover in order to meet its existing orders for the re-sale of raisins.[225] The trial court found in favor of Sun-Maid and awarded damages of $295,339.40 for lost profits.[226] Victor appealed, arguing the damages awarded for lost profits were unreasonable because the amount of lost profits was unforeseeable at the time the contracts were formed.[227]

The court affirmed, holding that under Uniform California Commercial Code section 2713, "the basic measure of damages for a seller's nondelivery or repudiation" of a contract was the difference between market price and contract price at the time the buyer learned

220 *See id.*
221 *Id.*
222 *Willfulness*, *supra* note 13, at 1522.
223 194 Cal. Rptr. 612 (Ct. App. 1983).
224 *See id.* at 613, 615.
225 *See id.* at 615.
226 *Id.* at 613.
227 *Id.*

of the breach.[228] In addition, Sun-Maid was entitled to recover incidental expenses such as expenses of cover under Uniform California Commercial Code section 2715(1), and consequential damages to the extent they could not have been avoided by cover under Uniform California Commercial Code section 2715(2)(a).[229] Consequential damages included any loss resulting from Sun-Maid's requirements and needs of which Victor had reason to know. Since Victor knew that the raisins were purchased for resale, they were charged with knowledge that Sun-Maid anticipated a profit.[230] Indeed, in issuing its decision, the *Sun-Maid Raisin Growers* court was very explicit about the role that bad faith played in its consideration of an appropriate remedy:

> This is where the trial court's findings of appellants' bad faith become pertinent. A reasonable inference may be drawn that from early spring appellants were gambling on the market price of raisins in deciding whether to perform their contracts with Sun-Maid. If the price would fall below the contract price, appellants would buy raisins and deliver them to Sun-Maid. If the market price went substantially above the contract price, appellants would sit tight.[231]

Without using the actual words "retribution" or "punishment," the court's language strongly suggested that it was, in part, retributively punishing the promisor for its bad faith breach of contract, and the remedy awarded by the court must have certainly felt this way to the promisor. Indeed, if both measures of damages before the court were truly "compensatory," and if the larger of the two was chosen in no small part due to the "bad faith" breach of the promisor, it is difficult to support any other conclusion than that the court was punishing the promisor for its actions.[232]

Indeed, even in cases in which courts take great pains to toe the traditional contract line and repeat in their opinions that the bad faith of the breaching party should be irrelevant in the court's

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[228] *Id.* at 614, 617.

[229] *Id.* at 614.

[230] *See id.* at 614, 615.

[231] *Id.* at 616.

[232] *See id.* ("While we cannot read Sahatdjian's mind during the late spring and summer months, we can surmise that he speculated that the market price would remain below the contract price after the current crop year so that he could purchase new raisins for delivery to Sun-Maid at the contract price. He threw the dice and lost.").

determination of damages, it is often in such cases there is no bad faith to speak of, rendering the court's language little more than platitudinous rhetoric. Consider, for instance, *Allied Canners & Packers, Inc. v. Victor Packing Co.*[233] Allied enter into two contracts with Victor to buy raisins.[234] Allied then had contracted to sell the raisins to Japanese firms.[235] Heavy rains damaged the raisin crop and "Victor notified Allied that it would not deliver the raisins as required by the contracts."[236] "Allied did not cover by purchasing raisins on the open market" and they did not fulfill their contracts with the third-party buyers.[237] Allied sued Victor for breach of contract, and the trial court found in Allied's favor.[238] At the trial court, damages were awarded on the basis that plaintiff was a broker, rather than a buyer, under the Uniform California Commercial Code, and, thus, the commercial laws governing a buyer's remedies for a seller's breach of contract were not applied.[239]

On appeal, the court found Allied was the buyer in the contract and had a "forward contract" to sell raisins to a foreign firm.[240] However, under the facts of the case, in which Victor *knew* Allied had a resale contract, Allied was unable to show that it would be liable in damages to a buyer on its forward contract, and there was no finding of bad faith on the part of defendant.[241] The policy of Uniform California Commercial Code section 1106(1), "that the aggrieved party be put in as good a position as if other party had performed, require[d] that the award of damages to [plaintiff] be limited to [plaintiff's] actual loss, the amount [plaintiff] expected to make on the transaction."[242] As the court explained:

> We do not deem this record one to support an inference that windfall damages must be awarded the buyer to prevent unjust enrichment to a deliberately breaching seller. (Compare *Sun Maid Raisin Growers v. Victor Packing Co.*, *supra*, 146 Cal.App.3d 787, 194 Cal. Rptr. 612 [where, in a case coincidentally involving Victor, Victor was expressly found by

233 209 Cal. Rptr. 60 (Ct. App. 1984).
234 *Id.* at 61.
235 *See id.*
236 *Id.*
237 *Id.* at 61-62.
238 *Id.* at 60.
239 *Id.* at 62.
240 *See id.* at 61-62, 63.
241 *Id.* at 66.
242 *Id.*

> the trial court to have engaged in bad faith by gambling on the market price of raisins in deciding whether to perform its contracts to sell raisins to Sun Maid].)[243]

Despite this talk of bad faith, however, it played little to no role in the court's decision, because bad faith simply was not at play here. This is because, in *Allied*, the seller did not fail to deliver to take advantage of a move in the market price, but rather because its *crop was destroyed*. Therefore, the seller here, unlike the seller in Tongish, who *was* attempting to exploit the difference between the contract and market price, was acting with the best of intentions. The court's rhetoric about the irrelevance of bad faith breaches was irrelevant to the court's resolution of the proper measure of damages because there was no bad faith breach. Looked at this way, the case provides another example suggesting that, where the breach is not wrongful, and the court has a choice between two or more compensatory remedies, it will generally award the smaller of the two remedies.

In addition to taking into account retributive considerations when choosing between two different measures of damages (e.g., cost of completion versus diminution in value damages, or actual lost profits versus hypothetical lost profits as measured by the contract-market differential), courts also take retributive considerations into account in the way they apply the traditional limitations on compensatory damages of certainty, avoidability, and foreseeability. It is to these considerations that we now turn.

C. Limitations on Damages

In contract law, promisees are most frequently compensated through an award of expectation damages,[244] which is designed to put the injured party in the position it would have occupied but for the promisor's breach.[245] However, these damages are traditionally limited by the principles of certainty, avoidability, and foreseeability.[246] More

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[243] *Id.* (alteration in the original).

[244] *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. a (AM. LAW INST. 1981).

[245] *E.g.*, FARNSWORTH, *supra* note 15, § 12.1, at 730 (measuring expectation damages as the sum needed to "put [the injured party] in as good a position as it would have been in had the contract been performed").

[246] *See, e.g.*, *id.* § 12.8, at 759-60 ("To the general principle of recovery based on the promisee's expectation there emerged three important limitations that now serve as a basis not merely for instructing jurors, but for passing on the admissibility of evidence and for withdrawing some elements of damage from the jury's consideration altogether. One of these limitations is that the injured party cannot recover damages

specifically, the general rule is that the injured party can only recover those expectation damages that are: (1) proved with reasonable certainty, (2) cannot be avoided through mitigation, and (3) are foreseeable to the breaching party at the time of entering into the contract as a probable consequence of its breach. The result of these limitations, of course, is that sometimes compensatory damages fall short of their stated goal.[247] Far from constituting hard and fast rules, however, each of these traditional limitations on damages is easily manipulable,[248] and are frequently used by courts to calibrate the remedy in accordance with wrongfulness or willfulness of the breaching party's behavior.[249] Stated differently, and in stark contrast to the prevailing view about how contract remedies are awarded, the cases discussed below suggest that courts frequently take into account retributive considerations, applying these traditional limitations with particular rigor where the promisor acts in good faith, which has the effect of limiting the promisee's compensatory damages, and with much less rigor where the promisor's breach is particularly wrongful, leading to a much larger compensatory remedy for the promisee.

1. Certainty

The general rule is that damages, to be recoverable, must generally be proved with reasonable certainty.[250] Conceptually, this means that

for loss that could have been avoided if that party had taken appropriate steps to do so . . . . A second limitation denies the injured party recovery for loss that the party in breach did not have reason to foresee as a probable result of the breach at the time the contract was made . . . . The third limitation is that the injured party cannot recover damages for loss beyond the amount proved with reasonable certainty." (footnotes omitted)).

247 *See, e.g.*, *id.* § 12.8, at 760 ("The effect of these three limitations is to reduce the amount of damages recoverable under the general principle that the law protects the injured party's expectation.").

248 *See, e.g.*, L. L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52, 85 (1936) [hereinafter *Reliance Interest*] (arguing that the test of foreseeability, one of the three classic limitations on compensatory damages, is "subject to manipulation by the simple device of defining the characteristics of the hypothetical man who is doing the foreseeing").

249 This idea is tantalizingly suggested, but not fleshed out, in Professor Murray's treatise on contract law. JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS §107(C)(2), at 683 (4th ed. 2001) ("Courts typically do not define 'wilful' though they appear to be concerned with the motive of the defaulting party. There is judicial support for the view that one whose motive is good should be entitled to greater consideration than one who acts from improper motives.").

250 RESTATEMENT (SECOND) OF CONTRACTS § 352 (AM. LAW INST. 1981) ("Damages are not recoverable for loss beyond an amount that the evidence permits to be

despite the rightful position principle, which holds that an injured party should be put in the position it would have occupied but for the promisor's breach,[251] the certainty requirement will operate to ensure that some plaintiffs will not recover anything at all, and that many plaintiffs who do recover may not recover less than the amount needed to put them in their rightful position through an award of expectation damages whenever these damages cannot be proven with the requisite certainty. Of course, without a requirement that damages be proven with a reasonable degree of certainty, the opposite problem would arise, in that many plaintiffs would recover damages that often exceeded the harm they suffered. The important point to realize, however, is that the standard requiring that damages be proved with "reasonable certainty" is a flexible one, and that in applying this standard, courts are doing much more than merely supplying this major premise to a set of facts to reach a pre-ordained conclusion, but are frequently taking into account a number of hidden factors,[252] not least of which includes the blameworthiness of the wrongdoer.[253] More specifically, where a wrongdoer's actions make it difficult for a promisee to satisfy this standard, courts are often willing to lower it,

established with reasonable certainty."); *see also* Griffin v. Colver, 16 N.Y. 489, 491 (1858) (damages "must be shown with certainty, and not left to speculation or conjecture"); ARTHUR GEORGE SEDGWICK, ELEMENTS OF THE LAW OF DAMAGES: A HANDBOOK FOR THE USE OF STUDENTS AND PRACTITIONERS 13 (2d ed. 1909) ("The most fundamental general rule with regard to damages is that of Certainty. Damages must be certain, both in their nature and in respect to the cause from which they spring. It is more fundamental than any rule of compensation, because compensation is allowed or disallowed subject to it.").

[251] *See, e.g.*, *Reliance Interest*, *supra* note 248, at 54 (the purpose of expectation damages "is to put the plaintiff in as good a position as he would have occupied had the defendant performed his promise").

[252] Hidden, in any event, from the casual reader of judicial opinions. *See, e.g.*, *Reasonable Certainty*, *supra* note 118, at 17 (arguing that when courts consider the extent to which damages must be proven with a reasonable degree of certainty in awarding lost profits, they frequently "apply a discretionary standard and then choose one or more of the rules to serve as a justification for a decision already reached on another basis").

[253] *See, e.g.*, *id.* at 39 ("The extent to which the defendant has done something morally wrong, rather than merely causing damage through inadvertence or bad luck, plays a major part in the courts' determinations of whether the lost profits have been proven with reasonable certainty . . . ."); *see also id.* at 43 (arguing that when courts manipulate the standard that damages be proven with reasonably certainty, they are "merely [offering] post hoc justifications of decisions reached on other grounds. What courts are actually doing, and what they should do, is take into account the defendant's blameworthiness as one of a number of factors in determining whether the lost profits have been proven with sufficient certainty").

seemingly in proportion to the extent to which the wrongdoer has acted willfully, as I shall now argue.[254]

Consider, for instance, *U.S. Naval Inst. v. Charter Commun., Inc.*[255] Here, the previous court found that Berkley's premature publication of the paperback edition of Naval's book constituted a contract violation and an infringement of Naval's copyright,[256] and calculated Naval's damages from the wrongful publication as the profits Naval would have earned from hardcover sales in September 1985 if the competing paperback edition had not been offered for sale. Both plaintiff and defendants sought review of the damages awarded to the plaintiff.[257]

On appeal, the court set aside the district court's award of relief under the Copyright Act, finding Berkley was not liable for copyright infringement.[258] However, the court upheld that Naval was entitled to recover for breach of contract.[259] Specifically, they found the previous court properly measured damages under a breach-of-contract theory and that it was within the prerogative of the court as the finder of fact to look to the plaintiff's sales.[260] True, these damages could not be ascertained with the reasonable certainty ordinarily required by law, but as between an innocent party and a willful breacher, the risk is better placed on the wrongdoing party. As the court explained:

> Though there was no proof as to precisely what the unimpeded volume of hardcover sales would have been for the entire month of September, any such evidence would necessarily have been hypothetical. *But it is not error to lay the normal uncertainty in such hypotheses at the door of the wrongdoer who altered the proper course of events, instead of at the door of the injured party*.[261]

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[254] FARNSWORTH, *supra* note 15, § 12.15, at 800 (citing U.S. Naval Inst. v. Charter Commc'ns, Inc., 936 F.2d 692, 697 (2d Cir. 1991)) ("Doubts are generally resolved against the party in breach on the rationale, as Judge Amalya Kearse put it, that it is 'not improper, given the inherent uncertainty, to exercise generosity in favor of the injured party rather in favor of the breaching party.' Courts are therefore less demanding in applying the requirement if the breach was 'willful,' in spite of the general tenet that the amount of contract damages does not turn on the character of the breach." (footnote omitted)).

[255] 936 F.2d 692 (2d Cir. 1991).

[256] *Id.* at 694.

[257] *Id.* at 693-94.

[258] *Id.* at 695-96.

[259] *Id.* at 696.

[260] *Id.* at 696-97.

[261] *Id.* at 697 (emphasis added). The court went on to note that "[t]hough the court

The Court may also have been influenced by Naval's vulnerability in going up against an industry leader in publishing, emphasizing Naval's position as "a small specialized publisher of books of naval interest,"[262] and comparing its lack of experience in handling best-sellers like *The Hunt for Red October* to Berkley's position as a major publishing organization with experience in buying the rights to publication.[263] Here, then, was one example of a court relaxing the certainty requirement in favor of the injured party rather than the breaching party.

Another example can be found in *Locke v. United States*,[264] in which the court held that uncertainty about the amount of damages suffered will not preclude recovery if a reasonable probability of damage can be established. Here, the contractor, Locke, brought two claims against the defendant, the United States, concerning two separate contracts. One claim was for lost profits resulting from a breach of a requirements contract covering repair of typewriters, and a second claim was for damages resulting from defendant's improper refusal to accept plaintiff's bid on another typewriter repair contract.[265] Both parties sought summary judgment, and the court granted summary judgment to the government in regard to the second contract.[266]

In regard to the first contract, the plaintiff claimed that the contract was "terminated for default" without proper cause.[267] Defendant claimed that no damage had resulted to plaintiff, because under a requirements contract, no minimum requirement was guaranteed.[268] The Court disagreed, and directed the trial commissioner to make further determinations on the amount of damage that plaintiff incurred with respect to the first contract.[269] The Court stated that if a reasonable probability of damage can be clearly established, uncertainty as to the amount will not preclude recovery, especially

accurately described its selection of August 1985 sales as its benchmark as 'generous [ ],' it was not improper, given the inherent uncertainty, *to exercise generosity in favor of the injured party rather than in favor of the breaching party*." *Id.* (emphasis added).

[262] U.S. Naval Inst. v. Charter Commc'ns, Inc., 875 F.2d 1044, 1045 (2d Cir. 1989).

[263] *See id.* ("Since Naval had never before conducted an auction for the paperback rights to one of its books, it sought advice from industry contacts on the proper procedures to follow.").

[264] 283 F.2d 521 (Ct. Cl. 1960).

[265] *Id.* at 522.

[266] *Id.* at 522, 526.

[267] *See id.* at 523.

[268] *Id.*

[269] *See id.* at 523, 525.

where the inability to prove damages with reasonable certainty was a consequence of the promisor's own conduct:

> But the constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is not to be confused with right of recovery. Nor does it exonerate the defendant that his misconduct, which has made necessary the inquiry into the question of harm, renders that inquiry difficult. The defendant who has wrongfully broken a contract should not be permitted to reap advantage from his own wrong by insisting on proof which by reason of his breach is unobtainable . . . .
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> . . . .
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> Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery by rendering the measure of damages uncertain. Failure to apply (this rule) would mean that the more grievous the wrong done, the less likelihood there would be of a recovery. "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created."[270]

[270] *Id.* at 524 (citations omitted) (citing Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264-65 (1946)). In *Bigelow*, petitioner, the owner of Jackson Park Theatre, brought suit against respondent RKO, theatre owners and film distributors, claiming that the respondent discriminated against petitioner in favor of competing theatres owned or controlled by RKO. The jury returned a verdict for Bigelow, but the court of appeals reversed on the ground that the evidence of damage was not sufficient to support the award because it was not proven with the requisite degree of certainty. The Supreme Court reversed the court of appeals, however, finding that there was evidence from which the jury could have found that respondents maintained a discriminatory system of distributing motion pictures by a conspiracy among themselves. Specifically, although it was true that petitioner could not prove its damages with the degree of certainty generally required in such cases, it was the respondents' wrongful action that prevented Bigelow from making a more precise proof of its damages. Therefore, the Court stated that Bigelow's method of calculating damages (i.e., comparing its net receipts before and after RKO's unlawful action) afforded a *sufficient* basis for the jury's computation of the damage, which was permissible where it was the respondents' own wrongful action that prevented Bigelow from making any more precise proof of the amount of the damage. As the Court explained, "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created . . . . [T]he wrongdoer may not object to the plaintiff's reasonable estimate of

The principle articulated in the previous cases can be understood as an exception to the general rule that the injured party, to recover, must prove its damages with reasonable certainty. But even more than this, I think it is fair to say that while damages are concerned with compensation, they are not *exclusively* concerned with this principle. Rather, there seems to be an implicit recognition in the law of the important but often neglected principle that where — but for defendant's wrongful conduct — plaintiff would not have suffered a loss at all (or would have suffered a much smaller loss), it should be the defendant who is made responsible for such losses for, in a very real sense, it is the defendant who can be said to have *caused* these losses. Where courts see that plaintiff suffered losses it would not have

the cause of injury and of its amount, supported by the evidence, because not based on more accurate data which the wrongdoer's misconduct has rendered unavailable." *Bigelow*, 327 U.S. at 265.

The court in *Grace v. Corbis-Sygma*, 487 F.3d 113 (2d Cir. 2007) reached a similar conclusion. There, plaintiff was a photojournalist who had photographed many celebrities and important national and international events. As such, plaintiff entered into an agreement with defendant in which defendant agreed to act as plaintiff's agent in the licensing of his photographs and plaintiff would receive fifty percent of the net sales. Defendant, however, never had a system to keep track of its inventory and many images went missing. Plaintiff sued upon learning that the defendant could not account for and return many photographs that plaintiff had entrusted to them. In evaluating plaintiff's loss, the court observed that plaintiff's burden to prove his damages with reasonable certainty was impacted by defendant's wrongdoing, and noted that "[t]he difficulty in computing damages under these circumstances is apparent. However, in cases such as this, 'in which the defendant's wrongdoing prevented the plaintiff from demonstrating the exact measure of the damages suffered, the factfinder may make a "just and reasonable estimate" of the damages caused.' Therefore, although [plaintiff] had the burden of proof as to loss, 'he had no obligation to offer a mathematically precise formula as to the amount of damages.'" *Id.* at 119 (citations omitted). Although the plaintiff received less than he claimed, he got far more than he would have had the court upheld the traditional limitations that damages must be proved with reasonable certainty. Citing *Bigelow*, the court explained that, in awarding damages, "Relevant data must be considered, and '[w]hen damages are at some unascertainable amount below an upper limit and when the uncertainty arises from the defendant's wrong, the upper limit will be taken as the proper amount.' This principle was developed in *Bigelow* to avoid the potential for a wrongdoer to 'profit by his wrongdoing at the expense of his victim.'" *Id.* at 119 (citations omitted). The court even went on to note that, "Although this figure may seem generous, given the District Court's findings that Grace's average earnings per year from *all* images in 1979-1989 totaled $8,475.77, without New York income, and $11,002.48 in 1990-2002, including New York income, 'the wrongdoer may not object to the plaintiff's reasonable estimate of the cause of injury and of its amount, supported by the evidence, because not based on more accurate data which the wrongdoer's misconduct has rendered unavailable.'" *Id.* at 122 (citing *Bigelow*, 327 U.S. at 265).

suffered but for defendant's conduct, therefore, they are much more likely to put the burden on the defendant, rather than on the plaintiff, regarding the degree to which damages must be proven with reasonable certainty.

For instance, one clear example of a court relaxing the certainty requirement where the wrongdoer's own actions prevented damages from being calculated with such precision is *Budget Rent-A-Car of Missouri, Inc. v. B & G Rent-A-Car, Inc.*[271] Here, Budget Rent-A-Car, of Missouri, ("Licensor") made an exclusive franchise with Budget Rent-A-Car, of Kansas City, Kansas, ("Sublicensee") to rent automobiles in that city.[272] (The sublicensee later changed its corporate name to B & G Rent-A-Car, Inc). The sublicensee subsequently breached the provision of the contract that stated that the "sublicensee shall not during the term of this Agreement and for a period of one hundred eighty (180) days after its termination engage in any other vehicle rental business from a location within the licensed territory."[273] The licensor therefore filed a breach of contract action against B&G, alleging that it violated their covenant not to compete. The trial court gave judgment for the licensor, awarding it damages for lost profits, attorney fees, punitive damages, and an injunction. B&G appealed.[274]

On appeal, the court affirmed the award of damages, holding that sufficient evidence supported the determination that appellants breached the covenant not to compete, and the evidence was sufficiently certain and definite to support the award for lost profits.[275] The court also held that there was sufficient evidence showing that former car rental franchisees' breach of noncompetition covenant in the franchise agreement was *willful and without just cause or excuse* and, even more dramatically, found that the fact that the franchisees sought to conceal such breach was sufficient to support award of punitive damages.[276] Although the promisee was not able to prove damages with the requisite degree of certainty ordinarily required to recover its losses, here the court found that it was willing to waive this requirement. As the court explained: "The covert manner of the breach considered, Garrett proved all damage capable of proof and he

[271] 619 S.W.2d 832 (Mo. Ct. App. 1981).

[272] *Id.* at 833.

[273] *Id.* at 833-34.

[274] *Id.* at 834-35.

[275] *Id.* at 837-38.

[276] *Id.* at 838 ("The evidence shows appellants' breach to have been wilful and without just cause or excuse, and the same was sought to be concealed. The award of punitive damages is supportable.").

will not be denied compensation because the nature of the wrongdoing prevented a more fastidious demonstration of loss."[277]

For another example, consider *Milton v. Hudson Sales Corp.*[278] Here, Milton, as dealer, and Hudson, as distributor, executed a "Hudson Distributor-Master Dealer Sales Agreement."[279] Milton alleged that Hudson failed to supply him with his reasonable requirements of new cars for his dealership, and that all defendants conspired to restrain trade by not renewing plaintiff's dealership contract.[280] The trial court found against defendant manufacturer alone on the breach of contract claim.[281] It entered judgment against four defendants on the conspiracy to restrain trade claim but granted their motion for a new trial.[282]

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[277] *Id.* at 837 (citing Garrett v. Am. Family Mut. Ins. Co., 520 S.W.2d 102, 118 (Mo. Ct. App. 1971)). The court went on to note that: "It is perhaps true that absolute certainty as to the amount of loss or damages in such cases is unattainable, but that is not required to justify a recovery. All the law requires is that it be approximated by competent proof. That proof of the exact amount of loss is impossible will not justify refusing compensation. If that were the law, contracts of the kind here involved could be violated with impunity. All the law requires in cases of this character is that the evidence shall, with a fair degree of probability, tend to establish a basis for the assessment of damages." *Id.* at 835 (citing Schatz v. Abbott Labs., Inc., 51 Ill.2d 143, 147-48 (1972)); *see also id.* at 837 ("Other cases following the Illinois and Missouri trends are: Burckhardt v. Burckhardt, 42 Ohio 474 (1885); Wood v. Pender-Doxey Grocery Co., 151 Va. 706, 144 S.E. 635 (1928), in which an intentional wrong was involved, the holding being that in such cases the degree of proof is much relaxed in favor of the injured party. See also Corbin on Contracts, § 1021 (1964); Williston, A Treatise on the Law of Contracts, § 1345 (3rd Ed. 1968); and McCormick on Damages, § 27, pp. 101-102, where it is said, 'There are various modifications to the rule of certainty. They enable the courts, while holding up a high standard of certainty as an ideal, to avoid harsh applications of it. Among them are: (a) If the fact of damage is proved with certainty, the extent or amount may be left to reasonable inference. (b) Where the defendant's wrong has caused the difficulty of proof of damage, he cannot complain of the resulting uncertainty. (c) Mere difficulty in ascertaining the amount of damage is not fatal. (d) Mathematical precision in fixing the exact amount is not required. (e) If the best evidence of the damage of which the situation admits is furnished, this is sufficient. (f) The plaintiff may recover the value of his contract, and this may be measured by the value of the expected profits. (g) Profits may sometimes be proved as evidence of damages, when they would not be directly recoverable.' Note also the Uniform Commercial Code (adopted in Illinois), § 1-106 (1), and Comment 1; and § 2-715, Comment 4, indicating a relaxation of the rule of certainty in sales transactions.").

[278] 313 P.2d 936 (Cal. Dist. Ct. App. 1957).

[279] *Id.* at 940.

[280] *Id.* at 939.

[281] *Id.*

[282] *Id.*

On appeal, the court affirmed the verdict finding breach of contract against defendant manufacturer, and held that there was an implied in fact promise to supply plaintiff with his requirements for cars, in good faith, and that the amount of damages assessed was as reasonably accurate as the circumstances would permit.[283] The court justified its decision by noting that "the defendant whose wrongful act gave rise to the injury will not be heard to complain that the amount thereof cannot be determined with mathematical precision."[284] In a statement that left little doubt about how the court viewed the relationship between the wrongfulness of the promisor's breach and the promisee's burden to prove damages with reasonable certainty, the court noted that

> Appellants have misconceived the law applicable to this situation. They stand before the court as *violators of their contract*. Their acts caused damage, serious damage, to Gardner. Those facts were proved definitely and with certainty. The law requires, and properly so, that the fact of damage be proved with reasonable certainty. Uncertainty as to the fact of damage, that is, as to the nature, existence or cause of the damages, is fatal. But the same certainty as to the amount of the damage is not required. An *innocent party* damaged by the acts of a *contract violator* will not be denied recovery simply because precise proof of the amount of damage is not available. The law only requires that some reasonable basis of computation be used, and will allow damages so computed even if the result reached is only an approximation.[285]

The language seems as though it could have been written by a chancellor in equity coming down harsh on a wrongdoer for not having "clean hands" (the wrongdoers, who have "misconceived the law applicable to this situation . . . stand before the court as violators of their contract"), thereby relaxing the standard that damages must be proven with reasonable certainty where they are inflicted on "[a]n innocent party" by a "contract violator" in a favor of a standard allowing such damages to be awarded "even if the result reached is only an approximation" of the actual harm caused. One cannot read such language, examples of which are abundant throughout the common law, and believe that courts, who are staffed by humans after

[283] *Id.* at 944-49.

[284] *Id.* at 947.

[285] *Id.* at 946-47 (emphasis added) (quoting Allen v. Gardner, 272 P.2d 99, 102 (Cal. Dist. Ct. App. 1954)).

all, are not concerned with the wrongfulness of the defendant's conduct, or that they are not willing to calibrate the remedy accordingly. What judges do in practice, in short, seems to be much more flexible than one would think if they were only familiar with the traditional rule that damages, to be recovered, must be proven with reasonable certainty. As we shall see, courts are not only flexible about the certainty standard, but about the avoidability standard as well.

2. Avoidability

Typically, an injured promisee is only entitled to recover from the promisor those damages that it could not have avoided by taking reasonable measures to mitigate its damages.[286] In American contract law, this principle was perhaps most famously articulated in *Rockingham County v. Luten Bridge Co.*[287] There, Rockingham County entered into a contract with the Luten Bridge Company for construction of a bridge. After construction had begun, but before the bridge was completed, Rockingham County breached and told the Luten Bridge Co. to cease construction on the bridge because it had "decided not to build the road of which the bridge was to be a part."[288] At this point in time, the Luten Bridge Co. had only expended about $1,900 in labor and materials. Nevertheless, the bridge company continued to build the bridge until it was completed, at which time it brought suit to recover $18,301.07 for the amount due for construction of the bridge. In deciding the case, the court held that although "the county had no right to rescind the contract," and although it breached the contract with the plaintiff, the bridge company should have refrained from "increas[ing] the damages flowing therefrom."[289] According to the court, rather than "pile up damages," the promisee's "remedy is to treat the contract as broken when he receives the notice, and sue for the recovery of such damages as he may have sustained from the breach, including any profit which he would have realized upon performance, as well as any other losses

[286] RESTATEMENT (SECOND) OF CONTRACTS § 350 (AM. LAW. INST. 1981) ("Except as stated in Subsection (2), damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation."); FARNSWORTH, *supra* note 15, § 12.12, at 778 ("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.").

[287] 35 F.2d 301 (4th Cir. 1929).

[288] *Id.* at 307.

[289] *Id.*

which may have resulted to him."[290] Here, because "[t]he bridge, built in the midst of the forest, is of no value to the county" and because the plaintiff "had no right thus to pile up damages by proceeding with the erection of a useless bridge," the court refused to award the larger sum, and remanding the case for a new trial in which damages would be calculated as the costs expended up to the time of the breach (i.e., $1,900), along with their lost profits.[291]

As illustrated in *Luten Bridge*, one purpose of the doctrine of mitigation is to avoid waste (recall the court's comment about the "useless bridge" which was of "no value to the county") by encouraging the injured party to act reasonably in the fact of breach.[292] But another purpose of this doctrine seems to rest squarely on the principles of causation and responsibility: whereas it is not inaccurate to think about a promisor's breach as having *caused* a promisee's damages (for which the promisor should generally be responsible), it is also true that those damages that could have been avoided by the promisee by taking reasonable measures to mitigate, but were not, were also *caused*, at least in part, by the promisee (for which the promisee, at least in part, was therefore responsible). This being the case, it would seem that the principle of avoidability should apply without regard to the reasons behind the promisor's breach, for amount of damages that could have been avoided by the promisee's mitigation should be the same without regard to the nature of the promisor's breach. Interestingly, however, here, too, there is evidence suggesting that courts *do* care about why the promisors have breached their contracts,[293] and even seem willing to change their minds about

290 *Id.*

291 *Id.* at 307-09.

292 Indeed, as Professor Laycock points out, this case offers a relatively "uncontroversial example of efficient breach: The bridge is not needed, and it is far more efficient to pay the contractor's lost profits than to waste resources building the bridge." *See* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS Notes on Avoidable Consequences (4th ed. 2010).

293 *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, 598 (1976) [hereinafter *Keeping the Deal Together*] ("An analysis of the case law demonstrates that factors considered by courts in determining whether to apply the avoidable consequences rule may be loosely bunched in three separate categories: (1) reasons for the original breach; (2) the position of the injured party following breach; and (3) the terms of the substitute offer. 'Reasons for the breach' can be 'willful' or unavoidable. Willful breaches include holding out for better terms, *i.e.*, playing the 'hold-up game,' or 'playing' the market."); *see also id.* at 610 ("With adequate assurance that the new offer will be performed, the 'reason for breach' factors are relevant only if the avoidable consequences rule is designed to punish the

whether an injured party must accept a mitigating offer from a breaching party,[294] or otherwise lower the burden of what a promisee is required to do in the face of a promisor's breach, where that breach was willful or wrongful.

Consider, for instance, *S.J. Groves & Sons Co. v. Warner Co.*[295] Here, the Pennsylvania Department of Transportation entered into a contract with American Bridge Co. to build a bridge. American Bridge Co. (the general contractor) then contracted with Groves (the subcontractor) to build the concrete decks and parapets.[296] Groves then contracted with Warner to supply the concrete.[297] In the course of performance, Warner often failed to make its deliveries on time, causing Groves extra expenses and overtime pay.[298] Groves sued Warner for breach of contract, but only recovered a portion of its requested relief, because the district court said it could have (but did not) mitigate its damages by using an alternate supplier, Trap Rock.[299] On appeal, the Circuit Court overturned the lower court's decision, allowing Groves to recover even those damages it could have mitigated.[300] Specifically, the court found that the burden of proving

breacher, since the loss suffered by the breach is the same regardless of the willfulness of, or reason for, the breach. The possibility of avoiding loss is also identical regardless of the type of breach, providing that there is adequate assurance of performance."); *id.* at n.259 ("Nevertheless, '[o]ur courts have taken the position that it is but in accord with fundamental principles of fairness that one whose motive is good should be entitled to greater consideration than one who acts from improper motives.' MURRAY, [MURRAY ON CONTRACTS], § 172, at 334 [(2d ed. 1974)].").

294 *See Keeping the Deal Together*, *supra* note 293, at 598 (arguing that, in determining whether an injured party must accept a breaching party's offer to mitigate, courts will take into account, among other things, the "reasons for the original breach," including whether the breach was willful or unavoidable. "Willful breaches include holding out for better terms, *i.e.*, playing the "hold-up game," or "playing" the market"); *see, e.g.*, Theis v. duPont, Glore Forgan, Inc., 510 P.2d 1212, 1218 (Kan. 1973) ("[I]t is not necessary for the plaintiff to make another contract with the defendant who has repudiated, even though he offers terms that would result in avoiding loss.") From such cases, Professor Hillman concludes that, "With adequate assurance that the new offer will be performed, the 'reason for breach' factors are relevant only if the avoidable consequences rule is designed to punish the breacher, since the loss suffered by the breach is the same regardless of the willfulness of, or reason for, the breach. The possibility of avoiding loss is also identical regardless of the type of breach, providing that there is adequate assurance of performance." *Keeping the Deal Together*, *supra* note 293, at 610.

295 576 F.2d 524 (3d Cir. 1978).

296 *Id.* at 525.

297 *Id.*

298 *Id.* at 526.

299 *Id.* at 526-28.

300 *Id.* at 530.

that losses from breach of contract could have been avoided by reasonable effort and expense must sometimes be borne not by the promisee, as the rule is traditionally understood, but by promisor, as the party who has broken contract.

Indeed, in reviewing the promisee's so-called "duty"[301] to mitigate damages under Pennsylvania Statutes and Consolidated Statutes Annotated title 12A, section 2-712, the court considered the various courses of action that the promisee could have taken to avoid the harmful consequences of the defendant's breach. Because both Groves *and* Warner had equal opportunity to reduce the damages by engaging in the same mitigating acts, the court found that defendant, as the breaching party, was the party responsible for failing to take action to mitigate its own damages. As the court explained:

> Confronted with these alternatives, Groves chose to stay with Warner, a decision with which the district court did not agree. The court's preference may very well have been the best; that, however, is not the test. As Judge Hastie wrote in *In re Kellett Aircraft Corp.*, 186 F.2d 197, 198-99 (3d Cir. 1950): "Where a choice has been required between two reasonable courses, the person whose wrongforced the choice can not complain that one rather than the other was chosen. McCormick on Damages, 530 § 35 (1935). *The rule of mitigation of damages may not be invoked by a contract breaker as a basis for hypercritical examination of the conduct of the injured party*, or merely for the purpose of showing that the injured person might have taken steps which seemed wiser or would have been more advantageous to the defaulter . . . . One is not obligated to exalt the interest of the defaulter to his own probable detriment."[302]

[301] What is traditionally considered the promisee's "duty" to mitigate damages is not, strictly speaking, a duty at all, because there is no party on the other side of that "duty" with an identifiable right. As explained by Professor Nyquist: "Breach of a Hohfeldian duty results in a claim by the rightholder. A failure to mitigate, on the other hand, does not result in a claim, but means that a claim, or a portion of a claim, is ineffective. In Hohfeldian terms, a failure to mitigate means the party in breach is privileged not to pay damages that could have been avoided." Curtis Nyquist, *Teaching Wesley Hohfeld's Theory of Legal Relations*, 52 J. LEGAL EDUC. 238, 246-47 (2002). In other words, the promisor only has a duty to pay those damages that it caused (i.e., those damages that could not be reasonably avoided by the promisee), but is privileged to not pay damages that could have been — but were not — reasonably avoided by the promisee.

[302] S.J. Groves & Sons Co. v. Warner Co., 576 F.2d 524, 529-30 (3d Cir. 1978)

Here, because the wrongdoing defendant could have mitigated damages just as easily (or perhaps more easily) than the innocent plaintiff, the court found that "Warner [the breaching party] may not assert Groves' [the non-breaching party's] lack of mitigation in failing to do precisely that which Warner chose not to do. Particularly is this so in light of the finding that *Warner breached the contract in bad faith*."[303]

In re Kellett Aircraft Corp.,[304] one of the main cases relied upon by the *Groves* court, Kellett contracted with Amerform to fabricate 5,000 shower cabinets at $13.18 each plus $3,33l for tooling costs.[305] Kellett was unable to perform and breached its contract with Amerform.[306] Amerform immediately approached other companies in the area to procure the cabinets as soon as possible.[307] "Cutler, which had previously made identical cabinets for Amerform," offered to make the cabinets for $18 each and Luscombe proposed to make the cabinets for $13.18 each.[308] Amerform contracted with the higher bidder, Cutler to make the cabinets.[309]

The issue on appeal was whether buyer mitigated its damages when it selected the higher of two bidders to perform the contract. The court found that buyer exercised prudent business judgment and did not act unreasonably when it "awarded the contract at somewhat increased cost to one whose performance had on previous occasions proved satisfactory, who had at hand proper and adequate tools for the job, and who promised to get on with it at once."[310] The court reversed the judgment and remanded the case, explaining that:

> Where a choice has been required between two reasonable courses, the person whose wrong forced the choice can not complain that one rather than the other was chosen. *The rule of mitigation of damages may not be invoked by a contract breaker as a basis for hypercritical examination of the conduct of the injured party*, or merely for the purpose of showing that the injured person might have taken steps which seemed wiser or would have been more advantageous to the defaulter. One is

(emphasis added).

303 *Id.* at 530 (emphasis added).

304 186 F.2d 197 (1950).

305 *Id.* at 199.

306 *Id.*

307 *Id.*

308 *Id.*

309 *Id.*

310 *Id.* at 199-200.

> not obligated to exalt the interests of the defaulter to his own probable detriment.[311]

For another example, consider *Tampa Elec. Co. v. Nashville Coal Co.*[312] Here, Tampa Electric entered into a contract with Nashville "for the sale and delivery . . . of all the coal required as fuel for the production of electrical energy at its newly constructed Gannon Station . . . for a period of twenty years."[313] Nashville requested to modify the price provisions of the contract, which Tampa Electric refused to do.[314] Less than two months prior to the scheduled start of the coal deliveries, Nashville informed Tampa Electric that the contract would not be performed.[315] Tampa Electric brought an action, pursuant to 28 U.S.C. § 2-202, for breach of contract.[316] The court held that the amount of damages with respect to some items could be ascertained by simple calculation, whereas the amount of damages as to other items could be computed only on basis of conflicting evidence.[317] Tampa Electric was awarded damages, which included interest where calculable with certainty.[318] The court held that Nashville breached its contracts and failed to show that Tampa Electric did not make reasonable effort to mitigate damages in making purchases of substitute coal, writing that:

> As stated in McCormick, Damages Sec. 35 (1935), "a wide latitude of discretion must be allowed to the person who by another's wrong has been forced into a predicament where he is faced with a probability of injury or loss. Only the conduct of a reasonable man is required of him."[319]

Or consider *Westamerica Mortg. Co. v. First Nationwide Bank*,[320] in which Westamerica and First Nationwide entered into a contract in which the bank would purchase from the mortgage company a portfolio of loans. Nationwide missed the contract's deadline for

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311 *Id.* at 198-99. "To allow such evidence to weigh in favor of the defaulting supplier would be unfairly to exalt the certainty of hindsight over the reasonable anticipation of foresight. The claimant acted promptly and diligently." *Id.* at 199-200.

312 214 F. Supp. 647 (M.D. Tenn. 1963).

313 *Id.* at 649.

314 *Id.*

315 *Id.*

316 *Id.*

317 *Id.* at 658.

318 *Id.* at 658-59.

319 *Id.* at 652.

320 CIV.A. No. 86-A-1901, 1988 WL 76377 (D. Colo. July 15, 1988).

payment and then retracted the contract because of certain misrepresentations made during negotiations for the contract by an employee of the mortgage company.[321] The mortgage company investigated the alleged misrepresentations, discovered they were without merit, and urged the bank to adhere to the contract.[322] When the bank refused, the mortgage company filed an action for breach of contract.[323]

The court held that the portfolio's servicing rights were unsaleable at all times following the repudiation, that any attempt by the mortgage company "to sell the portfolio would have resulted in a useless disruption of business, embarrassment within the industry, and unreasonable expense," and that the bank failed to prove that a portion of the mortgage company's damages were avoidable.[324] The court went on to explain that:

> A wide latitude of discretion must be allowed the person who by another's wrong has been forced into a predicament where he is faced with a probability of injury or loss. Only the conduct of a reasonable man is required of him. If a choice of two reasonable courses presents itself, *the person whose wrong forced the choice cannot complain that one rather than the other is chosen*. Sometimes a reasonable man might consider that either active efforts to avoid damages or a passive awaiting of developments are equally reasonable courses. If so, a failure to act would not be penalized by the rule of avoidable consequences, even though it later appears that activity would have reduced the loss.
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> McCormick, *The Law of Damages* § 35 (1935).
>
> With regard to this duty to arrange a substitute transaction, the rule disallowing avoidable losses merely requires the injured party to make *reasonable* efforts. The wronged party need not act if the cost of avoidance would involve unreasonable expense. J. Calamari and J. Perillo, *The Law of Contracts* § 14-15 (3d ed. 1987) . . . .
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> . . . .

[321] *Id.* at *2.

[322] *Id.*

[323] *See id.*

[324] *Id.* at *3-6.

> . . . The authorities cited above clearly indicate that WestAmerica was not required to perform such useless acts and go to such unreasonable lengths to attempt a resale that would have been solely for the Bank's benefit.
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> . . . .
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> . . . It is also arguable that a portion of the expenses resulting from foreclosures initiated after February 28, 1986 have been *wrongfully withheld*. Most of these expenses will be incurred in the future. However, a portion of them had actually been incurred, and therefore *wrongly withheld*, as of the date of trial.[325]

In conclusion, where, due to the promisor's wrongful actions, the promisee has failed to mitigate damages, or behaved in a less than optimal manner, courts are unwilling to hold the promisee's feet to the fire and bar recovery for damages that could have been — but were not — mitigated. Instead, the promisee need only behave reasonably, rather than optimally, and the worse the promisor's behavior, the easier it is for the promisee to meet its burden to mitigate damages.

Let us now turn to the final limitation frequently imposed on expectation damages, that of foreseeability, to see if courts are here also willing to impose a more lenient standard based on the culpability of the wrongdoing party.

3. Foreseeability

Let us now turn to consider the concept of foreseeability more carefully. Generally speaking, ever since the seminal case of *Hadley v. Baxendale*[326] was decided nearly two centuries ago, a breaching party has only been held liable for those damages it could reasonably foresee would be caused as a probable result of its breach.[327] Where the breaching party is unaware of the consequential damages that may

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[325] *Id.* at *5-9 (emphasis added).

[326] (1854) 156 Eng. Rep. 145 ("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.").

[327] *See* FARNSWORTH, *supra* note 15, § 12.14, at 792-93 ("A party in breach is not liable for damages . . . that the party did not at the time of contracting have reason to foresee as a probable result of the breach.").

arise as a probable consequence of its breach, it seems unfair to force that party to pay for that which they seem to bear little responsibility. This is because, in the run of the mill case, it is not only difficult to see how the breaching party could be held responsible for causing harm it was unaware of at the time of making the contract, but it is also difficult to see how that same party could have taken economically efficient precautions to avoid such harm, which is one of the animating principles of *Hadley*.[328] This rule has also been justified on the grounds that making a breaching party liable "for unforeseeable loss might impose upon an entrepreneur a burden greatly out of proportion to the risk that the entrepreneur originally supposed was involved and to the corresponding benefit that the entrepreneur stood to gain."[329]

As applied in practice, the doctrine of foreseeability seems to rest, at least in part, on the unstated assumption that both parties have behaved in good faith towards each other, acting as other parties would have acted under similar circumstances: the breaching party acting without any particular malice towards the injured party, and the injured party taking reasonable steps to avoid losses foreseeable to it, but not foreseeable to the breaching party.[330] Therefore, where that assumption does not hold, and where the wrongdoer seems to have acted in a particularly egregious fashion towards the promisee, perhaps causing consequential damages that might not have been caused had the injured party been contracting with another similarly-situated party, it now seems justified in holding that, in a very real sense, the wrongdoer has *caused* these damages in a way that another similarly-situated party would not have. If we grant these premises, it is but a short leap to conclude that this particular wrongdoer was responsible for these damages in a way that another party would not have been, and that courts would not be acting with impropriety in

[328] *See, e.g.*, Evra Corp. v. Swiss Bank Corp., 673 F.2d 951, 957 (7th Cir. 1982) ("The animating principle of *Hadley* . . . is that the costs of the untoward consequence of a course of dealings should be borne by that party who was able to avert the consequences at least cost and failed to do so.").

[329] FARNSWORTH, *supra* note 15, § 12.14, at 792.

[330] *See, e.g.*, Daniel P. O'Gorman, *Contracts, Causation, and Clarity*, 78 U. PITT. L. REV. 273, 313 (2017) ("The foreseeability limitation . . . play[s] an important role in precluding recovery when the injured party's pre-contract or pre-breach fault contributed to the loss, because such fault is ordinarily not sufficiently foreseeable . . . . In fact, Judge Richard Posner has argued that *Hadley*'s animating principle is to preclude a recovery by an injured party who could have avoided the loss at a lower cost than the breaching party, either before or after contract formation.").

applying the standard governing foreseeability in the injured party's favor, expanding the concept of foreseeability to capture the consequential damages caused by the wrongdoer's actions, damages that do, in fact, seem to have been caused as a probable consequence of his or her breach.

Would it therefore be all that surprising if we were to find instances of courts relaxing the foreseeability requirement where the breach that caused promisee's damages was not accidental but willful? As it currently stands, contract doctrine may take into account breaches that involve fraud or other tortious conduct, of course, and punitive damages may often be awarded in addition to compensatory damages.[331] But even absent such obviously egregious conduct, several commentators believe that the willfulness involved in a contract-breaker's breach may also have an effect on how courts view the foreseeability of damages arising from that breach. Professor Perillo, for instance, has claimed that "the willfulness or innocence" of the promisor's breach may influence how courts think about whether the damages were foreseeable,[332] and if he is correct, then this is highly suggestive of the fact that the courts are taking into account retributive considerations in determining what compensation is due the promisee. Similarly, Fuller and Purdue, who were the first to clearly distinguish between and attempt to justify expectation, reliance, and restitution damages, wrote that the "rule" stating that damages, to be recoverable, must have been foreseeable by the promisor at the time of entering into the contract, is actually quite flexible. As they explain:

> [I]t is clear that the test of foreseeability is less a definite test itself than a cover for a developing set of tests. As in the case of all "reasonable man" standards there is an element of circularity about the test of foreseeability. "For what items of damage should the court hold the defaulting promisor? Those

[331] *See, e.g.*, Welborn v. Dixon, 49 S.E. 232, 234-35 (S.C. 1904) ("There is no doubt as to the general principle that in an action for breach of contract the motives of the wrongdoer are not to be considered in estimating the amount of damages, and that he is only liable for such damages as are the natural and proximate result of the wrongful act. When, however, the breach of the contract is accompanied with a fraudulent act, the rule is well settled, certainly in this state, that the defendant may be made to respond in punitive as well as compensatory damages.").

[332] JOSEPH M. PERILLO, CONTRACTS § 14.7, at 522 (7th ed. 2014) ("The doctrine [of foreseeability] is not applied blindly and mechanically. Courts must be aware of the transactional context. Notions of disproportionality between the agreed price and the ensuing loss, relative *fault*, and the willfulness or innocence of the breach are some of the factors that guide the decisions in a concrete case." (emphasis added)).

> which he should as a reasonable man have foreseen. But what should he have foreseen as a reasonable man? Those items of damage for which the court feels he ought to pay." The test of foreseeability is therefore subject to manipulation by the simple device of defining the characteristics of the hypothetical man who is doing the foreseeing. By a gradual process of judicial inclusion and exclusion this "man" acquires a complex personality; we begin to know just what "he" can "foresee" in this and that situation, and we end, not with one test but with a whole set of tests. This has obviously happened in the law of negligence, and it is happening, although less obviously, to the reasonable man postulated by *Hadley v. Baxendale*.[333]

The logic seems compelling — if judges, guided by very human emotions, are manipulating the avoidability and certainty requirements based on the culpability of the wrongdoer, it makes sense to suppose that those same judges, even if only unintentionally, would lengthen or narrow the concept of foreseeability to include or exclude certain damages that ought or ought not to have been foreseen by the wrongdoer based on how culpably he or she acted. To test for this directly, however, is another matter entirely, and one would be hard pressed to devise a test capable of catching judges in the act, for a clever judge, like a trained magician, would be much more likely to use legerdemain to expand or contract the concept of foreseeability to increase or decrease the size of the remedy without tipping their hand. In the common law, therefore, one would be hard pressed to find a case (that does not get reversed) in which a court finds, for instance, that the rule of *Hadley* should be ignored. Much more probable, a judge not wishing for *Hadley* to restrict a promisee's remedy would be more likely to find certain damages (even difficult-to-foresee damages) quite foreseeable, and a judge wishing for *Hadley* to apply with particular rigor would find certain damages (even damages quite easy to foresee) unforeseeable. Indeed, this arguably happened in *Hadley* itself![334]

However, when one takes a peek at what other courts not beholden to *Hadley* in the same way are doing, where they do not have to hide

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[333] *Reliance Interest*, *supra* note 248, at 85.

[334] *See, e.g.*, MCCORMICK, *supra* note 22, § 140, at 573 ("Thus, in Hadley v. Baxendale itself, the carrier was told of the use to which the broken shaft was to be put and that the mill was shut down, but it was held that this was not enough, since it was not told that another shaft was not available!"); *see also Reliance Interest*, *supra* note 248, at 86 (citing this provision of McCormick's treatise on damages).

their craft, we can gain a much better sense of what is only implicit in the common law: that judges manipulate the standards of foreseeability in proportion to the promisor's culpability. Consider, for instance, *Hollenbach v. Holden*,[335] in which the defendant's bad faith breach entitled the plaintiffs to a larger award by making the damages sought by the promisee more foreseeable than they otherwise might have been. The Hollenbachs (plaintiffs) contracted with Stewart and his company to remove tanks and their contents from their property.[336] "When one of the tanks broke and clean-up became more expensive," Stewart intentionally breached the contract and "took no steps to contain the oil spill and did not notify the Hollenbachs of the leak."[337] The trial court awarded the Hollenbachs delay damages but denied their claim for actual damages, to which the Hollenbachs appealed.[338]

On appeal, the court affirmed the award of delay damages,[339] but held further that the trial court erroneously held that an award of delay damages precluded an award of actual damages.[340] The court found from the facts that "the defendants' conduct was sufficiently intentional and malicious to warrant finding them in bad faith for their breach of the agreement."[341] As the law implied the right to damages in a contract, plaintiffs were entitled to be placed in the position they would have been had the defendants not breached and were therefore entitled to actual damages. Specifically:

> An obligor who breaches a contract in good faith is liable only for the damages that were foreseeable at the time the contract was made. An obligor who breaches a contract in bad faith is liable for all the damages, foreseeable or not, which are a direct consequence of his failure to perform.[342]

Here, because the defendants breached the contract in "bad faith," the court found that the injured promisees were "entitled to an award from this court for the money that was invested in the tract which was lost when the tract was seized and sold to pay the amounts due Well

[335] 728 So. 2d 544 (La. Ct. App. 1999), *modified* 728 So. 2d 544 (La. Ct. App. 1999).

[336] *Id.* at 546.

[337] *Id.* at 549-50.

[338] *Id.* at 546.

[339] *Id.* at 549.

[340] *Id.* at 548-49.

[341] *Id.* at 550.

[342] *Id.* at 549 (citations omitted).

Vac, Inc., to clean-up the oil spill,"[343] regardless of whether the promisor foresaw these damages as a probable consequence of its breach at the time of entering into the contract. Other courts have followed this lead.

For instance, the court in *Kite v. Gus Kaplan, Inc.*,[344] reached a similar conclusion, holding that:

> If a person breaches a contract of lease in good faith, he "is liable only for the damages that were foreseeable at the time the contract was made." La. Civ. Code art.1996. But, a party that breaches an obligation in bad faith is liable for damages to a considerably greater extent than a good faith breach of an obligation. "An obligor in bad faith is liable for all the damages, foreseeable or not, that are a direct consequence of his failure to perform." La. Civ. Code art.1997. Comment (b) to Article 1997 explains that "an obligor is in bad faith if he intentionally and maliciously fails to perform his obligation."[345]

In addition to the bad faith of the breaching party, the court might have also been influenced by the worthiness of the non-breaching party. Indeed, here, Kite was sympathetically described by the court as a reasonable man who made genuine efforts to satisfy Kaplan's demands, going to "extraordinary lengths to accommodate Kaplan's requests . . . in order to maintain a harmonious relationship with him."[346] The court also noted that, upon the surprise removal of Kite's merchandise, which Kite had meticulously cared for and organized, "Kite was so distraught at what had happened that he publicly cried in the store."[347]

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[343] *Id.* at 550.

[344] 708 So. 2d 473 (La. Ct. App. 1998).

[345] *Id.* at 482. The court went on to note that: "*Bond v. Broadway*, 607 So. 2d 865, 867 (La. App. 2 Cir. 1992), *writ denied,* 612 So. 2d 88 (La. 1993), construed Article 1997 by quoting the definition of 'bad faith' from *Black's Law Dictionary:* The opposite of 'good faith', generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties but by some interested or sinister motive. The court then stated, 'The term bad faith means more than mere bad judgment or negligence, it implies the conscious doing of a wrong for dishonest or morally questionable motives.'" *Id.* at 482.

[346] *Id.* at 477.

[347] *Id.*

Similarly, the court in *Oriental Fin. Group, Inc. v. Fed. Ins. Co., Inc.*,[348] reached a similar conclusion, finding that:

> As previously stated, Puerto Rico law provides that when a party acts with bad faith ("dolo") in breaching a contract, the aggrieved party may recover all damages that originate from the nonfulfillment of the obligation. *See* P.R. Laws Ann. Tit. 31 § 3024. In the absence of a finding of bad faith ("dolo"), "[t]he losses and damages for which a debtor in good faith is liable, are those foreseen or which may have been foreseen, at the time of constituting the obligation, and which may be a necessary consequence of its nonfulfillment." Id. Accordingly, regardless of whether a party acts with bad faith ("dolo") or not, in order to recover damages, the aggrieved party must prove that the damages claimed resulted from the breach.[349]

As with the limitations of reasonable certainty and avoidability, courts can also make ex post adjustments to the doctrine limiting recoverable damages to those that are foreseeable by the breaching party at the time of entering into the contract as a probable consequence of the breach by allowing more recovery, under a theory of "compensatory" damages, based on the extent to which the breaching party's behavior is considered "wrongful" by the court. This, of course, suggests that the courts are trying to do much more than compensate the injured party, and is highly suggestive of the fact that they are trying to punish them in accordance with the wrongfulness of their breach.

D. "Opportunistic" Breaches

Finally, we come to the matter of opportunistic breaches. Up until this point, we have been considering indirect challenges to the traditional view that courts are unconcerned with the reasons underlying a promisor's breach of contract,[350] and have seen the way

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348 598 F. Supp. 2d 199 (D.P.R. 2008).

349 *Id.* at 224.

350 *See, e.g.*, Evra Corp. v. Swiss Bank Corp., 673 F.2d 951, 956 (7th Cir. 1982) ("[C]ontract liability is strict. A breach of contract does not connote wrongdoing; it may have been caused by circumstances beyond the promisor's control — a strike, a fire, the failure of a supplier to deliver an essential input."); RESTATEMENT (SECOND) OF CONTRACTS ch. 16, topic 4, intro. note (AM. LAW INST. 1981) (explaining that restitution in breach of contract cases is not concerned with protecting a party's expectations but rather it's about preventing unjust enrichment); Farnsworth, *supra* note 68, at 1147 ("In its essential design . . . our system of remedies for breach of

in which courts have subtly manipulated remedial doctrine to compensate the promisee more where the promisor's breach was wrongful, willful, or otherwise in bad faith, and less where the promisor's breach was accidental, inevitable, and otherwise in good faith. According to the traditional view, we have seen how the "duty to keep a contract" has been conceived merely as "a prediction that you must pay damages if you do not keep it, — and nothing else."[351] The other view, however, is that courts conceptualize contracts as imposing a moral obligation on the promisor to perform its promises,[352] and where the promisor fails to discharge its duties in good faith, the courts will take this fact into account in calibrating its remedy, consistent with the principle of retributive punishment.

With the recent publication of the *Restatement (Third) of Restitution and Unjust Enrichment* (2011) ("RRUE"), we come to a frontal assault on the traditional view of contract law, allowing courts to directly take into account the wrongdoer's culpability in determining the remedy to be awarded for breach of contract where unjust enrichment is also involved.[353] Specifically, section 39 of the RRUE, which deals with "Profit Derived from Opportunistic Breach," states that where a breach of contract is "both material and opportunistic,"[354] then the promisee

contract is one of strict liability and not of liability based on fault . . . .").

[351] *The Path of the Law*, *supra* note 9, at 462; *see also* sources cited *supra* note 68.

[352] *See, e.g.*, Robin West, *Three Positivisms*, 78 B.U. L. REV. 791, 811 (1998) ("To say that we are morally obligated to keep our promises means precisely that: that we are *obligated.* The promise imposes an imperative from an earlier to a later self to be obeyed, not an option to be weighed.").

[353] *See, e.g.*, Caprice L. Roberts, *Restitutionary Disgorgement as a Moral Compass for Breach of Contract*, 77 U. CIN. L. REV. 991, 993-94 (2009) ("There is a quiet revolution underway. Section 39 of the . . . . Restatement (Third) of Restitution and Unjust Enrichment sanctions a restitutionary remedy of disgorgement where one profits from an 'opportunistic breach.' While couched in the language of limitation, this section is breathtaking in its potential transformation of the traditional contractual landscape from a choice model of contract law to a perspective that values keeping promises and condemns certain breaches . . . . In general, contract law does not morally judge the breaching party. Section 39 injects blameworthiness into the remedy calculation for breach of contract by authorizing restitutionary disgorgement for certain breaches — opportunistic ones." (footnotes omitted)).

[354] Roberts, *Restitutionary Disgorgement as a Moral Compass for Breach of Contract*, *supra* note 353, at 994-95 ("But what is an opportunistic breach? No consensus definition exists. It has a pejorative connotation unless one views as an 'ultimate virtue' taking selfish advantage of opportunities. At minimum, common conceptions might include exploitive, selfish, and advantageous behavior. Opportunistic may further mean 'exploiting opportunities and situations in general, especially in a devious, unscrupulous, or unprincipled way.' The Restatement employs 'conscious advantage-taking' and 'tak[ing] without asking.' Section 39 limits 'opportunism' in the

may see disgorgement of "the profit realized by the defaulting promisor as a result of breach." Although this provision strangely goes out of its way to deny that it is punishing the culpable party,[355] rejecting the explanation that seems to most obviously explain the remedy,[356] my sense is that most defendants who have this remedy imposed against them will see the matter much differently, especially in light of the fact that this remedy is tied directly to their culpability in dealing with the promisee!

Nevertheless, the important point here is to recognize the extent to which this new rule, if widely adopted, will overturn the traditional view of contract law remedies.[357] To take just one example, efficient

black-letter by requiring the breach to be 'deliberate' and 'profitable' and dictating further that a damage remedy must be 'inadequate.' Regardless of the precise definition, section 39 requires an assessment of the breaching party's mens rea and seeks to deter, if not punish, breach. In other words, section 39 creates an incentive for parties to keep their word." (footnotes omitted)); *see* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 39 cmt. a (AM. LAW INST. 2011).

355 *See, e.g.*, RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 51 (AM. LAW INST. 2011) ("The object of restitution . . . is to eliminate profit from wrongdoing while avoiding, so far as possible, the imposition of a penalty.").

356 *See, e.g.*, *id.* § 1 cmt. d (2011) ("Restitution may strip a wrongdoer of all profits gained in a transaction . . . but principles of unjust enrichment will not support the imposition of a liability that leaves an innocent recipient worse off . . . ."). However, where the transferee is guilty of fault, the tables turn quickly. See, for example, *id.* §49, reporter's note a, which discusses situations where the plaintiff has lost more than the wrongdoer has gained. ("[T]he measure of restitution is determined with reference to the tortiousness of the defendant's conduct or the negligence or other fault of one or both of the parties in creating the situation giving rise to the right to restitution . . . If the defendant was tortious in his acquisition of the benefit he is required to pay for what the other has lost although that is more than the recipient benefited. If he was consciously tortious in acquiring the benefit, he is also deprived of any profit derived from his subsequent dealing with it."); *see also id.* § 51 subsec. 4 ("[T]he unjust enrichment of a conscious wrongdoer . . . is the net profit attributable to the underlying wrong . . . . The object of restitution in such cases is to eliminate profit from wrongdoing while avoiding, so far as possible, the imposition of a penalty.").

357 *See, e.g.*, Roberts, *Restitutionary Disgorgement as a Moral Compass for Breach of Contract*, *supra* note 353, at 996 ("[T]here may be effects — potentially unintended — that will stem from the underlying moral foundation of the disgorgement remedy. The consequences may be far-reaching for a host of traditional contract doctrines including mitigation, foreseeability, and expectancy. Such effects may include altering the traditional Holmesian choice model of contracts to a conception grounded in moral obligation and judgment. Restitutionary disgorgement for breach of contract warrants support because it broadens the alternatives for remedying contract breach. Embracing the remedy's formalization in the Restatement also necessarily brings a moral stance that encourages keeping promises and deters conscious advantage-taking without asking.").

breach is a cornerstone for those who, drawing their inspiration from Holmes,[358] maintain that the purpose of contract law remedies is not to incentivize the promisor to perform its obligations, but rather to (1) compensate the disappointed promisee in such a way that (2) the promisor is provided with the proper incentives to engage in welfare-maximizing transactions, breaching or performing depending on what is most efficient. To take Posner's famous illustration of the problem:

> Suppose I sign a contract to deliver 100,000 custom-ground widgets at $0.10 apiece to A, for use in his boiler factory. After I have delivered 10,000, B comes to me, explains that he desperately needs 25,000 custom-ground widgets at once since otherwise he will be forced to close his pianola factory at great cost, and offers me $0.15 apiece for 25,000 widgets. I sell him the widgets and as a result do not complete timely delivery to A, who sustains $1000 in damages from my breach. Having obtained an additional profit of $1250 on the sale to B, I am better off even after reimbursing A for his loss. Society is also better off. Since B was willing to pay me $0.15 per widget, it must mean that each widget was worth at least $0.15 to him.

[358] HOLMES, JR., THE COMMON LAW, *supra* note 9, at 301 ("The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves him free from interference until the time for fulfillment has gone by, and therefore free to break his contract if he chooses."); *see* Remington, *supra* note 20, at 647 ("The law has come to regard the obligation to perform a contract as being generally equivalent to an option to perform or pay damages. Holmes saw the matter this way more than one hundred years ago."); *see also* Richard Craswell, *Contract Remedies, Renegotiation, and the Theory of Efficient Breach*, 61 S. CAL. L. REV. 629, 636 (1988) ("The stated goal of contract damages is . . . 'to put the plaintiff in as good a position as he would have been in had the defendant kept his contract.' In economic analysis, this is usually translated as . . . the amount necessary to leave the plaintiff absolutely indifferent, in *subjective* terms, between having the defendant breach and pay damages or having the defendant perform." (emphasis added) (quoting Hawkins v. McGee, 146 A. 641, 643 (N.H. 1929))); Melvin Eisenberg, *Actual and Virtual Specific Performance, The Theory of Efficient Breach, and the Indifference Principle in Contract Law*, 93 CAL. L. REV. 975, 991 (2005) ("[I]f damages are based on a market-price construct, rather than on the buyer's valuation, there will be regular shortfalls between expectation damages and the amount required to make the buyer indifferent between performance and damages."); Goetz & Scott, *supra* note 17, at 558 ("The modern law of contract damages is based on the premise that a contractual obligation is not necessarily an obligation to perform, but rather an obligation to choose between performance and compensatory damages."). *But see* Joseph M. Perillo, *Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference*, 68 FORDHAM L. REV. 1085, 1086-89 (2000) (arguing that Holmes never intended to suggest that the promisor had an option to choose between performance or breach plus a payment of money damages).

> But it was worth only $0.14 to A — $0.10, what he paid, plus $0.04 ($1000 divided by 25,000), his expected profit. Thus the breach resulted in a transfer of the 25,000 widgets from a lower valued to a higher valued use.[359]

Section 39 of the RRUE, if widely adopted, would all but abolish efficient breach, because its entire premise is based on "opportunistically" engaging in economically efficient behavior where it is in the promisor's interest to do so — behavior that is specifically disallowed (and disincentivized) via the disgorgement remedy.[360]

But will courts use section 39? History suggests the answer is yes, because courts were already taking such factors into consideration long before the RRUE was published, and new evidence is also already pointing in that direction.

1. Opportunistic Breach Before the Restatement (Third) of Restitution and Unjust Enrichment

Let us first turn to a few examples of the ways in which courts considered the wrongfulness of a promisor's breach prior to the RRUE.

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[359] *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 57 (1st ed. 1972). As I have argued elsewhere, the above calculation necessarily assumes that any potential loss of future business from A has been accounted for, because otherwise A, fearing that another "B" may come along in the future, might refuse to do business with the widget manufacturer, or might only do so at a much lower price to take into account the higher risk of breach. Marco J. Jimenez, *The Value of a Promise: A Utilitarian Approach to Contract Law Remedies*, 56 UCLA L. REV. 59, 94 n.144 (2008).

[360] Interestingly, long before the RRUE was drafted, the distinction between efficient and opportunistic breaches was supported by Professor Posner, one of the leading figures in the law and economics movement (and an outspoken proponent of efficient breach), who recognized that "opportunistic" breach, unlike efficient breach, should be deterred by means of a more generous remedy to the promisee: "If a promisor breaks his promise merely to take advantage of the promisee's vulnerability in a setting (the normal contract setting) in which performance is sequential rather than simultaneous, we might as well throw the book at him. An example would be where A pays B in advance for goods and instead of delivering them B uses the money to build a swimming pool for himself. An attractive remedy in such a case is restitution. We can deter A's opportunistic behavior by making it worthless to him, which we can do by making him hand over all his profits from the breach to the promisee. No lighter sanction would deter. (Why not make his conduct criminal as well or instead?) POSNER, ECONOMIC ANALYSIS OF LAW, *supra* note 11, § 4.10, at 119. Notably, this meant that, according to Professor Posner, courts should have given consideration to the wrongfulness of the promisor's behavior (although he probably would not have put it in these terms) in determining what remedy would best "compensate" the injured party.

First, consider *Laurin v. DeCarolis Const. Co., Inc.*,[361] in which the court approved an award of the fair market value where there was a "deliberate and wilful breach of contract."[362] Specifically, Laurin contracted with DeCarolis to have them construct a home on a wooded lot they purchased.[363] The contract specified to not remove the trees, shrubs, or gravel from the land, except as necessary for construction.[364] The defendant bulldozed many of the trees on the premises and removed about 3,600 cubic yards of gravel from the property in 360 truckloads with an average fair market value of $18, for a total of $6,480.[365] The buyer claimed that the removal of this property from the land constituted conversion because the buyers were the equitable owners of the land. The appellate court, however, found that the buyers were not entitled to recover for conversion because they were not entitled to possession of the land at the time the property was removed.[366]

More specifically, the court held that the buyers were entitled to recover under breach of contract principles and that the measure of damages was the value of the property removed less the seller's costs in removing it.[367] The court ruled that it would be improper for the buyers to be compensated for the full market value of the property removed because the seller's efforts in removing the property added value to it.[368] As the court explained, "Particularly where the defendant's breach is deliberate and wilful, we think damages limited to diminution in value of the premises may sometimes be seriously inadequate."[369] Indeed, the court went on to note that:

> "Cutting a few trees on a timber tract, or taking a few hundred tons of coal from a mine, might not diminish the market value of the tract, or of the mine, and yet the value of the wood or coal, severed from the soil, might be considerable. The wrongdoer would, in the cases instanced, be held to pay the value of the wood and coal, and he could not shield himself by showing that the property from which it was taken was, as a

361 363 N.E.2d 675 (Mass. 1977).
362 *Id.* at 678-79.
363 *Id.* at 677.
364 *Id.* at 678.
365 *Id.* at 677.
366 *Id.* at 676-77.
367 *Id.* at 678-79.
368 *Id.* at 679.
369 *Id.* at 678.

> whole, worth as much as it was before." This reasoning does not depend for its soundness on the holding of a property interest, as distinguished from a contractual interest, by the plaintiffs. Nor is it punitive; it merely deprives the defendant of a profit wrongfully made, a profit which the plaintiff was entitled to make.[370]

Despite the court's attempt to categorically deny the "punitive" nature of this remedy, it still seems clear, if we look at what the court *did*, rather than what it said it did, that the wrongfulness of the breaching party's actions were front and center, and that the court's taking into account these considerations to adjust the remedy can best be described as retributive.

As another example, consider *May v. Muroff*,[371] in which Muroff contacted to sell his land to May. In between contracting to sell and the final closing, Muroff sold fill from the land to a third party for $240,000.[372] May brought action against Muroff for damages resulting from vendor's improper sale of fill from land, seeking the profits Muroff made from the sale.[373] Muroff, however, contended that May should only get the diminution in the property's value, amounting to $122,067.[374]

The trial court accepted Muroff's argument, awarding May a reduction off the purchase price equal to the difference between the value of land before and after fill was removed, and May appealed.[375] On appeal, however, the court held that May was entitled to the full value of the fill that was improperly sold from land in question, rather than lesser amount representing difference between value of land before and after injury.[376] Not surprisingly, the court justified its decision by looking at the wrongfulness of the promisor's breach:

> The seller's breach here was deliberate and he should not be permitted to profit by his own wrong and enjoy a windfall profit of $117,933. The purchaser, under the facts and

370 *Id.* at 678-79 (citing Worrall v. Munn, 53 N.Y. 185, 190 (1873)).

371 483 So. 2d 772 (Fla. Dist. Ct. App. 1986).

372 *Id.* at 772.

373 *See id.*

374 *See id.*

375 *Id.*

376 *Id.*

> circumstances of this case, is entitled to the fruits of this wrongfully received windfall.[377]

Or, consider *Snepp v. United States*,[378] where Snepp, a former CIA agent, published a book about CIA activities in South Vietnam but failed to submit his book to the CIA for prepublication review, despite the fact that, "as an express condition of his employment with the CIA," he signed an agreement promising not to publish anything relating to the CIA during or after his employment without "specific prior approval by the Agency."[379] The District Court found that Snepp's breach was willful, that he "deliberately mislead CIA officials into believing that he would submit the book for prepublication clearance,"[380] and that publishing the book "irreparably harmed the United States."[381] Snepp pointed out that because the book would have cleared prepublication review in exactly the same form in which it was ultimately published, the United States did not suffer any damages from its breach of contract. Nevertheless, in an opinion more focused on the retributive nature of Snepp's actions, rather than on the damages suffered by the government, the Supreme Court imposed a constructive trust on Snepp, requiring him "to disgorge the benefits of his faithlessness."[382] In doing so, and contrary to the traditional view that courts are not concerned with the reasons for the promisor's breach, the Court emphasized the fact that Snepp's breach violated "an extremely high degree of trust"[383] between the parties, which also made the United States particularly vulnerable to such a breach.

As a final example of the type of case preceding the RRUE, consider *Y.J.D. Rest. Supply Co. v. Dib*.[384] Here, plaintiff purchased a store from defendant, and the contract included a covenant not to compete. Nevertheless, defendant "willfully and deliberately violated" the covenant not to compete with plaintiff in a five-block radius for three years, and then sold the competing business for a profit of $35,500.[385] In an action against defendant, the court imposed an injunction on the defendant and also found that plaintiff was entitled to the full profits

377 *Id.* (citing Laurin v. DeCarolis Construction Co., 363 N.E.2d 675 (Mass. 1977)).
378 444 U.S. 507 (1980).
379 *Id.* at 507-08.
380 *Id.* at 508.
381 *Id.* at 513.
382 *Id.* at 515-16.
383 *Id.* at 510-11.
384 413 N.Y.S.2d 835 (Sup. Ct. 1979).
385 *Id.* at 836.

of defendant's sale of the unlawful competing business to prevent the defendant from being "enriched by his own willful and wrongful acts."[386] The court awarded this remedy, in part, due to the plaintiff's difficulty of establishing its damages with reasonable certainty,[387] noting that:

> It was shown that too many competitive and economic factors were involved herein to prove any correct or even fair estimate of the amount of damages sustained as a result of loss of profits by the plaintiff. On the other hand, the Court finds that the plaintiff herein is entitled to recover the full profit made by the defendant on the sale of his competing business, which he opened unlawfully.[388]

Finally, the court also recognized the inadequacy of damages to return the plaintiff to its rightful position, as "the competing store will remain in business and continue to compete against the plaintiff."[389]

Arguably, courts in the future will examine the reasons motivating a promisor's breach with much more scrutiny than in the past, due in no small part to the recently published RRUE, which we turn to next.

2. Opportunistic Breach After the Restatement (Third) of Restitution and Unjust Enrichment

As mentioned above, section 39 of RRUE provides a frontal assault on the Holmesian view of contract law discussed earlier, requiring courts to distinguish between efficient and opportunistic breaches, drawing the court's attention to the deliberateness of the promisor's breach, and, under certain circumstances, permitting the court to disgorge any profits made by a party who deliberately breaches its contract.[390] The full text of RRUE section 39 reads as follow:

> (1) If a deliberate breach of contract results in profit to the defaulting promisor and the available damage remedy affords

386 *Id.*

387 See *supra* notes 250–54 and accompanying text for a discussion of the certainty requirement.

388 *Y.J.D. Rest. Supply Co.*, 413 N.Y.S.2d at 836 (citations omitted).

389 *Id.* at 837.

390 *See, e.g.*, Caprice L. Roberts, *Restitutionary Disgorgement for Opportunistic Breach of Contract and Mitigation of Damages*, 42 LOY. L.A. L. REV. 131, 144 (2008) ("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.").

> inadequate protection to the promisee's contractual entitlement, the promisee has a claim to restitution of the profit realized by the promisor as a result of the breach. Restitution by the rule of this section is an alternative to a remedy in damages.
>
> (2) A case in which damages afford inadequate protection to the promisee's contractual entitlement is ordinarily one in which damages will not permit the promisee to acquire a full equivalent to the promised performance in a substitute transaction.
>
> (3) Breach of contract is profitable when it results in gains to the defendant (net of potential liability in damages) greater than the defendant would have realized from performance of the contract. Profits from breach include saved expenditure and consequential gains that the defendant would not have realized but for the breach, as measured by the rules that apply in other cases of disgorgement (§ 51(5)).[391]

It is still early, but this provision has the potential to be revolutionary in the same way that promissory estoppel's appearance in the Restatement (First) of Contracts as a new cause of action became revolutionary to the field of contract law. This is true, in large part, because RRUE section 39 would specifically require courts to distinguish between breaching parties and "conscious wrongdoers," the latter of who should be deterred "from retaining profits from 'opportunistic' breaches of contract."[392]

Indeed, the revolution might be even more profound, because, if widely adopted, it would threaten to shift the very foundations of contract law from one in which the stated goal is merely to choose between damages and performance to one that took seriously the goal of promoting "promise-keeping"[393] by calling on courts to take into account the "moral blameworthiness" of the breaching party in determining an appropriate remedy. Indeed, the very fact that the "the underlying rationale for disgorgement is in tension with efficient breach theory"[394] should cause courts in the future to look much more

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391 RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 39 (AM. LAW INST. 2011).

392 Roberts, *Restitutionary Disgorgement as a Moral Compass for Breach of Contract*, *supra* note 353, at 992.

393 *Id.*

394 *Id.*

deeply at the goals of contract law and to consider, explicitly rather than implicitly, whether (and to what extent) the wrongfulness of a promisor's breach should be considered when awarding an appropriate remedy to a disappointed promisee. Although time will tell, if the cases that have already been decided are any indication, one can expect courts in the future to be much more transparent in their consideration of the blameworthiness of the promisor's conduct in determining how much "compensation" is owed to the injured promisee or, more accurately, how much retribution is exacted from the injuring promisor.[395]

Signs are already pointing in that direction. Consider, for instance, *Watson v. Cal-Three LLC*.[396] Here, Watson, the plaintiff, agreed to guarantee repayment of a real estate loan in exchange for part of the proceeds of the project.[397] After a dispute mediation between the developer and general contractor, all the rights to the project were transferred to Cal-Three LLC ("Cal-Three"), the defendant.[398] Several months later, Watson sent a notice to Cal-Three alleging multiple failures on Cal-Three's part, and then brought an action for a receivership, and also foreclosing the deed of trust and bid on the property at the foreclosure sale.[399] Watson then sold the completed townhome units and the raw land.[400] The court found that Watson's letter was sent in bad faith, and Watson's claims against Cal-Three (failing to obtain a construction loan, failing to repay a loan, failing to pay taxes, failing to resolve mechanics' liens) were not credible.[401] In remanding the damages determination to the trial court, the court noted that disgorgement of profits could be an appropriate remedy here, and recommended considering "the factors set forth in Restatement (Third) of Restitution § 39."[402] This was due in no small part to the fact that Watson had "acted willfully and wantonly"[403] in breaching its contract with Cal-Three, and for making a number of

[395] I am less confident, however, that they will describe the fact that they are calibrating the remedy according to the wrongfulness of the promisor's conduct as anything other than "compensation."

[396] 254 P.3d 1189 (Colo. App. 2011).

[397] *Id.* at 1190-91.

[398] *Id.* at 1191.

[399] *Id.*

[400] *Id.*

[401] *Id.* at 1195-96.

[402] *Id.* at 1196-97.

[403] *Id.* at 1195.

false allegations against Cal-Three in testimony that "was not credible."[404]

Further, in *Enslin v. Coca-Cola Co.*,[405] Enslin brought a class action against Coca-Cola, alleging that Coca-Cola failed to securely maintain their personal identification information in connection with the theft of company laptops. Coca-Cola moved to dismiss the complaint on a number of grounds, including Enslin's failure to state a claim in restitution. In rejecting Coca-Cola's argument, the Court went through the requirements of § 39, noting that the claim in restitution must be "deliberate," "opportunistic," "profitable," and that the traditional "contractual damage remedy must 'afford inadequate protection to the promisee's contractual entitlement.'"[406] Having found that the plaintiff satisfied each of these requirements, the court denied Coca-Cola's motion to dismiss plaintiff's claim in restitution.

Finally, and perhaps most significantly for the future of this provision, in 2015 the United States Supreme Court invoked section 39 in deciding the case of *Kansas v. Nebraska*.[407] The case concerned a breach of the Republican River Compact, an agreement concerning the apportionment of water between Kansas, Nebraska, and Colorado.[408] Specifically, the Compact gave forty-nine percent of water rights to Nebraska, forty percent to Kansas.[409] Nebraska violated the Compact with excessive groundwater pumping, Kansas brought suit, and a settlement was reached in 2002 "to promote compliance with the Compact's terms."[410] A second suit was subsequently brought because Kansas alleged Nebraska continued to violate the terms of the Compact. An expert determined that "Nebraska had knowingly failed to comply with the Compact in the 2005-2006 accounting period, by consuming 70,869 acre-feet of water in excess of its prescribed share."[411] Notably, water was worth more in Nebraska than in Kansas at the time, so Nebraska's gain outweighed Kansas's loss "by more than several multiples."[412] Accordingly, in addition to paying $3.7 million in compensatory damages, Nebraska was ordered to disgorge $1.8 million in profits.

404 *Id.* at 1195-96.
405 136 F. Supp. 3d 654 (E.D. Pa. 2015).
406 *Id.* at 676-77.
407 135 S. Ct. 1042 (2015).
408 *Id.* at 1045.
409 *Id.* at 1049.
410 *Id.* at 1050.
411 *Id.* at 1051.
412 *Id.* at 1056.

In justifying its decision, the Court focused on the nature of the breach and noted that Nebraska's behavior was particularly culpable. Specifically, the Court stated that "Nebraska recklessly gambled with Kansas's rights, consciously disregarding a substantial probability that its actions would deprive Kansas of the water to which it was entitled."[413] And, in no small part due to Nebraska's culpable behavior, the Court squarely rejected the Holmesian view upon which so much of contract law is said to be based that would allow a breaching party to choose between performance, on the one hand, and breach plus a payment of compensatory damages, on the other hand. Instead, the Court found that it had the power to "order disgorgement of gains, if needed to stabilize a compact and deter future breaches, when a State has demonstrated reckless disregard of another, more vulnerable State's rights under that instrument."[414] According to this view, the point of a contract was in its being performed, rather than in giving the power to choose between performance and breach to the breaching party of all people. Indeed, in its opinion, the Court made clear that disgorgement exists for precisely this purpose, and the court was even willing to relax the requirement that damages be proven with a reasonable degree of certainty in favor of a remedy that was aimed at *preventing* such breaches, thereby incentivizing the parties to perform their contractual obligations in most cases.[415] Even more strikingly, the Court firmly rejected the classic "efficient breach" argument and explained why disgorgement was an appropriate remedy, even though it may have been efficient for Nebraska to breach:

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[413] *Id.*

[414] *Id.* at 1057 ("[W]hatever is true of a private contract action, the case for disgorgement becomes still stronger when one State gambles with another State's rights to a scarce natural resource. From the time this Court began to apportion interstate rivers, it has recognized part of its role as guarding against upstream States' inequitable takings of water.").

[415] *See id.* at 1059 ("Truth be told, we cannot be sure why the Master selected the exact number he did — why, that is, he arrived at $1.8 million, rather than a little more or a little less. The Master's Report, in this single respect, contains less explanation than we might like. But then again, any hard number reflecting a balance of equities can seem random in a certain light — as Kansas's own briefs, with their ever-fluctuating ideas for a disgorgement award, amply attest. What matters is that the Master took into account the appropriate considerations — weighing Nebraska's incentives, past behavior, and more recent compliance efforts — in determining the kind of signal necessary to prevent another breach. We are thus confident that in approving the Master's recommendation for about half again Kansas's actual damages, we award a fair and equitable remedy suited to the circumstances.").

> [T]he higher value of water on Nebraska's farmland than on Kansas's means that Nebraska can take water that under the Compact should go to Kansas, pay Kansas actual damages, and still come out ahead. That is nearly a recipe for breach — for an upstream State to refuse to deliver to its downstream neighbor the water to which the latter is entitled. And through 2006, Nebraska took full advantage of its favorable position, eschewing steps that would effectively control groundwater pumping and thus exceeding its allotment. In such circumstances, a disgorgement award appropriately reminds Nebraska of its legal obligations, deters future violations, and promotes the Compact's successful administration."[416]

CONCLUSION

This Article has argued that, if we judge courts by what they do rather than by what they say they do, the retributive interest seems to play a not-insignificant role in determining the quantum of "compensatory" damages awarded in many breach of contract cases. Specifically, and despite claims made by courts and commentators to the contrary, courts seem to invoke the retributivist interest and punish wrongdoers in proportion to both the damage caused to injured promisees and the wrongfulness of the promisor's breach. To be clear, this Article has not argued that courts awarding contract damages are not primarily concerned with compensating the injured party — they are. Rather, this Article has argued that there is ample evidence to suggest that courts are also concerned with retribution, and that whenever they have a choice between two or more different ways of compensating the injured party, or whenever they are called upon to apply the traditional limitations of certainty, avoidability, or foreseeability to limit such damages, they will often take into account the wrongfulness of the promisor's breach in doing so. Taken as a whole, these cases show a significant connection between a promisee's "compensation" and the wrongfulness of a promisor's breach, and strongly suggest that retribution plays a much more significant role in determining damages than has previously been recognized.

[416] *Id.* at 1057.