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Michael B. Kelly

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Living Without the Avoidable Consequences Doctrine in Contract Remedies

MICHAEL B. KELLY*

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* Professor of Law, University of San Diego School of Law; B.G.S. 1975, University of Michigan; M.A. 1980, University of Illinois at Chicago; J.D. 1983, University of Michigan. Christopher Wonnell’s contributions to this article and to my writings generally deserve particular thanks and recognition. Tom Smith’s contributions prevented this paper from floundering. I am also grateful for the contributions of Larry Alexander, Gail Heriot, Michael Rappaport, Emily Sherwin, Kristine Strachan, Paul Wohlmut, Fred Zacharias, and many others who encouraged or hounded me during this project. The research assistance of Geoffrey Morrison, Ronald Webb, John Doherty, and David Boyd and financial support from the University of San Diego also contributed to the successful completion of this article.
INTRODUCTION

The avoidable consequences doctrine, sometimes called the duty to mitigate damages, precludes plaintiffs from recovering damages for losses they could have prevented by reasonable efforts. Legal authorities generally treat the doctrine as an exception to or a limitation on the expectation interest. The expectation interest normally permits the nonbreaching plaintiff to recover damages sufficient to put the

1. See Restatement (Second) of Contracts § 350 (1979); Restatement (Second) of Torts § 918 (1977). This Article will frequently rely on these Restatements to summarize state law, rather than producing long and unnecessary string citations of case law.

plaintiff in the position she would have occupied if the defendant had performed the contract. Application of the avoidable consequences doctrine may leave the plaintiff short of that position. If the plaintiff failed to avoid some part of the loss because she failed to act reasonably, the damage award will not compensate her for the avoidable portion of the loss. This apparently leaves her worse off than if the contract had been performed. The avoidable consequences doctrine imposes a portion of the loss on the plaintiff rather than on the breaching defendant.

This Article challenges the traditional approach to the avoidable consequences doctrine. The avoidable consequences doctrine produces results entirely consistent with the expectation interest. In every contract case where the avoidable consequences doctrine reduces a damage award, the breach appears to bestow some benefit on the plaintiff for which the expectation interest must account. The expectation interest insists that courts not make the plaintiff better off than if the contract had been performed. If the breach left the plaintiff with some benefit, then the damage award must subtract the value of that benefit from the amount that the plaintiff may recover. The avoidable consequences doctrine serves this function, estimating the value of benefits that courts might have difficulty recognizing or valuing directly.

3. See, e.g., Restatement (Second) of Contracts § 347 cmt. a (1979); Farnsworth, supra note 2, §§ 12.1, 12.6, at 840, 871.


5. For example, if a discharged employee refuses to take a comparable job when available, the court should reduce the award by the amount that the employee could have earned by accepting the job. Restatement (Second) of Contracts § 350 cmt. c, illus. 8; see, e.g., Sutherland v. Wyer, 67 Me. 64 (1877) (employee took substitute employment, but quit before expiration of contract term with defendant). Reducing the recovery in these circumstances leaves the plaintiff with less money than she would have received if she had continued to work for the defendant.

6. See, e.g., Thorne v. White, 103 A.2d 579 (D.C. 1954). Without this insistence, the award would miss the target: the position that the plaintiff would have occupied if the defendant had performed. Indeed, even the reliance interest, as applied by courts, cannot place the plaintiff in a better position than if the contract had been performed. Restatement (Second) of Contracts § 349 (1979). The theoretical justifications of this limitation to the reliance interest have been explored elsewhere. See Lon L. Fuller & William R. Perdue, Jr., The Reliance Interest in Contract Damages, 46 Yale L.J. 52, 79 (1936); Michael B. Kelly, The Phantom Reliance Interest in Contract Damages, 1992 Wis. L. Rev. 1755, 1783-1811; Mark Pettit, Jr., Private Advantage and Public Power: Reexamining the Expectation and Reliance Interests in Contract Damages, 38 Hastings L.J. 417, 445-52 (1987).
Part I develops this theme in several contexts. Basically, when a plaintiff chooses not to avoid losses, her choice implies a judgment that she would be better off to incur those losses rather than to avoid them. That judgment suggests that she expects to benefit from the breach, either directly (such as leisure to a discharged worker) or indirectly (such as by redirecting productive capacity to projects she could not have pursued if the defendant had performed the contract). If courts compensate the plaintiff for the full loss, without accounting for the benefit of the breach, they leave the plaintiff in a better position than she could have occupied if the defendant had performed. Since the expectation interest cannot justify this result, it must create an offset for the benefits. Because the decision not to avoid the loss implies that the value of the benefit to the plaintiff at least equals the loss she could have avoided by reasonable efforts, the amount of avoidable loss becomes a reasonable estimate of the amount to subtract when accounting for the benefit. Thus, rather than reducing damage awards below what the expectation interest normally would require, the avoidable consequences doctrine simply implements a limitation inherent in the expectation interest.

Standing alone, Part I deserves attention. It identifies a previously unrecognized purpose served by the subtraction of avoidable losses from contract damage awards. Future discussions of the avoidable consequences doctrine need to take this function into account, along with other goals the avoidable consequences doctrine serves. In addition, Part I reconciles the avoidable consequences doctrine with the expectation interest. We no longer need to explain why the law accepts undercompensation in the name of mitigation. Mitigation is necessary to avoid overcompensation.

Part II advances a more extreme implication of the arguments presented here: the law could live without the avoidable consequences doctrine. Even if courts never again mentioned the avoidable consequences doctrine or a duty to mitigate damages, proper implementation of the expectation interest would produce the same damage awards. That extension, however, confronts an obstacle. Part I rests upon a critical inference: the failure to minimize losses reveals the plaintiff's valuation of the benefits of the breach. That inference, however, arguably assumes the existence of the avoidable consequences doctrine, making the argument circular. Part II addresses the independence of the analysis here in two ways. First, continued reference to the avoidable consequences doctrine is superfluous. Even if its existence was necessary to create the inference, from now on that inference can displace the avoidable consequences doctrine. Second and more importantly, common-law judges concerned with proper implementation
of the expectation interest would have needed to create an offset for the benefits of breach even if the avoidable consequences doctrine never existed. In so doing, they could have drawn the inference proposed here independently of any concerns for avoidable consequences.

In explaining how common-law courts could have derived the offset, this Article stumbles upon a concept that may have considerable significance in other areas: the idea of natural harm, or the amount of harm that would have occurred if no remedy was available. Some losses a plaintiff incurs may exist as much because of the remedies the law makes available as because of the defendant's misconduct. Recognizing this fact may shed light on other remedial issues far removed from the narrow question discussed here. Part III, however, focuses on the narrower issues that motivated this work. It identifies the significance of viewing the avoidable consequences doctrine as a corollary to the expectation interest.

Part I does not propose any change in the rules courts apply. Whether viewed as a separate avoidable consequences doctrine or as an intrinsic part of the expectation interest, courts must reduce awards by the amounts that plaintiffs could have avoided by reasonable conduct. Nonetheless, at least three advantages seem likely to flow from the analysis presented here—one theoretical, two more practical.

First, understanding the avoidable consequences doctrine may illuminate our theories of contract remedies—and, more generally, of contract law. Recent efforts to explain contract remedies as including fault principles start by criticizing the expectation interest's ability to explain limitations on remedies. If the expectation interest can in fact explain these limitations on recovery, these theories may require additional thought. At the very least, our understanding of contract remedies will be richer once it accounts for the consistency between the avoidable consequences doctrine and the expectation interest.

Second, court decisions occasionally deviate from the avoidable consequences doctrine, apparently because they place undue emphasis on

8. This Article does not attempt to rebut Professor Cohen's excellent work, which presents ideas I find quite appealing. In fact, the initial working title for this Article (in 1991) was Contributory Negligence in Contract Law. That project began with the argument that the avoidable consequences doctrine incorporated fault notions—an idea I gave up because I could not overcome the argument presented below.
the existence or nonexistence of a duty to mitigate damages. Scholars have long argued that the avoidable consequences doctrine does not really involve a duty to mitigate damages and is not a manifestation of contributory negligence. Nonetheless, the language of duty persists in legal decisions. That persistence flows, at least in part, from the weakness of efforts to explain why the avoidable consequences doctrine is not a manifestation of contributory negligence. The explanation offered here cuts the link to duty-based concepts such as contributory negligence. Thus, it may help prevent misapplication of the avoidable consequences doctrine in the future.

Third, recognizing the harmony between the avoidable consequences doctrine and the expectation interest may help courts apply the avoidable consequences doctrine more appropriately. The avoidable consequences doctrine can arise in some intricate situations, when an appreciation of its harmony with the expectation interest can help the court approach the problem in a productive way.

9. The language used to discuss the avoidable consequences doctrine may not have much significance. Dobbs, for one, believes "no one is likely to be misled" by imprecise usage such as the duty to mitigate damages. DAN B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 3.9 n.5 (2d ed. 1993). Shortly after the treatise's appearance, however, Riffer and Barrowman reported significant confusion over the existence of a duty to mitigate. See Jeffrey K. Riffer & Elizabeth Barrowman, Recent Misinterpretations of the Avoidable Consequences Rule: The "Duty" To Mitigate and Other Fictions, 16 HARV. J.L. & PUB. POL'Y 411 (1993).

10. See, e.g., DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.7, at 188 (1973); CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 128 (1935); ARTHUR G. SEDGWICK, ELEMENTS OF THE LAW OF DAMAGES 73 (2d ed. 1909).

11. Scholars generally agree that the doctrine is not a manifestation of either contributory or comparative negligence. DOBBS, supra note 10, § 3.7, at 188; MCCORMICK, supra note 10, at 128. But see SEDGWICK, supra note 10, at 73-74. While neither proposition has achieved universal support, each has achieved a breadth of support that most principles of black letter law would covet. The support extends far beyond the authors of scholarly treatises. The American Law Institute's Restatements, on which practitioners and judges frequently rely, endorse the propositions. See RESTATEMENT (SECOND) OF TORTS § 918 cmt. a (1977); RESTATEMENT (SECOND) OF CONTRACTS § 350 cmt. b (1979) (relating only to duty, perhaps because contributory negligence plays no obvious role in contract law). Legal encyclopedias, designed primarily as practice aids, reiterate the points, citing case authority for them. See 22 AM. JUR. 2D DAMAGES §§ 497, 499 (1988); 15 AM. JUR. DAMAGES § 27 (1938) (distinguishing contributory negligence, though otherwise using language of duty); 25 C.J.S. DAMAGES § 32 (1966) (distinguishing comparative negligence, but otherwise using language of duty). Articles by practitioners indicate the propositions have penetrated law offices, a fate that gives them effect beyond that of many scholarly exhortations. See Riffer & Barrowman, supra note 9.

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I. AVOIDABLE CONSEQUENCES AS A COROLLARY OF THE EXPECTATION INTEREST

This section seeks to explain how the avoidable consequences doctrine is completely consistent with the expectation interest. That explanation is complicated somewhat by the existence of several different rules that use the same moniker. At the same time, the law avoids identifying several very similar results as applications of the avoidable consequences doctrine by incorporating the limitations on damages into basic damage calculations. The expectation interest explains the avoidable consequences doctrine's peripheral and core aspects. Readers may find the discussion of the peripheral aspects too elementary. Nonetheless, the discussion of the periphery lays the groundwork for the more controversial argument that follows. In addition, the Article can claim success only by explaining all aspects of the avoidable consequences doctrine. Thus, a brief explanation of two collateral aspects of the avoidable consequences doctrine follows.

A. Peripheral Aspects of the Avoidable Consequences Doctrine

1. Affirmative Uses of the Avoidable Consequences Doctrine

A fundamental division within the avoidable consequences doctrine comes from its affirmative and negative applications. Most people think of the doctrine as a limitation on damages: plaintiff cannot recover damages for losses she could have avoided by reasonable conduct. But the avoidable consequences doctrine includes a corollary: plaintiff can recover the cost of any reasonable effort to avoid the losses inflicted by the defendant's wrongful conduct.

Affirmative application of the avoidable consequences doctrine adds virtually nothing to the law of damages. It simply duplicates the result achieved by the fundamental principle of damages: putting the plaintiff

12. Dobbs identifies "four rules of avoidable consequences." DOBBS, supra note 9, § 3.9, at 271 (emphasis in original).
15. See DOBBS, supra note 10, § 3.7, at 187; DOBBS, supra note 9, § 3.9.
as nearly as possible in the position she would have occupied if the
wrong had not occurred. 16 If the wrong had not occurred, the injured
party would incur no expense to minimize the harm caused by the
wrong. Compensation for such losses, thus, seems inescapable.

Consider how the affirmative use of the avoidable consequences
doctrine might arise in a simple contract case. A seller breaches, forcing
a buyer, in order to avoid consequential losses, to purchase substitute
goods (or land or services). As long as the buyer makes reasonable
efforts to obtain substitute goods, the affirmative application of the
avoidable consequences doctrine would permit the buyer to recover these
incidental expenses. Similarly, if a buyer breaches, the seller incurs the
cost of arranging to sell the goods to another person. The affirmative
aspect of the avoidable consequences doctrine would entitle the seller to
recover the cost of resale.

Contract law does not need the avoidable consequences doctrine to
explain why a nonbreaching seller may recover the cost of reselling the
goods to another or why a nonbreaching buyer may recover the cost of
effectuating cover. The expectation interest explains the law perfectly
without any embellishment from the avoidable consequences doctrine.
If the contract had been performed, the plaintiff would not have incurred
the costs of reselling or covering. 17 Thus, the plaintiff should recover

16. See, e.g., Hatahley v. United States, 257 F.2d 920, 923 (10th Cir. 1958);
Laycock, supra note 2, at 14 ("Hatahley's rule—that the fundamental principle of
damages is to restore the injured party as nearly as possible to the position he
would have been in but for the wrong—is the essence of compensatory damages."). This
Article occasionally follows Laycock's shorthand of referring to this as the plaintiff's
"rightful position."

17. For those who prefer the reliance interest, we might adapt the sentence in the
text. If the contract had not been made, the plaintiff still would have incurred the cost
of buying or selling the goods (or land or services) in the cover transaction, but might
not have incurred the cost of buying the goods from or selling the goods to the
defendant. By forcing the plaintiff to incur these transaction costs twice, the breach left
the plaintiff worse off than if the contract had not been made. The reliance interest
refocuses our attention on recovering the cost of dealing with the defendant, not the cost
of the cover or resale transaction. The net effect is much the same.

This transformation assumes that the reliance interest would hypothesize no dealing
between the plaintiff and the defendant. Arguably, we could assume that the parties
would have incurred all of the expenses of dealing with each other, but at the last
possible moment would have stopped short of entering the agreement. Under that
assumption, the reliance interest might reject recovery of incidental expenses incurred
in the process of making either sale. The reliance interest does not compel any
particular assumption concerning the hypothetical bargaining that might have occurred
if the contract had not been made. It dictates the general question ("What if the contract
had not been made?"), but leaves the answer open to several alternatives, including lost
opportunities to deal with others in addition to the two possibilities already identified in
this footnote. See Fuller & Perdue, supra note 6, at 55, 60-61; Pettit, supra note 6, at
420-21. As long as the resale or cover generates actual out-of-pocket expenses, recovery
any such costs incurred in finding a substitute transaction. To the extent that we need a name for this portion of the award, "incidental damages" should serve the purpose quite well.\textsuperscript{18} No embellishment of the basic damage rule is necessary to generate this result.

The point extends beyond contract law. In every case where a plaintiff must incur expenses to minimize the losses caused by the defendant's wrong (regardless of the nature of the wrong),\textsuperscript{19} the plaintiff would not have incurred those expenditures but for the wrong. Any effort to put her into the position she would have occupied but for the wrong necessarily must include expenses incurred to minimize the harm. Both the damage formula (the position but for the wrong) and the definition of the expenses recoverable under the affirmative use of the avoidable consequences doctrine (expenses to reduce the harm caused by the wrong) focus on damages caused by the wrong. Under these circumstances, the affirmative application of the avoidable consequences doctrine remains a subset of the damages recoverable under the expectation interest, requiring no separate explanation.

\textbf{2. Avoided Consequences}

The negative application of the avoidable consequences doctrine presents three further possibilities: the plaintiff may fail to make of those expenditures would serve the principle advantages of the reliance interest: certainty and measurability. Thus, one might anticipate courts choosing to allow recovery of these expenses under the reliance interest. Since contract law generally prefers the expectation interest, any additional discussion of whether the reliance interest would adopt a stinger view of incidental damages seems unnecessary here.


\textsuperscript{19} The superfluous nature of affirmative avoidable consequences applies even in tort. Medical expenses minimize harm: rather than suffer through life without the use of one leg, the plaintiff should have the bone set, allowing her to use the leg again within a few months. Since those expenses are reasonable, the affirmative use of the avoidable consequences doctrine justifies their recovery. Medical expenses in tort may be the archetypical affirmative use of the avoidable consequences doctrine. See RESTATEMENT (SECOND) OF TORTS § 918 cmt. d (1977). But tort law does not need the avoidable consequences doctrine to explain why an injured party may recover medical expenses. If the tort had not occurred, the plaintiff would not have incurred medical expenses. Causing the plaintiff to incur medical expenses fits comfortably within compensation for "the creation of liabilities." \textit{Id.} § 906(c). Thus, basic damage principles justify awarding medical expenses without reference to the avoidable consequences doctrine.
reasonable efforts to avoid the loss; the plaintiff may make reasonable efforts that nonetheless fail to avoid the loss; or the plaintiff may make successful efforts to avoid the loss. The avoidable consequences doctrine usually addresses only the first two situations. The Restatement (Second) of Contracts deals with only the first two situations.\(^{20}\) The Restatement (Second) of Torts leaves a similar gap in the definition of the avoidable consequences doctrine.\(^{21}\) Unless the law prefers to encourage futile efforts to avoid the loss, omitting the treatment of successful efforts seems odd.\(^{22}\) At least superficially, the avoidable consequences doctrine seems designed primarily to encourage successful efforts to minimize the loss.\(^{23}\)

The law does not need the avoidable consequences doctrine in order to decide how to treat successful efforts to avoid the loss. The expectation interest addresses the issue by limiting recovery to damages caused by the breach. Damages aim to put the plaintiff in the position she would have occupied if the defendant had performed the contract, but not a better position.\(^{24}\) If the plaintiff avoids some portion of the loss, allowing recovery for the avoided loss would leave her in a position better than the one she would have occupied if the contract had been performed. This general rule finds specific manifestation in several provisions of the Uniform Commercial Code. For example, a nonbreaching seller may recover contract price minus the amount she realized by reselling the goods to a new buyer (net of resale expenses, of course).\(^{25}\) The defendant deprived the seller of the full price, but the seller avoided part of the loss by selling to another, leaving only part of

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20. Restatement (Second) of Contracts § 350 (1979):

(1) 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.

(2) The injured party is not precluded from recovery by the rule stated in Subsection (1) to the extent that he has made reasonable but unsuccessful efforts to avoid loss.

While the language explicitly discusses unsuccessful efforts to avoid the loss, it does not explain how to treat successful efforts.

21. Restatement (Second) of Torts § 918 (1977). By including the benefits rule in another section, the Restatement (Second) of Torts fills the gap left by § 918. See id. § 920.

22. This may explain why Dobbs includes losses actually avoided as the first of his "four rules of avoidable consequences." See Dobbs, supra note 9, § 3.9.

23. One purpose for the avoidable consequences doctrine is to prevent waste. See McCormick, supra note 10, at 127; Dobbs, supra note 10, at 188. Successful efforts prevent waste far better than unsuccessful efforts.


the price unsatisfied. Similarly, the nonbreaching buyer may not collect the full cost of the substitute goods, only the cost minus the price she would have paid under the contract with the breaching seller. 26

Although everything in this section seems obvious, the conclusion may not be as apparent. The avoidable consequences doctrine does not address losses actually avoided. That treatment, like the affirmative applications of the avoidable consequences doctrine, stems entirely from the expectation interest. Even if the law never examined the adequacy of the plaintiff's efforts to avoid the loss, the law nonetheless would not permit recovery of losses actually avoided.

**B. Unsuccessful Efforts To Avoid the Loss**

The core of the avoidable consequences doctrine involves its treatment of unavoided losses. In this area, the avoidable consequences doctrine augments the expectation interest by providing a limitation that the general rules do not appear to include. 27 It limits recovery by excluding amounts the plaintiff could have avoided losing even if those amounts are necessary to put the plaintiff in the position she would have occupied if the contract had been performed. Thus, an employee discharged in breach of contract may receive less than her full salary even if she does not find other employment, if she could have found other employment by reasonable efforts. 28 A company that cannot resell goods because the seller failed to deliver them in breach of contract may not recover the profits lost on the resale if they could have avoided the loss by reasonable efforts to cover. 29 In each case, if the contract had been performed, the plaintiff would have received more money—the full salary or the profits on the lost resale. But the avoidable consequences doctrine precludes recovery of those losses despite the basic damage principle. 30 The avoidable consequences doctrine dictates results that seem to diverge from the expectation interest.

26. Id. § 2-712(2).
27. Despite this appearance, this Article argues that the expectation interest does include a limitation on a plaintiff's ability to recover unavoided losses. See infra Part I.C.
30. Kelly, supra note 6, at 1765 n.39; LAYCOCK, supra note 4, at 84.
To a large extent, the need for the avoidable consequences doctrine stems from the treatment of losses actually avoided. If the plaintiff could recover for losses even though she had avoided them, one would not need to limit damages in order to encourage mitigation efforts. The gain from such efforts would accrue to the plaintiff, providing her with ample incentive to keep losses to a minimum. The expectation interest, however, permits the defendant to capture the benefit of any loss reduction the plaintiff actually achieves. Thus, moral hazard might lead some plaintiffs to allow avoidable losses to mount. The buyer might not cover, no matter how easily she could find substitute goods and resell them at a profit. The employee might remain idle no matter how easily she could find other work.

The avoidable consequences doctrine combats this moral hazard by imposing the cost of avoidable losses on the plaintiff, despite the defendant’s wrongful conduct that caused the losses. When appropriately applied, it eliminates the difference between avoided losses and avoidable losses by allowing the plaintiff the same recovery regardless of whether she actually avoided the losses. The plaintiff cannot externalize the cost of idleness; it will fall on her, not on the defendant. Thus, the plaintiff again has an incentive to make efforts to minimize the losses. Efforts to avoid the loss will accrue to her benefit, by providing her money she cannot obtain in a damage award. In fact, efforts to

31. See Christopher T. Wonnell, *The Abstract Character of Contract Law*, 22 Conn. L. Rev. 437, 493-94 (1990). Rockingham County v. Luten Bridge Co., 35 F.2d 301 (4th Cir. 1929), provides a vivid example. The county hired the plaintiff to build a bridge. When the county decided not to build a road up to the bridge, it notified the plaintiff to stop work. The plaintiff could have minimized the loss by doing nothing—about as easy a task as the avoidable consequences doctrine will ever require. The plaintiff finished the bridge anyway and sued for the price. The plaintiff must have assumed that any additional expenditures it incurred would come out of the defendant’s pocket, not its own—a classic example of moral hazard. The court, of course, refused to allow recovery of expenses incurred after the county’s repudiation.

32. Unlike the possibility raised in the preceding section, the avoidable consequences doctrine eliminates the difference between avoided and avoidable losses by denying recovery for both rather than by granting recovery for both. Either approach would reduce moral hazard following the wrong. Allowing recovery for both avoided losses and avoidable losses violates the basic stricture prohibiting recoveries in excess of the position the plaintiff would have occupied if the defendant had performed. In addition, recoveries in excess of losses create a different kind of hazard: an incentive to provoke the other party into breach, since the plaintiff might receive more money from a damage award than she could have obtained if the other party had performed. See Andrew Kull, *Restitution as a Remedy for Breach of Contract*, 67 S. Cal. L. Rev. 1465, 1506-11 (1994); Kelly, *supra* note 6, at 1768-69 & n.48 (discussing situations where a party can obtain a substantial recovery in restitution even though the expectation interest might be small or even negative because the plaintiff would have incurred large losses under the contract if the defendant had performed).
minimize the loss will increase the damage award slightly because the award will include the cost of reasonable efforts to minimize the loss.

**C. The Benefits of Breach of Contract**

The preceding sections demonstrate how the expectation interest explains portions of the avoidable consequences doctrine. If the defendant had performed as promised, the plaintiff would not have incurred any expenses attempting to minimize the consequences of the defendant’s breach. Thus, the expectation interest compels the recovery provided by affirmative application of the avoidable consequences doctrine. Similarly, if the plaintiff actually avoided a portion of the losses, recovery for avoided losses would defy the expectation interest by putting the plaintiff in a position better than she would have achieved if the defendant had performed. Thus, the expectation interest compels denying recovery of losses actually avoided. These peripheral aspects of the avoidable consequences doctrine pose no inconsistencies with the expectation interest at all.

The core of the avoidable consequences doctrine, however, appears to conflict with the expectation interest. By denying recovery of some damages that the breach caused and that the plaintiff did not avoid, the avoidable consequences doctrine leaves the plaintiff in a position worse than the one she would have occupied if the defendant had performed. This section will attempt to explain how the expectation interest can account for this apparent inconsistency.

**1. Identifying the Benefits of Breach**

The explanation depends on a fundamental premise: every time the avoidable consequences doctrine comes into play, breach of the contract provides the nonbreaching party with benefits for which the expectation interest must account. When a seller breaches before the buyer has

33. The proposal to offset contract recoveries to account for benefits of breach resembles the offset for benefits in tort law. *See Restatement (Second) of Torts § 918 (1977).* The proposal differs in several particulars, however, notably in the mechanics of evaluation. The benefit rule in tort limits the offset to injury to the same interest benefitted. While that limitation has been questioned, *see Laycock, supra note 2,* at 141, it may serve some purpose where either the benefits or the losses cannot be measured with much confidence or accuracy. Thus, when pecuniary harm can be proven with certainty, allowing an offset for emotional benefits that cannot be calculated by
paid in full for the goods (or services or land), the buyer benefits from the breach by retaining money that she would not have retained if the contract had been performed. If a buyer breaches before the seller has delivered all of the goods (or services or land), the seller benefits by retaining goods (or time or land) that she would not have if the contract had been performed.

Contract remedies often account for these benefits without any reference to the avoidable consequences doctrine or the benefits rule. The basic damage formulae in the Uniform Commercial Code (U.C.C.) subtract these benefits from the award without comment. Section 2-712 allows the buyer to recover the difference between the cover price and the contract price, in effect offsetting the amount that the buyer did not pay the seller as a benefit. Section 2-706 allows the seller to resell the goods and recover the difference between the resale price and the contract price. Each section allows further offset for other benefits reference to any market may make little sense. See Kelly, infra note 53, at 520-21 (discussing genetic counselling torts). Whatever the merits of this distinction, the discussion of contract damages proceeds without any effort to ascertain or distinguish among the various interests that the plaintiff may have (except, of course, to keep the expectation interest distinct from the reliance interest). Laycock points out that contract law has avoided the distinction drawn by the benefit rule in tort. See LAYCOCK, supra note 2, at 142. That may result from the reluctance to allow recovery for emotional distress and other intangible losses in contract cases. See RESTATEMENT (SECOND) OF CONTRACTS, §§ 352-53 (1979). Rather than rely on these doctrines, this Article proposes relatively ascertainable market measures of the benefits involved. The measure of these benefits will be indirect, depending upon inferences. In each case, however, the measure relies upon a market transaction (or decision by an actor in the market) rather than a jury judgment about the relative dollar value of emotion or pain, divorced from any objective criteria. Thus, even if differentiating the interests under the benefit rule makes sense in tort, perhaps the rationale will not apply to the approach advanced here.

34. Initially I will focus on breaches that occur before full performance by the nonbreaching party, since these provide the clearest examples of benefits from the breach. As the Article progresses, the application to nonbreaching parties who have fully performed the contract should become apparent.

35. This sentence assumes that if the seller had performed, the buyer also would have performed. While the buyer could have retained the benefit of money not paid even after full performance by the seller, presumably the law would remove that benefit via a damage award against the buyer in favor of the seller. Thus, I refer to the situation if both parties had performed fully.

36. U.C.C. § 2-712 (1995). The U.C.C. treats the entire contract price as a benefit because another section allows the buyer to recover amounts paid to the seller in addition to the remedy under § 2-712. Id. § 2-711.

37. Id. § 2-706. A lost volume seller—one who could have sold goods both to the breaching buyer and to the customer who purchased the goods on resale—may recover lost profit on the original sale and keep the profit on the resale. See, e.g., Neri v. Retail Marine Corp., 285 N.E.2d 311 (N.Y. 1972); U.C.C. § 2-708(2) (1995). The avoidable consequences doctrine does not reduce the recovery by lost volume sellers because the resale does not avoid losing the profit on the original sale. Rather, breach of the original contract leaves the seller with the profit on one sale (the resale) instead of the profit on two sales (the original sale and the resale). See DOBBS, supra note 10, § 12.19, at 889.
of the breach by subtracting "expenses saved in consequence of the . . . breach." 38

The benefits noted in the preceding paragraph represent avoided losses, not avoidable losses. The U.C.C., however, treats avoidable losses in exactly the same manner. If a seller does not resell the goods, she still cannot claim the entire price without regard to the benefit of retaining the goods. Instead, the U.C.C. looks to the amount the plaintiff could have received by reselling the goods (the market price) and values the benefit to the seller at that amount as if it was the resale price. 39

In effect, this treats the goods as having been resold to the seller at the market price. This income is fictional, attributed to the seller and subtracted from the award even though the seller does not possess the money she would have received from the contract or from an actual

39. Id. § 2-708. The Restatement (Second) of Contracts and at least one court have recognized that the contract/market differential amounts to application of the avoidable consequences doctrine. See Autonomerics v. Bayer Indus., 696 P.2d 1330, 1341 (Ariz. Ct. App. 1985); Restatement (Second) of Contracts § 350 cmt. c. (1979). Dobbs recognizes that this market measure serves the purpose of minimizing damages, but suggests procedural differences remove it from the avoidable consequences doctrine. See Dobbs, supra note 9, § 3.9 & n.4 (identifying the specified date and the willingness to ignore potential transactions above the market price as differences between the avoidable consequences doctrine and market measures). To the extent that Dobbs seeks to identify mechanical differences in the way the avoidable consequences doctrine operates within market measures, I concur in his distinction. But the procedural differences he isolates do not negate the manifestation of the avoidable consequences doctrine within market measures. The focus on a specific date (such as the date of breach, of notice of repudiation, or of an actual cover or resale transaction) limits litigation costs by precluding lengthy argument, based on 20-20 hindsight, concerning when to assess the market price. But the market price remains an estimate of how much the plaintiff could have obtained by reasonable efforts. Similarly, the decision to ignore opportunities to deal above the market price merely reflects the avoidable consequences doctrine's limitation to reasonable efforts. The avoidable consequences doctrine does not insist that a plaintiff make the best possible transaction. As long as the plaintiff enters a reasonable transaction, the avoidable consequences doctrine will not reduce the award. Thus, the U.C.C. formula need not impute the best possible transaction to a plaintiff who does not cover or resell. Market price—or, more accurately, the average price at which transactions in the market occurred at that time (see infra note 73)—seems presumptively reasonable. Some commercial actors entered transactions for less; the plaintiff hardly could be faulted for not getting more. That the market measures produce this result mechanically rather than insisting upon case-specific evidence represents a procedural compromise of a sort Dobbs recognizes. See Dobbs, supra note 9, § 3.1, at 213-24. That compromise, however, does not negate the fundamental role the avoidable consequences doctrine plays in the formula embodying the market measure.
resale. Similarly, a buyer who does not cover nonetheless finds the unpaid portion of the contract price subtracted from the recovery. In each case, other expenses saved remain an offset against the award.

I anticipate the objection that I am still dealing with avoided losses, not with avoidable losses. But that is precisely the point, not an objection at all. The law attributes the market price to the seller not because she could have realized that value by reasonable efforts to sell the goods, but because she did realize that value by retaining the goods. The goods are valuable; retaining them is a benefit. The plaintiff, thus, has received an actual benefit from the breach, not merely an opportunity to reduce the loss. The expectation interest requires an offset for the value of that benefit.

The seller of services presents an even clearer example. An employee discharged in breach of a contract with a specified duration receives a benefit: the time she can devote to other pursuits. She may devote this time to another job, in which case she receives the benefit of the wages earned in the other job. She may devote this time to leisure activities, eschewing other employment for the remainder of her contract term. In that case, she receives the benefit of the leisure time she would not have enjoyed if her employer had performed the contract. In either case, she has received an actual benefit from the discharge.

2. Quantifying the Benefits

In order to offset the value of these benefits against the damage award, the law needs a mechanism for measuring the benefit. The market price—the amount the seller could have realized in a reasonable sale of the goods (or land or services)—offers an acceptable proxy for, or estimate of, the amount of that benefit. The subjective benefit to the seller might exceed the market price. The seller may have a use for the goods (or land or time) that she values more highly than other market participants. But the seller must value the goods (or land or time) at least as highly as the market price. Otherwise she would resell them. Thus, attributing to the seller a benefit valued at the market price fixes the lowest reasonable offset for benefits bestowed.

41. A third possibility—that she devotes the time to an unsuccessful search for substitute employment—will be discussed shortly. See infra Part I.D.1.
42. The analysis does not rest on the assumption that the seller has not fully performed, see supra note 34, but applies with equal force to cases where the buyer breaches after full performance by the seller. Following full performance, however, neither the avoidable consequences doctrine nor the expectation interest suggests any offset against the seller's recovery. The seller has no apparent way to reduce the loss.
While the expectation interest compels some reduction for the benefits of a breach, it may not compel the specific measure urged here. The benefit to the nonbreaching party consists of the subjective value she attaches to whatever she retained by not completing performance. For various reasons, that subjective value might differ from the amount she could have saved by reasonable efforts to minimize the loss. Argu-

She retains no goods to resell; full performance implies that she has delivered all of the goods to the buyer. All expenses she normally would incur have been incurred. Retaining no goods, the seller has no apparent benefit from the breach and, thus, no offset arises under either U.C.C. § 2-706 or § 2-708. The same applies to the employee discharged after full performance. The principal remaining duty is the employer’s duty to pay. The employee cannot find someone else willing to pay for the time already spent working for the breaching employer. The time the employee retains is time she would have retained despite the breach—time to which the employer had no claim. Full performance by the employee removes the issue of avoidable consequences from the table under any theory.

Despite delivery of the goods, the seller may have additional duties, such as service obligations under a warranty. When the buyer breaches before full performance of the warranty by the seller, a different portion of the rules applies. The buyer’s breach benefits the seller, but not in ways the U.C.C. accounts for by subtracting resale price or market price. Instead, the seller’s benefit falls within the provisions subtracting “expenses saved in consequence of the buyer’s breach.” See U.C.C. §§ 2-706, -708 (1995). Nonetheless, the expenses represent actual savings—expenses not incurred to repair the product. (I assume here that the buyer’s breach is material, thus excusing the seller’s performance of the warranty obligations. If the buyer’s breach is not material, the seller may need to perform under the warranty and seek damages against the breaching party. In this case, the avoidable consequences doctrine will not come into play, since the seller has no way to reduce the loss and receives no savings.) These savings exist immediately upon the buyer’s rejection; the seller need not expend any effort to obtain them. Thus, we again face avoided, not avoidable, losses. The savings do not accrue to the seller who actually resells, since she incurs the same warranty obligations to the new, different buyer. They will apply, however, to the lost volume seller, who incurs only one set of warranty obligations where she would have incurred two but for the breach. See Laycock, supra note 4, at 71 (discussing Neri v. Retail Marine Corp., 285 N.E.2d 311 (N.Y. 1972)).

43. One difference, already noted in text, arises because the amount of loss the plaintiff could have avoided offers only a minimum estimate of the value to the plaintiff. We know she values the benefit more than the amount of loss she could prevent, but we do not know how much more. Unconstrained by the avoidable consequences doctrine, defendants might urge courts to subtract more than the amount of avoidable loss rather than settle for a minimum estimate. Another difference arises if the plaintiff makes the amount of loss she could avoid. If she overestimates the amount of loss she could prevent and still does not avoid the loss, defendants again might urge reducing the damages by more to reflect the true value to the plaintiff. On the other hand, if the plaintiff underestimates the amount of loss she could prevent, she may retain the benefit even though she values it less than she values the savings she actually could have obtained. In this case, plaintiff might object that subtracting the full amount she could
ably, the expectation interest dictates subtracting the entire subjective value of the benefit retained.44

The avoidable consequences doctrine attaches no significance to subjective values. It rests entirely on the objective value of the portion of the loss that the plaintiff should have avoided. Arguably, the difference between these two methods of calculating the offset reveals an inconsistency between the expectation interest and the avoidable consequences doctrine.

The inconsistency is more apparent than real. If a reasonable lawmaker set out to devise a method of evaluating the subjective benefits of the breach to the nonbreaching party, she easily might choose the amount of loss the nonbreaching party could have avoided by reasonable efforts.45 The lawmaker understandably might prefer to draw inferences of value from objectively verifiable facts, rather than resort to a subjective inquiry into value to the plaintiff. Efforts to measure the value of benefits apart from the market confront serious problems that might justify recourse to proxies, such as the amount of avoidable loss.46 Direct evidence of the subjective value of the benefit will be difficult to adduce. In most cases, it will come entirely from the seller,
with inevitable concerns for distortion (conscious or otherwise). 47
Problems increase if the benefits consist of additional utility rather than
additional monetary gain—as, for example, when an employee gains

47. Courts are familiar with the phenomena of selective perception and selective retention, which help explain how an individual may quite honestly come to believe facts that do not accord with reality—or, at least, with the reality perceived and recalled by other observers. See, e.g., In re Kreps, 700 F.2d 372, 375 (7th Cir. 1987). The problems take on particular significance when the facts sought to be adduced involve the subjective state of mind of the individual. The Kreps case involved reliance, in effect seeking to determine whether a bank officer renewed a loan because of a financial statement that contained material misrepresentations or whether the officer would have renewed the loan for other reasons even with an accurate financial statement. The bankruptcy court noted:

Rynberk, who personally handled the loan transaction for the plaintiff, testified that he relied on the financial statement on the second renewal of the loan. Now, if the trial court was bound by the testimony of loan officers about reliance, trials would end at that point and lending institutions would win 100% of the cases because in the court’s considerable experience with such cases it has never heard a loan officer testify that he did not rely upon a financial statement and does not expect to hear one do so. Looking at the evidence as a whole, the court believes Rynberk was induced to allow the loan renewal by reason of his bank’s loan experience with the debtor dating back 15 years. The court is not convinced that Rynberk would not have approved the renewal if the financial statement had not been given.

What has been said about loan officers in trials always testifying that they relied on financial statements is not intended to imply that they intentionally gave false testimony. There seems to be something in the make-up of human beings which enables them, by the processes of hindsight, self-deception, rationalization, forgetfulness and whatever else comes into play, to convince themselves that events of the past were different than what actually took place. In the field of psychology, these processes are known by the following terms: selective perception, selective retention and selective forgetfulness. Id. at 375. Subjective value seems equally susceptible to these phenomena—and equally difficult to discern without reference to external indicators, such as market forces.

The holding of Kreps, which reversed the bankruptcy court’s finding that the bank officer did not rely on the financial statement, establishes the need for presumptions like the one noted in the text. If courts engage in a specific inquiry into subjective factors, knowing that phenomena like selective perception and selective retention exist may not produce appropriate outcomes in a given case. One may not prove that these forces have distorted the testimony of a specific witness. Even a credibility judgment may not withstand appeal in the absence of contrary evidence. Thus, a lawmaker may prefer a manageable standard to one that relies too heavily upon the vagaries of individual factfinding. Heriot has pointed out how rules, by minimizing the problems of administration (including factfinding), may produce more appropriate results than case-by-case adjudication. See Gail Heriot, A Study in the Choice of Form: Statutes of Limitation and the Doctrine of Laches, 1992 B.Y.U. L. REV. 917, 935-41.
leisure rather than substitute wages. "\[^{48}\] No one knows how to measure utility," let alone how to translate a measurement into monetary terms. \[^{50}\] Even when the goods produce a monetary benefit for the seller, courts may have trouble allocating the benefit between the goods and the other productive inputs of the seller that helped generate the monetary gain. \[^{57}\] Problems with certainty may doom efforts to measure the benefit directly. \[^{52}\] If the breaching party bore the burden of proof on the amount of the benefit, \[^{53}\] the problems with certainty


49. Id. at 341.

50. We could attempt to zero in on the amount of utility the goods have for the seller by using the contract price as the highest possible value of the goods to the seller. The plaintiff seller was ready and willing to part with the goods for that amount, giving rise to the inference that she did not value the goods more than she valued the contract price. At best, however, this merely prevents estimates of utility that exceed contract price; it does not help decide how much utility, if any, the goods had between the contract price and the price for which they could have been resold on the market. More important, inferences about the ceiling will not always be true. The defendant's breach bestowed the value the seller attached to the goods on the date of the breach, which may exceed the value she attached to the goods on the date of contract formation. While there are reasons to believe that problem will not affect many cases, an effort to determine utility directly still faces problems that make this approach less practical than the proxy based on market price.

51. Where the monetary gain stems from a simple resale, we confront actual avoided losses, not avoidable losses, thus permitting measurement without a proxy. Any time the seller's benefit (in excess of avoidable loss) stems from more than a simple resale, the seller will have employed other productive resources with the good—say, by using it as a component part of another good or putting it into an attractive package. The defendant provided only the amount of the benefit attributable to the original good; amounts attributable to the other productive resources belong to the plaintiff and should not be subtracted from the damage award. Cf., e.g., Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390 (1940) (discussing how much of the profit from a movie was attributable to a stolen script and how much attributable to the defendant's other contributions to the movie).

52. See, e.g., id.

53. The defendant bears the burden of proof under the avoidable consequences doctrine. Dobbs, supra note 9, § 3.9, at 272. Whether the courts would allocate the burden of proof in the same way if pursuing the expectation interest remains an open question. Once the plaintiff has proven the amount of the loss caused by the defendant, it would make some sense to insist that the defendant prove any assertions that the breach benefitted the plaintiff. That seems to be the allocation of burdens under the benefit rule in tort law. See Michael B. Kelly, The Rightful Position in “Wrongful Life” Actions, 42 Hastings L. Rev. 505, 520 (1991). At the same time, at least some offsets arguably related to the avoidable consequences doctrine are treated as part of the plaintiff's burden to prove damages. See, e.g., O'Brien Bros. v. Helen B. Moran, 160 F.2d 502 (2d Cir. 1947). As long as the law treats the market price as the amount of the offset, it may continue to insist that the plaintiff prove the market price as part of the measure of damages. Dobbs, supra note 10, § 3.7, at 189.
might make any reduction in the award impossible. 54

Faced with these difficulties, a lawmaker might indulge in the presumption that the subjective value to the plaintiff equalled the objective amount she could have obtained by reasonable efforts to sell the benefit to others. 55 The law often tolerates—or even prefers—objective presumptions. Sometimes the law presumes that the parties' subjective state of mind matches their objective actions. 56 Sometimes it declares that the subjective state of mind does not matter because only objective manifestations have legal significance. 57 Thus, the use of objective values as an estimate of subjective values poses no serious obstacle to considering the merits of this theory. A lawmaker implementing the expectation interest might reproduce the results of the avoidable consequences doctrine without reference to the doctrine itself.

Our lawmaker, however, might also have found the amount of avoidable loss a relatively accurate measure of the subjective benefit to the plaintiff. 58 The market price of the goods accurately measures the

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54. This concern echoes the concern in Kreps that taking a bank officer's statement as dispositive might permit banks to win every case. See supra note 47. In fact, certainty problems could prove dispositive either way, since the subjective nature of the inquiry might prevent either party from producing evidence that would satisfy the requirement. A requirement that systematically underestimates or overestimates the amount of damages (depending on the party with the burden) will not satisfy the expectation interest. The expectation interest seeks to take the benefit into account, not to ignore it, as would occur if the benefit could not be proven with satisfactory certainty, or to assume its greatest credible value, as would occur if testimony by an individual became dispositive absent certainty that another figure was correct.

55. In fact, the reasonable lawmaker might choose to make that presumption conclusive, without regard to efforts of either party to prove a greater or lesser benefit in a particular case.

56. Tort law often assumes that parties intend the natural consequences of their actions, without regard to whether they actually entertained that subjective intent. See, e.g., Cummings v. Farmers Ins. Exch., 202 Cal. App. 3d 1407, 1416, 249 Cal. Rptr. 568, 573 (1988); see also RESTATEMENT (SECOND) OF TORTS § 8A (1977) (party intends consequences "substantially certain" to result from an action).

57. The objective theory of contract law purports to ignore subjective intent when it differs from the manifestation of intent. See, e.g., FARNSWORTH, supra note 2, § 3.13 & n.2. Constant references to "manifestations" of intent throughout the Restatement (Second) of Contracts embody the objective theory. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS §§ 24, 27, 29, 33, 38, 164, 175 (1979).

58. This portion of the argument will claim accuracy, but not precision. The difficulties noted earlier, see supra note 43, will not disappear, but their significance may diminish.
benefit to the nonbreaching seller of retaining the goods. Neither party seems likely to raise a successful objection to the decision to subtract the market value of the goods from the plaintiff's recovery.

Consider first the defendant's argument that market price underestimates the subjective benefit to the seller. One certainly can infer that the seller kept the goods rather than reselling them because she valued them more than the market price. But whatever subjective value the plaintiff may attach to the goods, she could obtain that subjective value by delivering the contract goods to the defendant and buying substitute goods at the market price. The defendant, by not taking delivery of the goods, can claim responsibility for bestowing no more value than the amount for which the plaintiff could have obtained the goods from another. Thus, the market price not only represents the minimum value of the benefit to the plaintiff, but also represents the most that the plaintiff would have paid to obtain that benefit.

59. For now, it will be simpler to deal with the example of a seller of goods suing a buyer for breach. As shown later, the analysis applies more broadly. See infra Part I.D.

60. This proposition assumes that the goods are not unique. If they are unique, the market price will equal the plaintiff's subjective value. She will not sell for less. No one else can sell for less because, by definition, no one else has these unique goods. While it may be difficult to determine either plaintiff's subjective value or the market price, they will be the same.

61. Where the plaintiff is a manufacturer or wholesaler, the amount of the benefit arguably could be measured by her cost to replace the goods. This might be less than the price for which she could sell the goods. A manufacturer could replace the goods for the cost of the inputs to production, often less than the price for which it could sell the goods (except in a perfectly competitive market). A wholesaler could replace the goods at the wholesale price, but could resell them at the retail price. Once replaced, the seller could enjoy the benefit as much as she could after the buyer's breach. The plaintiff's decision not to resell, however, justifies inferring that she values the goods more than the amount for which she could sell them, not just more than the cost to obtain them.

62. The Restatement (Second) of Contracts confronts the same issue when prescribing the measure of restitution recoveries. The discussion focuses on services, since restitution of goods often can be accomplished by returning the goods themselves, rather than assessing their value and awarding restitution in money. The analogy, nonetheless, is instructive. The Restatement measures the benefit bestowed on one party by the amount for which that party could have obtained the benefit from someone else, apparently on the theory that the other party saved the beneficiary the cost of obtaining the benefit elsewhere. RESTATEMENT (SECOND) OF CONTRACTS § 371(a) (1979). The Restatement includes an alternative measure—the increase in wealth to the beneficiary—that may seem closer to the subjective value to the plaintiff. Id. § 371(b). The comments, however, make it clear that the American Law Institute believed the beneficiary's wealth often would increase less than the fair market value of the services performed, not more, as the breaching buyer argues in this example. Nor do they endorse a subjective measure of benefit, focusing instead on the increase in the market value of the beneficiary's property attributable to the other party's services—for example, the increase in the value of the beneficiary's land because the other party built
has little equity in claiming the right to sell to the nonbreaching seller at a price above market, thus capturing the nonbreaching party’s consumer surplus!63

The seller’s argument that market price overestimates the benefit to her seems equally unpersuasive. The seller must contend that she values the goods less than she values the market price, even though she did not sell them at the market price. Unless the seller is irrational, this argument necessarily implies that she underestimated the amount for which she could sell the goods on the market. In that case, market price may overestimate the actual benefit the seller received by keeping the goods.64 Neither irrationality nor mistake seems likely to arise often, at least not with any credibility.65 When they do arise, these errors probably will be relatively small. Sellers, especially merchants, generally know the value of their wares within a reasonable margin. While any given merchant may misjudge the amount that a particular resale would yield, the errors seem likely to be so small or so infrequent that they do not pose a substantial objection to the theory. Even nonmerchants seem likely to have some idea of the market value of goods before they enter into a contract to sell them. Thus, our reasonable lawmaker might entertain relatively little concern that market

a house (or part of a house) on it. In addition, the Restatement limits breaching parties to the lesser of the two measures, precluding a breaching party from capturing the nonbreaching party’s consumer surplus, if any. Id. § 371 cmts. a & b. In short, restitutionary measures, focussed directly on measuring benefits to one party, endorse market price as a measure of that benefit. A lawmaker reasonably could apply the same technique for measuring benefits here and in restitution.

63. The buyer has the opportunity to sell her right to receive the goods back to the seller instead of breaching. The seller would not agree to pay more than the market price of the goods. Breach, which accomplishes the same transaction without the seller’s consent, should not impose on the nonbreaching seller a worse deal than she could have made for herself.

64. We can infer that the seller valued the goods more than she valued the price she expected to obtain for them. But where her expected price was below the market price, the value to her might have been below the actual market price.

65. Claims of irrationality seem particularly doubtful. Strategic behavior seems more likely than irrationality: a seller who valued the goods more than the market price, but hoped to keep the goods and recover a larger than necessary damage award (or settlement) from the defendant. A lawmaker might trust juries to sort out these incredible claims. Alternatively, a lawmaker could trust perjury statutes and Federal Rules of Civil Procedure 11 to deter false claims. Or a lawmaker reasonably could avoid these problems and simplify factfinding by presuming that the market value actually estimates the subjective value to the plaintiff, with an occasional small error that undercompensates an irrational plaintiff.
price would reduce recovery by more than the subjective value of the benefit. Both the frequency and magnitude of any errors probably would seem too small to require notice. Combined with concerns for the accuracy and cost of the alternative (direct inquiry into subjective value), the lawmaker easily might prefer to estimate subjective value by reference to avoidable losses.

Equally important, any errors affect sellers only if they assume that efforts to resell (for more than their subjective value) will be futile without testing the market. Sellers can protect themselves from undercompensation by making reasonable efforts to resell. Reasonable efforts to resell should reveal the actual market value and allow the seller to make an informed choice. The seller who elects to keep goods without making any effort to resell seems oddly placed to object that the law undercompensated her by subtracting more than the actual benefit from the award. Her own mistaken estimate of the market value, perpetuated by her own inaction by not trying to resell, created the error in the first place. In short, the proposed presumption probably comes

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66. Epstein suggests that the entire effort to litigate issues concerning the avoidable consequences doctrine should be avoided by fixing contract damages below full compensation. This will encourage plaintiffs to minimize their losses even if no avoidable consequences doctrine applies at trial. Since damages will not cover their full loss, plaintiffs will benefit by keeping the loss as small as reasonably possible. See Richard A. Epstein, Beyond Foreseeability: Consequential Damages in the Law of Contract, 18 J. LEGAL STUD. 105 (1989). One may share the desire not to adopt rules that require unnecessarily large litigation costs, even if one disagrees with Epstein’s proposal to make contract damages even more seriously undercompensatory than those provided today.


68. The point does not challenge existing law regarding the need to make efforts the plaintiff knows will be futile. If the plaintiff correctly judges that reasonable efforts will not reduce the loss, the failure to make futile efforts should not affect the award. When reasonable efforts would not have produced any reduction in the loss, the amount of loss avoidable by reasonable efforts is zero and, therefore, the offset demanded by the avoidable consequences doctrine is zero, whether the plaintiff actually took those efforts or not. The text concerns a plaintiff who incorrectly believes that the efforts would be futile—or, more precisely, underestimates the benefit she can obtain by making reasonable efforts. (In effect, the plaintiff believes reasonable efforts to resell at an amount greater than the value she attaches to the goods would be futile.) The law has no desire to encourage futile efforts—which actually increase the damage recovery, since incidental damages rise without any reduction in the loss. The existing law, however, displays little sympathy for the person who fails to make efforts in the mistaken belief that they would be futile. By using the standard of reasonable efforts, rather than a good faith efforts test, the law reduces the recovery for one who honestly fails to make reasonable efforts if the factfinder concludes that those efforts would have been successful.

69. The point here is not that the seller has a duty to attempt resale or even a duty to investigate the market price, but merely that the seller is not entitled to relief from the effects of her own mistake about the market price of the goods. The failure to attempt
very close to the actual value to the plaintiff by using market price as an estimate of subjective value.

The analysis here will produce rules identical to the avoidable consequences doctrine only if the lawmaker would adopt a conclusive presumption. If the lawmaker exhibits sufficient concern for errors the presumption creates, she might choose to create an evidentiary presumption. This would allow the parties to introduce evidence that, in a particular case, the value of the benefit differed from the presumed value. The finder of fact could then determine how much to subtract from the award in order to offset the benefit. Much of the preceding argument has been directed at this latter possibility. The concern for certainty and objectivity in part explain why the lawmaker might choose not to consider evidence about the subjective value on a case-by-case basis. Strategic behavior designed to encourage or to take advantage of errors in the factfinding process presents another concern that mitigates toward a conclusive presumption. The cost-benefit analysis, comparing the ability to reach better results with the cost of that process—both in judicial resources consumed by the task and the cost of attorney time to the parties—suggests that the evidence should not be admitted. In short, the argument above is intended to demonstrate why the lawmaker would choose a conclusive presumption—a presumption that matches the existing rules generated by the avoidable consequences doctrine.

The arguments here do not demonstrate that the expectation interest provides a better explanation of the results than the avoidable consequences doctrine. One can posit reasons why the avoidable consequences doctrine produces these results with more elegance. For example, one might contend that the avoidable consequences doctrine explains the case law directly because market price precisely measures the amount of loss that could have been avoided. That may seem preferable to a theory

resale does not alter the presumption; the same presumption (that seller values the goods at least as much as she values the market price) applies whether she makes efforts or not. Neither the seller nor the buyer, however, can challenge the presumption.

70. See supra text accompanying notes 45-47.
71. See supra note 65.
72. See supra note 66 and accompanying text.
73. Market price, if we ascertain it with precision, arguably offers an exact measure of the amount that the seller could have obtained if she had sold the goods to minimize the loss. Market price, however, lacks the precision necessary to support the
that relies on indirect analysis, using market price as an imprecise estimate of some unknowable benefit.\textsuperscript{74} If accepted, these arguments might suggest that the avoidable consequences doctrine better explains the origin of these results and the reasoning judges consciously used to achieve them. Neither advantage, however, undermines the project here for two reasons.\textsuperscript{75}

First, the measure employed in court need not perfectly match the motive for employing the measure. Fuller and Perdue alerted lawyers and scholars alike to the danger of assuming that the motive and measure necessarily correspond, particularly in dealing with remedies.\textsuperscript{76} I have expressed concern about their conclusion that measuring claim. The advantage of an exact measure as opposed to an estimate fails if the so-called exact measure turns out to be nothing more than an estimate itself. Yet the very fact that the seller did not resell (or did so in an unreasonable manner) deprives us of any precise determination of market price in most cases. Except in a perfect market, with perfect information and no product differentiation, market transactions may not occur at a uniform price. Prices of identical goods vary from dealer to dealer even within a relatively small market area. Alternative goods may not be identical to the seller's and may come from other places, adding further variations to the price of substitute goods. The U.C.C. recognizes and attempts to deal with other factors that produce variation in market price, such as the date of purchase and place of the market in question. See U.C.C. § 2-723 (1995). Even so, disputes about the appropriate time can emerge. Depending upon whether the court decides the buyer repudiated, market price could be calculated at the time and place of tender or the time the aggrieved party learned of the repudiation. Compare id. § 2-708(1) with id. § 2-723(1). Neither time seems well designed to produce precisely what the seller would have obtained on resale, since a resale would occur sometime after the repudiation or rejection, subject to the limitation that it occur within a commercially reasonable time. Id. § 2-706(2). As a result, market price is an estimate that reflects a price in the middle of a range of market transactions. Variations in market price prevent it from measuring exactly what the seller would have obtained in a reasonable resale. She may have obtained the lowest price in the market or the highest. Market price, viewed as a point somewhere in between, offers an estimate of what the seller would have received. To attribute precision to this estimate grants it qualities it does not really possess. Market price offers a perfectly reasonable estimate of the amount the seller could have obtained with reasonable efforts, not a precise measure of the amount that resale would have provided. See Dobbs, supra note 9, § 3.9 n.5 (suggesting that indifference to the actual amount seller could have obtained demonstrates that market measures differ from the avoidable consequences doctrine). Thus, each explanation must resort to an estimate of the proper amount to subtract. The correspondence between the measurement technique and the item to be measured does not favor either explanation.

\textsuperscript{74} Ockham's razor urges us to prefer simpler, more direct explanations of observable phenomena—a principle I noted while addressing the controversy between the expectation interest and the reliance interest as guiding principles in contract damages. See Kelly, supra note 6, at 1762 n.31. One should not resort to Ockham's razor too quickly, lest one also act too simplistically. Id. Having heeded that admonition in discussing the work of Fuller and Perdue, I hope others will grant me the same latitude here.

\textsuperscript{75} That is, two reasons in addition to the discussion supra note 73.

\textsuperscript{76} Fuller & Perdue, supra note 6, at 66-67.
expectation merely serves as a proxy for the reliance interest. But their approach, their realization that unstated principles may guide results even if not identified as the rationale, remains important. The expectation measure is, at best, an imprecise proxy for the reliance interest. Yet for more than fifty years that imprecise match has not caused scholars to reject their work. Nor did their need to assume a perfect market in order to demonstrate the similarities rob their work of its power. The two explanations of avoidable consequences offered here correspond at least as closely as expectation and reliance.

Second, this Article contends only that the avoidable consequences doctrine and the expectation interest are consistent. The law can abolish the avoidable consequences doctrine without changing the results of cases. As long as each theory adequately explains the results, the relative elegance of each makes no difference. I do not argue that the avoidable consequences doctrine does not exist; that thesis might require an explanation of how the expectation interest explains results better than the avoidable consequences doctrine. I argue only that the avoidable consequences doctrine need not exist. That thesis is not challenged by arguments that the avoidable consequences doctrine provides a better explanation of the result. As long as the expectation interest gets there, we need not think of the avoidable consequences doctrine as an exception to the expectation interest. That reconciliation will suffice.

3. The Effect of Transaction Costs

If all applications of the avoidable consequences doctrine exhibit the same susceptibility to the explanation presented here, then the expectation interest can produce the same results as the avoidable consequences

77. Kelly, supra note 6.
78. In fact, the work has been heralded as "our most significant article on contract law." Robert Birmingham, Notes on the Reliance Interest, 60 WASH. L. REV. 217, 217 (1985). Other accolades for the work are gathered in Kelly, supra note 6, at 1757 & n.10.
79. Perhaps I should press a more forceful argument. The ability of the new explanation to support assertions that scholars and courts have announced for decades may give it some advantage. Similarly, the practical guidance it provides, as discussed in Part III, infra, might support claims that we should abandon the avoidable consequences doctrine. I will be satisfied, however, if the theory proposed here improves our understanding of the offset for amounts the plaintiff could have avoided losing.
doctrine. Instead of denying recovery for losses the plaintiff actually suffered, we can deny recovery for losses the plaintiff did not suffer by taking into account the offsetting benefit. This Article shortly will consider other applications of the avoidable consequences doctrine and will show how similar analysis seems plausible in other settings. Before embarking on that endeavor, however, I want to address some complicating factors that probe the basic assumption: that the amount the plaintiff could have obtained by reasonable efforts represents the minimum estimate of the value of the benefit she received from the breach. 80

Arguably, transaction costs complicate the picture. The cost of reselling the goods would reduce the amount the seller would realize on resale. Perhaps the seller does not value the goods as much as she values the market price, but does value the goods more than the market price minus the cost of reselling them. If so, the theory presented here may overestimate the benefit the seller received by keeping the goods.

The seller, however, does not bear the transaction costs in any case that comes to court. The transaction costs of resale are recoverable from the breaching buyer—either under the expectation interest (incidental damages) or under the avoidable consequences doctrine (affirmatively applied). 81 Thus, the seller's calculation of benefits of resale should not include the cost of resale; that cost will be borne by the defendant. The decision not to resell, therefore, reflects a direct comparison between the benefits of keeping the goods and the benefits of reselling them. 82

Arguably, the timing of the transaction costs complicates the picture. Even if recoverable in litigation, the recovery will occur years later, while the costs of resale must be incurred today. Given that a benefit

80. I devote considerable attention to this topic because the appeal of the explanation turns heavily on the similarity between the benefit and the offset. If the amount the plaintiff could have received offers a fairly close approximation of the benefit the plaintiff actually received, then it seems reasonable to suggest that the latter may explain the calculation. If, however, the benefit to the nonbreaching party differs substantially from the amount she could have obtained by reasonable efforts to avoid the loss in a significant number of cases, then the assertion that the latter serves as a proxy for the former loses much of its appeal.

81. U.C.C. § 2-710 (1995) (defining incidental damages allowable under §§ 2-706 and 2-708 to include costs of resale and most other transaction costs one can imagine).

82. In a case where courts do not hear the matter because the cost of litigation leads the seller not to bring suit in the first place, the decision not to resell would not support the inference suggested here. But the law will not draw that inference (or impose its equivalent via the avoidable consequences doctrine) in any case that does not come to court. In cases that come to court—that is, in cases where the avoidable consequences doctrine will be applied—the transaction costs become part of the recovery and, thus, net out. (In cases that do not produce litigation, the nonbreaching party almost certainly will minimize the loss, since without litigation the entire loss will fall on her.)
today is more valuable to most people than the same benefit next year, the eventual recovery of transaction costs may not fully offset the expenditure. If so, the seller may value the goods less than the market price, but refuse to resell them because she values the goods more than the market price minus the time value of the cost to resell the goods.

Again, however, the time value should be recoverable in litigation. Most states permit recovery of prejudgment interest on ascertainable claims. Once the resale costs have been incurred, they seem fully liquidated—at least to a sufficient extent to permit the award of prejudgment interest. Arguably, interest should be recoverable on incidental damages without regard to ascertainability. Thus, the time value of money should not pose a serious obstacle to the presumption suggested here. In addition, the time value of money may not amount to a very large sum. Barring exceptionally long delays in recovery, the interest would be less than the resale expenses themselves, which seem likely to be a relatively small portion of the value of the goods. Thus, the objection may dwindle into insignificance. The market price may be a fair approximation of the value of the goods to the seller, even if it slightly overestimates that value, thus reducing the award a little too much.

One final complication arises from the uncertainty of litigation.

83. Dobbs, supra note 10, § 3.5, at 165-66; Dobbs, supra note 9, § 3.6(1), at 247.
84. In contract actions, where damages commonly are ascertainable, some courts permit recovery of prejudgment interest as a matter of course. Laycock, supra note 2, at 195. Even if courts insist that incidental damages must be ascertainable in order to qualify for prejudgment interest, see, e.g., Afram Export Corp. v. Metallurgiki Halyps, S.A., 772 F.2d 1358, 1370-71 (7th Cir. 1985) (dicta concerning Wisconsin law), many costs of resale will consist of out-of-pocket expenditures capable of clear proof.
85. The Restatement suggests that interest on expenditures made arranging substitute performance is not subject to the normal rules on ascertainability. Restatement (Second) of Contracts § 354 cmt. a (1979) (implying that interest on incidental expenditures is itself an element of incidental damages, independent of rule limiting prejudgment interest). The trend to liberalized views of ascertainability may improve plaintiffs' ability to receive interest on the transaction costs necessary to minimize the loss. See Dobbs, supra note 9, § 3.6(2).
86. The errors in the calculation may offset. The decision not to resell implies that the seller values the goods at least as much as, and perhaps more than, the market price. Thus, market price arguably represents slightly too small an offset. If denying interest slightly decreases the plaintiff's recovery, perhaps that will move the award closer to the mark, rather than further from it. While two wrongs do not make a right, perhaps two almost rights will not be so far wrong that a reasonable lawmaker would abandon avoidable loss as an estimate of the benefits of breach.
Incidental damages and interest will eliminate the preceding objections only if the seller recovers them. Perhaps the seller does not value the goods as much as she values the market price, but values the goods more than she values the market price minus the transaction costs plus interest discounted by the chance of recovering them in the suit.\footnote{87} Even a case that seems like a sure-fire winner to lawyers presents at least some possibility of jury prejudice, passion, or misunderstanding.\footnote{88} Again, this possibility represents only a portion of the resale costs, minimizing the magnitude of the error.\footnote{89} The market price thus remains at least a reasonable proxy for the benefit to the plaintiff—especially in cases where the chance of prevailing seems relatively high (which, we might hope, describes the vast majority of contract cases brought before the courts).\footnote{90} Sellers who expect to win will prefer to sell under these circumstances, since that will maximize their benefit more often than not.\footnote{91} Only sellers who actually expect to lose

\footnote{87}{Lest the words prove confusing, let me lay the premise out with the parentheses in the right place: Market Price \textgreater\ Value of Goods > Market Price - ((Cost To Resell + Interest on Cost To Resell) \times Probability of Losing Suit)}.

\footnote{88}{One rule of thumb from practicing attorneys holds that even a sure winner has a 15\% chance of losing in front of a jury.}

\footnote{89}{In a case that seems like a toss-up, the market price would be discounted by half of the transaction costs; in a very strong case, by only 15\% of the transaction costs.}

\footnote{90}{Gross and Syverud reported that plaintiffs recovered more than the highest settlement offer in about 75\% of the commercial transaction cases that proceeded to judgment. \textit{See} Samuel R. Gross & Kent D. Syverud, \textit{Getting to No.: A Study of Settlement Negotiations and the Selection of Cases for Trial}, 90 MICH. L. REV. 319, 339 (1991) (sampling California Superior Court jury trial cases). Plaintiffs succeeded somewhat more often (about 80\%) for a broader range of contract actions, including employment and real estate disputes. \textit{Id.} For our purposes, these results are merely suggestive. Recovering more than the highest settlement offer does not necessarily mean recovering all damages, including incidental costs and interest thereon. In addition, cases that proceed to trial probably do not represent all cases filed. They may, however, represent a fair approximation of cases in which the court or the jury must apply the avoidable consequences doctrine. A seller considering whether to minimize the loss by resale probably would look to these figures to decide how to act. A seller who looks instead to settlement almost certainly will minimize the loss. Since settlement generally requires a compromise, the plaintiff probably will recover less than her actual losses and, thus, she has ample incentive to minimize the loss.}

\footnote{91}{If seller wins the suit, she keeps the market price undiminished by the transaction costs and interest, since she recovers them. Thus, she will be better off if she has sold the goods for market price. If seller loses, she retains the market price diminished by the transaction costs (which she did not recover), a worse situation than retaining the goods. But since she expects to win more often than not, she should sell the goods. One can imagine exceptions. If Market price - Value of goods < Value of goods - Transaction costs, then even though the seller expects to win most of the time (realizing full market price), the magnitude of the downside might outweigh the likelihood of its occurring. That is: (Value of goods - (Market price - Transaction costs)) \times Chance of losing > (Market price - Value of goods) \times (1 - Chance of losing), even though chance}
will keep the goods (despite a preference for the market price), since that will maximize their expected benefits.92

Would a reasonable lawmaker seeking an appropriate measure of the benefits of breach reject avoidable losses as a suitable proxy on this basis? The estimate seems to work well in that vast majority of cases. It seems odd to reject it because it may make small errors that disadvantage plaintiffs who fear they may lose their lawsuits. Those plaintiffs receive less than full compensation due to their pessimistic lack of confidence in the legal system. That this approach might undercompensate slightly those whose suits seemed weakest (to them) ex ante by attributing to them too high a benefit might serve the desirable end of discouraging the weakest of suits—if the difference is large enough to matter at all. If undercompensation occurs primarily in these circumstances, the lawmaker might tolerate that undercompensation. One can understand why a rule designed to subtract actual benefit might risk undercompensation in these cases.

D. The Benefits in Other Contract Contexts

The preceding discussion focuses heavily on the benefits to sellers of goods. Other contexts, however, raise different issues that require specific discussion. In order to establish a comprehensive theory of the avoidable consequences doctrine, this section attempts to demonstrate that benefits of breach apply in other typical settings where the doctrine arises. Ideally, this section would demonstrate that every application of

92. Since she expects to lose more often than not, she should keep the goods unless the market price exceeds the value of the goods by significantly more than the value of the goods exceeds the market price minus transaction costs. The decision to keep the goods, therefore, suggests that the market price and value of the goods do not differ by enough to justify sale—again, suggesting that the market price remains a relatively good proxy for the value of the goods, even though the normal inference from plaintiff's decision to keep the goods does not exactly describe the relative values. Thus, the cases where this approach seems likely to overestimate the plaintiff's benefit will be those cases where the magnitude of the error in the estimate seems likely to be smallest.
the avoidable consequences doctrine is susceptible to the same type of explanation, that every breach creates a benefit roughly equal to the amount the plaintiff could have realized from reasonable efforts to minimize the loss. This section cannot establish that no exceptions exist. By discussing examples typical of the contexts in which the avoidable consequences doctrine becomes important, however, this section hopes to demonstrate the plausibility of the claim.

1. Discharged Employees

Discharged employees present the same issues discussed regarding sellers of goods. The preceding sections often refer to sellers of services (employees, for example) as well as sellers of goods. Most of the analysis above applies with equal force to employees without any need for additional comment. Discharged employees, however, illustrate some useful elaborations upon the theory developed above. These elaborations respond to two questions the reader already may have considered. First, why should reasonable but unsuccessful efforts to minimize the loss affect the estimate of the value of the benefit to the plaintiff? Second, why is the value of the benefit to the plaintiff limited to the amount of loss that could have been avoided by reasonable efforts, instead of including the amount of the loss that could have been avoided by any efforts, however extraordinary? The employment context offers an opportunity to explore these issues.

a. To what extent does the plaintiff benefit despite reasonable but unsuccessful efforts to minimize the loss?

The benefit of leisure to a discharged employee, while a benefit not sought by the employee, presents a fairly clear example of the need for an offset. The breaching employer deprives the employee of wages. But the employee could not have received those wages without working. The benefit of not working requires some offset. 93 Perhaps one

93. Throughout this Article I refer to the benefit of leisure. This benefit can break down into two subparts: the benefit of not working and the benefit of having time for enjoyable pursuits. Avoiding the disutility of work is not necessarily the same as receiving the utility of spare time. But both are inextricably bound up in a single decision regarding employment. In taking a job, the employee accepts both the loss of leisure and the disutility of labor. In discharging the employee, the employer bestows both the freedom from labor and the freedom to do other things. While it may be useful to recognize these theoretically distinct components of the benefit, no useful purpose would be served by burdening the text with a lengthy and repetitive phrase that explicitly mentioned both each time the benefit required mention. In the one place where disaggregation is useful, I will more carefully distinguish these two aspects; otherwise,
mystery of damage awards calculated under the expectation interest is their consistent failure to mention the need to offset the leisure received by the employee. A person who receives wages without working for them clearly has been made better off than if the person had needed to work for the same wages—the position the employee would have occupied but for the breach.

In discussing sales of goods, the issue of reasonable but unsuccessful mitigation efforts does not arise. The seller either kept the goods or resold them. Either way, she obtained a benefit. For discharged employees, this equates with assuming that they are either re-employed or idle (that is, enjoying their leisure). Many employees fit neither category. They engage in unsuccessful efforts to find a new job, at least during part of the time they would have been employed under the contract. That situation hardly qualifies as leisure. At the same time, it does not qualify as alternative employment. In short, the employee has neither pay nor time to devote to enjoyable pursuits. The job search deprives the employee of the benefit of leisure without immediately providing any substitute income.

In this regard, employees differ from sellers of goods. The time and effort spent to seek out a new buyer for goods does not reduce the benefit of the good retained by the seller. Thus, a reasonable but unsuccessful search for a new buyer leaves the seller with some incidental damages (to cover the cost of efforts to resell), but does not diminish the value of the good retained. Employees, however, sell

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I will use “leisure” to include them both.

94. Perishable goods may deteriorate while the seller seeks a new buyer, but their value diminishes over time independently of the seller’s efforts to resell. The goods will perish even if the seller makes no effort to resell, or the seller might recover full value for the goods following extensive efforts to resell. The efforts do not consume the value of the goods the way an employee’s efforts to find work consume the leisure time the employer gave her.

95. If a seller attached zero value to goods and made diligent efforts to resell them without success, arguably no subtraction would be appropriate under the avoidable consequences doctrine. See Restatement (Second) of Contracts § 350(2) (1977). At first glance, the U.C.C. appears to attribute the market value of the goods to the seller even if the seller cannot resell the goods after Herculean efforts. At least § 2-708 includes no exception to the rule attributing market value to the seller. Section 2-709, however, allows the seller to recover the full price of the goods if reasonable efforts fail to produce a buyer willing to pay a reasonable price. U.C.C. § 2-709(1)(b) (1995). That result recognizes the paradox of concluding that goods have a market value greater than zero despite the fact that the seller’s efforts could not produce a buyer willing to pay
their time and effort. When they expend that time and effort in a job search, they consume the very thing they retain in a way the seller of goods does not. They thus, the benefit retained by the employee decreases as she attempts to find new employment.

Assuming for a moment that the employee conducts a reasonable job search, the avoidable consequences doctrine produces fairly intuitive results. The avoidable consequences doctrine permits recovery of full wages during any period the employee makes a reasonable effort to find substitute work. The avoidable consequences doctrine does not require successful efforts to find new work, only reasonable efforts. Thus, no subtraction from the normal recovery (of full wages) would apply to the period of the reasonable job search. In effect, the law assumes that the amount the employee could have earned with a reasonable job search equals $0. After all, she made reasonable efforts to find a new job, but earned nothing despite those reasonable efforts. Apparently, reasonable efforts would produce no income, leaving nothing to subtract from wages.

The expectation interest can produce the same result. At the risk of oversimplifying the problem, a job search is not leisure. Few people undertake a job search as a way to spend a vacation or relax on the weekend. A job search is work, just as much as the labor performed for an employer. In effect, the employee who undertakes a job search more than zero. Even under § 2-708, the absence of a market for the goods suggests they have a market price of zero, allowing the seller full recovery without any offset for the value of retaining the goods.

96. An employee who can relax while an agent finds substitute employment for her resembles the seller of goods more closely. The discussion here deals with the more common situation of employees who must find jobs for themselves.

97. Courts could prevent this result by including the value of the employee's time spent in the job search as an item of the employee's incidental damages. Generally, however, incidental damages include only the employee's out-of-pocket costs incurred in the job search. See Dobbs, supra note 9, § 3.9 ("If the plaintiff actually expends funds in a reasonable effort to minimize damages, the expenditures are recoverable . . .") (emphasis added). This approach reasonably prevents double compensation, which would occur if the employee recovered both the wages lost and the value of the time spent looking for a job, unless the award included an offset for the benefit of leisure. Rather than conceptualize the recovery as wages lost minus the benefit of not working plus the value of the time spent looking for a new job (plus any other incidental and consequential damages), the avoidable consequences doctrine as now applied cancels out (by ignoring) the benefit of not working and the value of the time spent looking for a job.

98. See Restatement (Second) of Contracts § 350(2) (1979).

99. This resembles concluding that some goods have zero market value. See supra note 95. In this case, part of the goods (the services for the weeks spent looking for work) have zero market value to offset against the loss, even though later weeks might have a greater market value (because the employee either did find work or would have found work if the job search had been reasonable).
receives no leisure, and thus receives no benefit to offset against the award. She receives full wages because she works for them, just as if she continued to report to her former workplace and put in a full day. 100

With very little effort, we can characterize discharge in breach of contract as an implicit modification of the contract between the employee and the employer. 101 When an employer breaches a contract by firing an employee, the employer implicitly requests the employee to spend her time conducting a reasonable search for a new job instead of working at the employer's business. 102 In exchange, the employer agrees to pay the employee the promised salary until such time as the contract expires or the employee obtains an equal or better job. 103

Normally, a modification would require the agreement of both parties. Inferring assent by the employee may pose more difficulty. Her assent to the original employment agreement may suffice, depending upon the

100. Allow me to defer, briefly, the issue of whether the disutility of working for the former employer equalled the disutility of the job search. If either involved more cost than the other, we might consider an adjustment to the award: an increase if the job search was more laborious than the job duties; a decrease if the job search was less laborious. This Article addresses that issue shortly. See infra text following note 107.

101. I do not mean to imply that either the employer or the employee actually agrees to the terms outlined in this paragraph. Nor do I contend that anyone actually thinks of discharge as a modification of the employment contract. The law, however, and particularly the avoidable consequences doctrine, arguably creates mutual obligations between the breaching employer and the discharged employee that resemble a contract. Identifying the similarities may illuminate some aspects of the avoidable consequences doctrine and its harmony with the expectation interest.

102. Often employers make no explicit request. But every employer who pleads the avoidable consequences doctrine as a defense to the employee's claim for lost income affirms its desire that the employee conduct a reasonable job search following discharge. Such post hoc ratification by the employer provides some indication that the employer expected or desired such efforts by the employee from the start. Thus, the law fairly can infer the employer's assent to this term.

103. The promise to pay wages following discharge is only partially fictional. The entire discussion of remedies for breach assumes a valid contract that obligates the employer to pay the employee for a specific period of time. That promise is quite real; the law need not imply any obligation to pay wages, but can impose it based on an actual, explicit promise by the employer. Employers who fire employees may feel they have the right to do so or, at least, may hope that they will not have to pay the employee even if the discharge is wrongful. But the employer's mistake about the effect of the promise or the likelihood of a successful suit by the employee should not obscure the promissory nature of the obligation to pay wages. While the bargain in the text presents an obligation the employer hopes never to perform, it arises from a real promise by the employer.
terms of that contract. The employer might have the prerogative to assign the employee to look for new work as her daily job assignment.\textsuperscript{104} If so, an implied agreement by the employee to use good faith efforts\textsuperscript{105} to look for new work poses no enigma; it inheres in her agreement to perform the work the employer assigns. Absent express provisions to the contrary, courts might be willing to find an implied term in employment agreements that would allow an employer, who no longer desired the services of an employee, to assign her to look for a

\textsuperscript{104} Contracts providing that the employee "work as directed" by the employer seem broad enough to include that prerogative.

\textsuperscript{105} I use the phrase "good faith efforts" here because, within a contract, the employee has an inherent obligation to act in good faith to do the tasks assigned by the employer. See \textit{Restatement (Second) of Contracts} § 205 (1979). Arguably, good faith demands less of the employee than the "reasonable efforts" required by the avoidable consequences doctrine. A person, in good faith, might make efforts that, when viewed objectively, seem unreasonable. See, e.g., Mattei v. Hopper, 51 Cal. 2d 119, 123-24, 330 P.2d 625, 626-27 (1958) (distinguishing reasonable efforts from good faith efforts). Reasonable efforts arguably involve a greater burden, insisting upon efforts that a reasonable person would take without allowance for persons subjectively (but not vindictively) unreasonable. Within an ongoing contractual relationship—especially an employment relationship—good faith efforts seem sufficient. The employer's ability to specify the employee's tasks and to supervise performance permit the employer to ensure that the employee makes reasonable efforts, as long as the employee follows the employer's direction in good faith. The avoidable consequences doctrine demands more of employees, perhaps because the employer has no opportunity to specify how the employee should look for work or to supervise her compliance with those specifications.

The avoidable consequences doctrine may require both reasonable efforts and good faith efforts. See Smith-Wolf Constr., Inc. v. Hood, 756 P.2d 1027, 1030 (Colo. Ct. App. 1988) (announcing but not applying the rule that U.C.C. § 2-715 "will not prevent or reduce recovery if the buyer’s actions are reasonable and undertaken in good faith") (emphasis added), a requirement that may flow from the universal requirement of good faith in U.C.C. § 1-203). An employee could go through the motions of a reasonable job search, but could do so in bad faith. An employee who hoped not to find a job might communicate that preference to prospective employers subtly but effectively. Under these circumstances, the absence of a bona fide job search might induce a court to subtract wages the employee could have earned if she had conducted the search in good faith. Cf. Brady v. Thurston Motor Lines, 753 F.2d 1269, 1277 (4th Cir. 1985) (equating willful misconduct that led to plaintiffs' discharge from substitute work with failure to use "reasonable and good faith efforts to maintain that job once accepted"). Dicta in other cases suggest an employee must use good faith in the job search. See Edgecomb v. Traverse City Sch. Dist., 67 N.W.2d 87, 90 (Mich. 1954); Tosti v. Ayik, 508 N.E.2d 1368, 1370 (Mass. 1987), cert. denied sub nom., United Auto Workers v. Tosti, 484 U.S. 964 (1987); Furno v. Pignona, 522 A.2d 746, 752 n.6 (Vt. 1986) (quoting jury instruction); cf. Department of Civil Rights v. Horizon Tube Fabricating, 385 N.W.2d 685, 688 (1986) (apparently equating good faith with reasonableness). The difficulty in proving the employee's lack of good faith and the expense necessary just to investigate her good faith probably will keep this issue from arising in very many cases. Thus, the avoidable consequences doctrine understandably focuses on the reasonableness of the employee's efforts.
new job. Thus, the employee looking for work does not enjoy leisure, but simply continues to perform her duties to the employer, though those duties have changed somewhat in their nature.

Recharacterizing the contract in this way may illuminate a possible inconsistency between the avoidable consequences doctrine as now applied and the explanation proposed here based on the expectation interest. Not every reasonable job search will consume the same amount of time that the employee’s original job would have consumed. While employment may require a forty-hour week (plus commuting time), a reasonable job search may consume only thirty hours per week (or less), leaving the employee with an apparent gain of ten leisure hours per week. Arguably, the expectation interest would urge an offset for the benefit to the employee of these ten additional leisure hours.

106. The law might want to encourage employers to pay employees while they seek new work (and even to supervise the adequacy of the job search efforts) rather than to fire them outright, at least when discharge would breach a contract. Employers might continue to discharge employees, perhaps fearing that employees who continue to receive weekly paychecks would not make good faith efforts to find new work. (That possibility has not prevented some law firms from continuing to pay attorneys while they seek new employment, thus helping them with the transition to a new job.) The law seems likely to tolerate employers who prefer to assign a job search as the employee’s daily workload. That tolerance could take the form of inferring an employee’s agreement to perform job search duties as an implicit element (or modification upon discharge) of the contractual employment relationship that existed.

107. The text could as easily discuss effort instead of time—the qualitative disutility of work (vs. the job search) rather than the quantity of time spent in each pursuit. Some jobs may demand activities far more draining than those required to conduct a reasonable job search. If so, the employee arguably benefits by expending less energy (on the job search) than she would have needed to expend (on the job) if the contract had been performed. For simplicity, the text will continue to address only the difference in time. Differences in energy present the same issues. They do not justify repeating the points with different terminology.

108. To the extent that the theory requires this result, it fails to explain existing law. The avoidable consequences doctrine permits no reduction in the award as long as the employee conducts a reasonable search for a new job. A reasonable job search might or might not require the employee to spend as much time looking for work as she would have spent working if the breach had not occurred. See Orzel v. City of Wauwatosa Fire Dep't, 697 F.2d 743, 756-57 (7th Cir. 1983) (during two years, plaintiff “secured one part-time job and applied for another, full-time position . . . [and] placed his name on file with the Wisconsin Job Service in an effort to seek whatever employment was available”), cert. denied, 464 U.S. 992 (1983); Sprogis v. United Airlines, 517 F.2d 387, 392 (7th Cir. 1975) (applying for one job and obtaining another temporary job constituted reasonable diligence); cf. Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149, 158-60 (7th Cir. 1981) (upholding reduction of award where plaintiff testified he spent 24 hours per week seeking work, in part based on concerns for the plaintiff’s
If, however, the discharge amounts to an implicit request that the employee conduct a reasonable job search, the additional leisure time does not require offset. In effect, the leisure is a gift from the employer to the employee, just as if the employer had told the employee to take the rest of the day off or to read a novel at the workplace that afternoon. An employer who gives such release time to employees cannot offset the pay without the employee's consent. The employee, by doing all that the employer asks, becomes entitled to the pay the employer promised. Similarly, an employee who conducts a reasonable job search does all that the breaching employer implicitly asks (via the legally imposed avoidable consequences doctrine), thus becoming entitled to full compensation as the employer promised (via the legally imposed damage remedy for breach of contract).

109. That conclusion may depend on the contract. In the construction trades, for example, employers often pay only for time worked by employees. When conditions make work impractical, employers may send employees home or not call them in (a near equivalent of the text's "take the rest of the day off") without any obligation to pay for the time the employees could have worked. An employer with that amount of discretion under the contract, however, rarely will face a claim for breach of contract such as the one envisioned in text. How could—or, equally telling, why would—an employer discharge an employee (in breach of a contract) if the employer had the power to pay the employee nothing (by not calling the employee to work on a job) without discharging her? Answers exist, particularly if the employer's ability to avoid paying for the employee's time depends on external conditions (such as weather conditions at the worksite) or is limited by the obligation to act in good faith. Perhaps fringe benefits or worker's compensation insurance premiums would motivate discharge in breach of contract instead of simply not calling the employee to work. The variety of factual settings that might give rise to discharge here evince the futility of attempting to address every possible contract setting in which the avoidable consequences doctrine might arise. For now, the text will continue to address the more common situation where an employer must pay the employee a certain amount each week, even if the employer cannot find enough work to keep the employee busy for the entire week.

110. We could infer the same implicit contract between the buyer and seller of goods, but it serves no useful purpose in that setting. The benefit retained by the seller exists independent of efforts to resell it. The law does not care at all whether the seller keeps the goods or resells them, as long as the value of the goods to the seller offsets the recovery. In fact, a buyer might prefer for the seller to keep the goods; incidental damages will be lower if the seller makes use of the goods instead of conducting expensive efforts to resell them. Presumably, the seller has no incentive to devote the goods to an inefficient use (that is, a use less valuable than the use other buyers could make of the goods).

The same arguments apply to discharged employees if we recognize the benefit of
Efforts to measure the value of leisure to the employee produce the same result without recourse to fictional post-discharge duties. The employee's decision to spend her time looking for a new job reveals a subjective assessment that she prefers wages to leisure—that she values the money she expects or hopes to make from a new job more than she values the leisure time. A good faith job search implies the employee will accept a job reasonably similar to her prior job—presumably including similar time and effort requirements. Thus, the employee's search, if in good faith, indicates a willingness to part with all of the spare time the employer so generously bestowed upon her, not just the spare time she actually spends looking for work.\textsuperscript{111} The decision to look for work, therefore, undercuts the inference about the value of the benefit (the leisure) the employee received. While it may have some value, that value may not equal the amount she could have earned by reasonable efforts. As long as the employee conducts a reasonable job search in good faith, we cannot infer how much value she attached to the leisure she received.\textsuperscript{112}

These same arguments could apply to a bad faith job search, but with

\textsuperscript{111} The time required to look for work may differ from the time required to perform work for reasons outside the employee's control, such as the scheduling constraints of interviewing personnel managers or the number of ads for suitable positions published in a given region. The employee's decision not to spend 40 hours per week actively pursuing work may reflect the futility of additional hours rather than some preference for leisure.

\textsuperscript{112} In this respect, the expectation interest does not reject subtracting the value of the leisure in theory, but despairs of measuring it. If we could measure and evaluate the utility of leisure directly, the expectation interest might justify an offset. The impossibility of such measurement, see SPENCER, supra note 48, at 341, makes offset impracticable without some objective indication of the value of leisure to the plaintiff.

The lack of an adequate measure explains an even more extreme case: the employee who does not look for work because the search would be futile. This employee certainly receives leisure as a result of the breach. But courts cannot estimate the value of that leisure. The amount she could have earned if she had conducted a reasonable job search equals zero since, by hypothesis, the job search would have been futile. Thus, while we know she values her leisure at least at zero, we have no evidence concerning whether (or by how much) she values leisure more than zero. In this respect, expectation analysis again duplicates the result dictated by the avoidable consequences doctrine. See DOBBS, supra note 9, § 3.9, at 272.
somewhat different results. The employee who conducts a job search with no desire to find new work fails to satisfy either prong of the analysis. She breaches the implicit contract suggested above by failing to perform her duty (to seek work) in good faith.但她 breaches the implicit contract suggested above by failing to perform her duty (to seek work) in good faith. Damages for that breach presumably would be measured by the amount the employee could have earned if she had looked for work in good faith. Alternatively, one could simply ask whether the employee’s bad faith search supports the inference that she valued work more than the leisure. Her failure to seek work in good faith implies that she prefers not to find work. The unwillingness to find new work suggests the employee actually values leisure—even that portion of leisure remaining after going through the motions of a job search—more than she values the wages she could obtain by working. The motions of looking for work show a preference to obtain both leisure and wages. But that preference looks very much like the employer’s hope to discharge the employee and not pay wages, despite the employment contract. Neither hope deserves much weight in legal decisions determining the effect of the parties’ conduct. Once a court determines that the employee failed to seek work in good faith, the expectation interest demands an offset of the wages the employee could have earned (as an estimate of the value of the leisure)—the same result dictated by the avoidable consequences doctrine.

113. Because the employee did not act in good faith, her breach of duty occurs regardless of whether her efforts may be reasonable. See supra note 105. Every contract includes the obligation to perform in good faith. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979). Failure to act in good faith is a breach of that obligation. The nonbreaching party (a paradoxical way to refer to the breaching employer) can recover damages caused by the employee’s breach of good faith. This approach equates the avoidable consequences doctrine with a counterclaim by the employer, much as any claim for breach of the “duty to mitigate damages” resembles an implicit counterclaim, though not generally so treated for purposes of the rules of civil procedure. See infra text following note 261.

114. An allusion to “having one’s cake and eating it, too,” seems in order here. At least one plaintiff showed unusual candor by testifying that he treated the first few months following discharge as a vacation, “enjoying [his] lay-off.” See Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149, 159 (7th Cir. 1981), overruled on other grounds by Coston v. Plitt Theaters, Inc., 860 F.2d 834 (7th Cir. 1988). The court ultimately disbelieved his testimony concerning the diligence of his job search efforts, concluding that “[w]hat the plaintiff did, in essence, was take a sabbatical and collect unemployment compensation.” 665 F.2d at 160 n.14.

115. I may be too hasty in assuming the avoidable consequences doctrine produces this result. Certainly it will if courts interpret it to require both reasonable and good faith efforts, as suggested earlier. See supra note 105. The conclusion will also apply if courts treat lack of good faith as inherently unreasonable. Good faith may impose a less demanding standard; honest but unreasonable conduct may meet a good faith test. Some courts may treat unreasonableness as a lesser included offense inherent in the finding of lack of good faith. Only if courts recognize the possibility of reasonable
The two approaches arguably could differ if we conclude that the employee conducted an unreasonable job search, but did so in good faith. In these circumstances, the avoidable consequences doctrine allows an offset for wages the employee could have earned if she had made an objectively reasonable search. The expectation interest, however, might not compel an offset. The employee did not breach the implied obligation to look for work, since she did so in good faith. Nor did she evince a preference for leisure over work, since her good faith search evinced a willingness to relinquish all of the leisure. Thus, a focus on the benefit might conclude that the employee subjectively valued the leisure received less than she valued the wages she could have earned if she had made a reasonable job search. As such, she received a benefit that we cannot measure.

The problem resembles one confronted in the preceding section, that subjective mistakes by the plaintiff may not fit the presumptions implicit in the evaluation of benefits. Like the seller who underestimates the market value of goods, the employee who conducts an unreasonable search may find the court subtracting more than her subjective value of efforts conducted in bad faith, and hold that the avoidable consequences doctrine does not permit reducing the award by the amount of the loss the plaintiff could have avoided if she had conducted the reasonable efforts in good faith, will the two approaches diverge here. In any situation in which the former seems plausible, the latter seems too remote to deserve extended attention.

116. Dobbs suggests that courts may apply a somewhat subjective standard in assessing the reasonableness of the victim’s efforts to minimize the loss. See Dobbs, supra note 10, § 3.7, at 188. He may mean only that the assessment of reasonableness takes into account the plaintiff’s individual circumstances, much as tort law considers (for example) the reasonably prudent five-year-old. If, however, courts take into account the plaintiff’s subjective state of mind, then the avoidable consequences doctrine and the expectation interest may not differ here. The avoidable consequences doctrine might allow recovery when the job search seemed reasonable from the plaintiff’s point of view. That seems like a minimum description of a good faith job search. The plaintiff can hardly claim good faith when performing a job search that she did not think was reasonable at the time. Thus, any efforts that satisfy this subjective version of reasonableness also satisfy a good faith requirement. This suggests that the reasonableness requirement serves largely as a proxy for a good faith requirement, perhaps because lack of good faith is so difficult to prove. Because the subjective nature of the avoidable consequences doctrine is not clear, the text addresses the alternative possibility: that the avoidable consequences doctrine requires objectively reasonable efforts. Cf. Restatement (Second) of Torts § 918 cmt. c (1977) (“The factors determining whether an injured person has used care to avert the consequences of a tort are in general the same as those that determine whether a person has been guilty of negligent conduct . . . .”).

117. See supra Part I.C.2.
the benefit. Again we can ask how a reasonable lawmaker seeking to offset the value of the benefit would choose to quantify that benefit.

A reasonable lawmaker plausibly could subtract the amount of loss the plaintiff could have avoided by good faith efforts to minimize the loss. Dobbs even suggests that the avoidable consequences doctrine, as applied, varies the definition of reasonable efforts to accommodate individual traits, bordering on a subjective good faith test. Indeed, we probably would see very little change in the avoidable consequences doctrine or case results if the law changed today to incorporate a good faith test in place of the existing reasonableness test.

For several reasons, however, a lawmaker trying to measure the value of the benefit might prefer the amount of loss avoidable by reasonable efforts. Several of these reasons have already been discussed in a different context. The law may infer subjective good faith from objective evidence—just as courts sometimes infer bad faith from evidence that the acts of one party were unreasonable. A finder of fact should have less difficulty determining whether the plaintiff acted reasonably than it would have determining whether the plaintiff acted in good faith. Good faith and reasonableness seem likely to correlate rather highly, producing few cases where an accurate determination of reasonableness will differ from the more difficult determination of good faith. The cost of determining subjective good faith may exceed the benefit of better results in those cases where reasonableness and good faith do not correlate. But in this context a new reason seems particularly important.

The decision to subtract the amount that could have been avoided by

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118. See supra note 116.

119. Some courts seem to equate good faith with reasonable conduct as a matter of law. See, e.g., Bushmiller v. Schiller, 368 A.2d 1044 (Md. Ct. Spec. App. 1977); Roger C. Henderson, The Tort of Bad Faith in First Party Insurance Transactions: Refining the Standard of Culpability and Reformulating the Remedies by Statue, 26 U. Mich. J.L. Ref. 1, 40-41 & n.167 (1992). But see Washington Metro. Area Transit Auth. v. Gatoil (U.S.A.), Inc., 607 F. Supp. 1422, 1425 (D.D.C. 1985) (granting summary judgment against defendant on ground that failure to make reasonable efforts breached the obligation to make good faith efforts), rev'd, 801 F.2d 451 (D.C. Cir. 1986) (in cases governed by U.C.C., good faith requires honesty in fact, not necessarily reasonable efforts). Even where courts hold to the definition of good faith as "honesty in fact," U.C.C. § 1-201(19) (1995), it may be impossible to demonstrate bad faith without recourse to evidence of unreasonableness. Good faith requires a determination of the party's subjective state of mind. Only the party has first hand knowledge of that state of mind. To litigate the issue of good faith at all, the unreasonableness of the party's conduct must be admitted into evidence, if only to challenge the credibility of the party's claim that she honestly held an unreasonable belief.

120. See supra text accompanying note 47.

121. See supra note 66.
reasonable efforts has two uses: it provides no subtraction if the plaintiff makes reasonable efforts to avoid the loss, and it provides a measure for the subtraction when the plaintiff fails to make reasonable efforts. While a good faith test seems fairly well suited to the first of these uses, it seems virtually unmanageable in the second. Determining whether the plaintiff's efforts were made in good faith seems within the capability of a jury, but we may expect some errors. On the other hand, determining the amount of loss that could have been avoided by good faith efforts seems horribly speculative in a case where the plaintiff did not make good faith efforts. If the plaintiff had sought a new job in good faith, what efforts would she have made? Can the finder of fact presume that the plaintiff would have acted reasonably if she had made good faith efforts? Since the plaintiff could have achieved a zero offset without acting reasonably, that presumption is not, theoretically, required. Good faith can describe a range of efforts, from extraordinary to unreasonable. Can the plaintiff contend that, even if she had acted in good faith, she would not have acted reasonably? If so, can she claim that she would not have found a new job or would have found one that would have paid less than the job that she could have located with reasonable efforts? How can the fact finder identify efforts that would have satisfied good faith even though the efforts were unreasonable? What evidence would be probative on that issue?

A reasonable lawmaker might decide to avoid these issues by presuming conclusively that the plaintiff valued leisure at least as much as the amount she could have earned by reasonable efforts to find new work. Perhaps the law could surmount these obstacles; the rhetorical questions can be answered, though the answers may not inspire confidence. A reasonable lawmaker, therefore, could choose a good faith standard despite these difficulties. But the choice seems a toss-up at best. The difference between good faith efforts and reasonable efforts does not seem dispositive evidence that the law pursues a goal other than evaluating benefits of breach. Rather, the expectation interest could produce the same rule now followed by the avoidable consequences doctrine.

122. The image of a plaintiff trying to look as dumb as possible while testifying, "Gee, I never would have thought to try that while looking for work," probably exaggerates the picture, at least slightly. The plaintiff, after all, does not want to seem so dumb that the jury decides the discharge was justified.
In short, the normal damage rules can explain the inference that the employee received a benefit she valued more than a new job from the fact that she made insufficient efforts to find new work. In a few cases that inference may not match the subjective values of the specific plaintiff—just as the objective theory of contracts may find agreements in some cases where the parties (or one of them) subjectively never intended to make a binding commitment. But on balance, the errors involved in this presumption seem likely to be small.

b. Why limit the value of the benefit to the amount of loss that could have been avoided by reasonable efforts?

An attack might emerge from the other direction. Even if persuaded that the reasonableness standard does not overestimate the value of the benefit, one might argue that it underestimates the value. Arguably, the plaintiff values the benefits of the breach more than she values the amount of loss she could avoid by any means, no matter how burdensome. Otherwise she would have taken the burdensome measures and avoided the loss. At least as long as the burden of the measures is compensable in the damage award, the decision not to take those measures seems to reflect a preference to retain the benefits rather than relinquish them by finding a substitute transaction.

In the context of employment contracts, this objection presents a most unpalatable alternative. It suggests that a discharged employee may not recover wages if she could have avoided the loss by taking employment in another state; the burden of relocating plays no role in the inference, only in the calculation of incidental damages. It suggests that the award to a discharged professional should be reduced by the amount that could have been earned dancing naked or cleaning bedpans because the humiliation of other employment does not impede the inference. It suggests that the employee cannot recover amounts she could have earned working in a coal mine because the risk of the alternative employment does not alter the inference. The avoidable consequences doctrine explicitly negates an offset for actions that involve undue risk, burden, or humiliation. If we focus instead on evaluating the

123. See, e.g., Embry v. Hargadine-McKitrick Dry Goods Co., 105 S.W. 777 (Mo. Ct. App. 1907); Farnsworth, supra note 2, § 3.13.

124. The presumption suggested here is the opposite of the presumption Dobbs suggests applies to the avoidable consequences doctrine. See supra note 116. Just as courts may soften the requirement of reasonable efforts in light of a plaintiff's subjective circumstances, a court may impose results that do not exactly match the plaintiff's subjective state of mind based on the objective evidence.

benefit, we must examine why risk, burden, or humiliation—or any other factors that make a decision not to pursue alternative employment reasonable—defeat the inference that the employee preferred leisure.

Intuitively, the results achieved by the avoidable consequences doctrine seem explainable in terms of the benefits. When an employee decides to refuse work in another locale, that decision may not reveal a preference for leisure. The preference revealed may relate more to the benefit of living in this community—a benefit that the employer did not bestow by breaching the contract—rather than to the benefit of idleness. The same intuition seems to apply when the characteristics of the other job are at stake. Whether the alternative employment involves substantially greater labor, substantially greater risk, or substantial costs to reputation or self-esteem, a decision to reject the job seems more related to those factors than to any preference to remain idle. We can understand why a reasonable person who truly preferred wages to leisure, nonetheless, might refuse the jobs involved.

Perhaps we can clarify that intuitive point if we separate the two components of leisure: the utility of play and the disutility of work. 126 When we infer that the employee values leisure more than earnings, we actually infer that she values play more than the net value of earnings less the disutility of working. 127 The benefit bestowed by the employ-

126. I use the word “play” simply to contrast the utility of time for one’s own pursuits with the disutility of work. Leisure may generate utility from a number of activities that we would not trivialize as play.

127. We might express the formula as Play ≥ Earnings - Work. The equivalent expression, Play + Work ≥ Earnings, is also true. Note that Work, in these formulae, is a positive number—perhaps better called the benefit of not working—rather than a negative number, as one might assume from the rhetorical formulation “the disutility of work.” Anyone who prefers to picture the disutility as a negative number may do so by simply changing the operators (+ and -) in the formulae. (Since Work reduces the value of earnings, it would be misleading to subtract a negative value of work from a positive value of earnings, since that would increase the total rather than decrease it. Only if job satisfaction exceeds the disutility of work, such that the employee might work even without pay, would it be accurate for the right side of the first formula to be greater than earnings. Let me assume that, for the vast majority of employees discharged in breach of contract, work involves some net disutility.)

The different rhetorical formulations do not affect the basic identity of the value Work. Whether viewed as the benefit of not working or the disutility of work, the value will be the same distance from the zero point, but in a positive or negative direction (respectively). The disutility of work takes not working as the base line, assigning it zero value. (Any positive value of free time has been included in the separate element Play.) Working moves one’s position in a negative direction. The benefit of not
er, however, is limited to the disutility of working at the original job (plus play). Relieving the employee of that disutility, which she would have endured if the employer had performed, is a benefit to the employee. As long as the disutility of any alternative employment does not exceed the disutility of the original job, rejection of the new job supports the inference that the employee preferred leisure to the earnings. But if the disutility of the new job exceeds the disutility of the original job, the inference no longer follows logically. Even if the employee would have preferred the earnings of the new job to her leisure if it involved the same disutility as the original job, she might refuse the job because the disutility of the new job reduces the net earnings below the value of her leisure.

"Undue risk, burden, or humiliation" seems an apt attempt to capture those cases where the new job involves substantially greater disutility than the old job. Risk of bodily harm (or other injury) and the indignity or humiliation of a new job are among the disutilities of that job. Some burdens, such as significantly more taxing job duties, also constitute disutilities of the job. The burden of moving to a new city often will involve disutilities attributable, at least indirectly, to the new job.

At least some burdens, however, may raise a different concern. Burdens may refer to the burden of the job search or the transition to the new job. For instance, an employee might be able to find work in a

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working takes the labor as the base line. Not working relieves one of the disutility, moving in a positive direction. But, for any given job, the gap between working and not working covers exactly the same distance regardless of whether we move from not working to working or from working to not working.

128. Rejecting a job (or failing to include that job in a search) establishes that $Play + Work_N \geq Earnings_N$. (The subscript $N$ indicates the new job; the subscript $O$ will designate the original job.) Where $Work_N \geq Work_O$, we also can infer that the benefit from the breach equals or exceeds the earnings of the new job: that is, that $Play + Work_O \geq Earnings_N$.

In this respect, the relative disutility of the two jobs does not differ in principle from the role fringe benefits play in the calculation. Throughout, I have taken earnings here to include the entire compensation package, including health benefits, retirement benefits, and the like. Sometimes non-salary aspects of the compensation can play a critical role in an employee's decision to accept a position. See, e.g., Ford Motor Co. v. EEOC, 458 U.S. 219, 222 (1982) (employees refused job with former employer because offer did not include seniority to original hire date). While calculations may become more difficult as we move from health insurance packages to seniority, to amenities (for example, an office with a view), to more burdensome work requirements, the differences have the same effect on the net benefit of employment by raising or lowering either the earnings or the disutility of work.

129. In short, knowing that $Play + Work_N \geq Earnings_N$ does not allow the inference that $Play + Work_O \geq Earnings_N$ if $Work_N > Work_O$. Since the benefit of the breach is $Play + Work_O$, no inference about the value of the benefit is available from the decision to reject the new job.

130. The disutility of the new location would count as a disutility of the new job.
The burden of moving to a new city—or even the burden of a longer commute—may be "undue" within the meaning of the avoidable consequences doctrine, even though no disutility attaches to the new location. The avoidable consequences doctrine generally does not subtract amounts the employee could have earned in other locations—and reaches that result without expressly comparing the relative attractiveness of the two living environments. This suggests that the burden of the transition, rather than the disutility of the new location, explains the existing rule.

The expectation interest might require an offset for losses the plaintiff could have avoided by incurring substantial transitional burdens. The expense of the move seems entirely an issue of transaction costs. If the law will compensate the employee for the transaction costs, then the employee's decision not to incur them arguably implicates the value the employee attaches to leisure itself. Part I.C.3 attempts to demonstrate that, at least with regard to the cost of resale, transaction costs do not undermine the inference that the plaintiff valued the benefit more than she valued the amount she could have gained in a substitute transaction. Other job search expenses also might seem undue to a jury—for example, the cost to dress for success. Where those burdens are large enough to be unreasonable, but tangible enough to permit

131. The general rule that a discharged employee need not accept employment "in another community" may overstate the issue slightly. The definition of the community, like geographic market in antitrust cases, may turn on the reasonableness of seeking employment in a place rather than on city or county lines drawn for different purposes. Dobbs suggests that for some professions, mobility may be the norm, thus making a willingness to relocate reasonable under the circumstances. DOBBS, supra note 10, § 12.25, at 926. Nonetheless, some cases imply a very limited search may suffice to avoid an offset. For instance, public school teachers may contend that "their former employer is the only employer in town." Shiffer v. Board of Educ., 224 N.W.2d 255, 258 (Mich. 1974).

132. See, e.g., Byrne v. Independent Sch. Dist., 117 N.W. 983 (Iowa 1908); DOBBS, supra note 10, § 12.25, at 926. While this might reflect a conclusive presumption that every employee lives in the city they love better than any other in the world, it seems better not to assume that the law embodies such an unrealistic presumption. More likely, the rule presumes that the relocation costs themselves are an undue burden that makes rejection of jobs in other locations reasonable. The same rule need not apply where the cities are close. The burden of a longer commute may or may not make reasonable a decision to reject (or not to look for) a job in a nearby city.

133. The preceding paragraph sought to remove the relative utility of the two locations by hypothesizing a job in a better city.

134. See supra text accompanying notes 80-92.
calculation, the law could choose to compensate the plaintiff for them and preserve the inference that she prefers leisure if she does not incur them. Since the avoidable consequences doctrine does not take this approach, some reconciliation remains. 135

The preceding discussion of transaction costs, however, relies in part on the relatively small amount involved. 136 Neither the transaction costs themselves nor the interest on them seems likely to be very large, either as an absolute amount, as a percentage of the harm the costs would avoid, or as a percentage of the plaintiff's resources. Thus, when recoverable, the plaintiff's need to wait until trial to recover them seems unlikely to influence the decision about whether to avoid the loss. That confidence diminishes when the transition costs refer to extraordinary efforts rather than reasonable efforts. The cost of moving to a new city may not be small in any sense of the word. Indeed, the burdens under discussion are by definition undue, implying that they represent a fairly large amount, at least in proportion to the amount of loss they will prevent. 137 In these circumstances, the plaintiff's concern over these costs may enter the decision concerning whether to minimize the loss by extraordinary efforts. If these elements enter into the calculation, then the inference that the decision not to act reflects a preference for leisure becomes uncertain. Once we cannot assert that the decision not to act reflects the value the plaintiff attaches to leisure, the expectation interest need not (and perhaps cannot) assume that the amount of loss the plaintiff could have prevented by taking those measures equals the benefit of the breach. Thus, the expectation interest, like the avoidable consequences doctrine, can treat extraordinary efforts to minimize the loss differently from reasonable efforts to minimize the loss.

Another practical constraint stems from the resources available to the plaintiff. If the law begins to reduce recoveries where employees failed

135. We might attempt the reconciliation by modernizing the avoidable consequences doctrine. A blanket rule that negates a duty to move to another city, appropriate in an era when the population was more static, may be obsolete in the era of the global village. The reasonableness of decisions not to move may have changed; courts may need to catch up. Yet at some point the avoidable consequences doctrine tolerates the conclusion that the burdens of transition are undue, a conclusion that the expectation interest must explain.

136. See supra text following note 85.

137. Thus, the argument in text is not limited to the example of moving to a new city. Any undue burden seems likely to involve amounts sufficiently significant to implicate the arguments concerning transaction costs. If the expenses involved are reasonable rather than undue, then they do not fall into the category now under discussion. The avoidable consequences doctrine and the expectation interest treat reasonable expenses alike, by expecting the plaintiff to incur them and by compensating her for them if she does.
to incur substantial (previously "undue") expense in the job search, the employee with limited savings may be caught in a vice. The employer has deprived the employee of regular pay, which might have been used to meet the expenses involved (in addition to the employee's living expenses). Yet the employer complains that the employee did not incur significant expenses during a job search. The law's normal presumption that everyone has easy access to capital markets—that is, that the employee could borrow money to cover the expenses—seems singularly ill-adapted to cases involving discharge from employment.\textsuperscript{138} It would be extremely unrealistic for the law to assume unemployed people can borrow money at will. Thus, an employee's limited means impede the inference that the decision not to incur substantial expense in the job search reveals a preference for leisure.

Third, employers again seem unlikely to raise the issue very often—especially when the costs involved are large—because employers would need to pay them as an element of damages. If the employee did incur the costs, however large, they become incidental damages the employer must pay.\textsuperscript{139} The employer will benefit from this argument

\textsuperscript{138} In fact, some avoidable consequences cases do not require plaintiffs to incur expenditures beyond their means. \textit{See}, \textit{e.g.}, Valencia v. Shell Oil Co., 23 Cal. 2d 840, 147 P.2d 558 (1944) (defendant damaged plaintiff's truck; plaintiff, who did not have $222 in order to pay mechanic for repairs to the truck, recovered $4,416 for loss of use of a truck while it sat in a shop subject to a mechanic's lien); \textit{Doobbs, supra} note 9, § 3.9.

\textsuperscript{139} If the law does not permit the employee to recover incidental damages that are unreasonably large, then the inference (that failure to incur them reflects a preference for leisure) fails from the outset. The lawmaker faces two choices: (1) to allow recovery of the substantial burdens and to subtract the earnings that would have followed those efforts; or (2) to reject the inference that leisure motivated the decision not to incur the burdens during the job search, thus rejecting the inference that the employee valued leisure more than the wages she could have earned if she had made a more burdensome job search.

Arguably, the employee should not recover for unreasonably large expenses incurred in the process of minimizing the loss because the employer could not foresee that the employee would incur such large damages. \textit{See} Wonnell, \textit{supra} note 31, at 490. One might quibble over whether foreseeability requires that the magnitude of the loss be foreseeable at the time of contract formation or merely that the type of loss be foreseeable. One also might quibble that since job search expenses arise naturally from the breach, the requirement of special notice at the time of contract formation should not apply to them. The issue does not affect the substance of the argument here. If the extra expenses are not recoverable, for whatever reason, the law cannot infer that the employee who failed to incur them preferred leisure to the amount she could have earned if she had incurred them. At best, the law can infer that she valued leisure more than
only if the amount the employee could have earned following a burdensome search would have exceeded the burdens by more than the difference between the original salary and the amount the employee could have earned following a limited search. While such cases may exist, they seem unlikely to outnumber the cases where the employer loses because the employee fails to find work (or sufficiently valuable work) after incurring the unduly large expenses. On the whole, employers and employees both seem likely to prefer the predictability of the more limited rule. A reasonable lawmaker concerned with benefits, therefore, might never be asked to choose to include consideration of jobs that the employee could have obtained only by unduly expensive efforts. Rather than include the undue burdens in the recovery, the lawmaker might prefer to reject the inference of a preference for leisure in cases where the alternative employment or the job search involve undue risk, burden, or humiliation.

A final set of practical difficulties may doom the argument for compelling plaintiffs to incur unduly large transition expenses. Sometimes, the law will not be able to tell whether the decision not to move to a different city represented concern for transitional costs or concern for the disutility of living in the new city. If the argument concerning the latter, disutility, has been persuasive, the expectation interest cannot infer that the decision not to relocate reflected the value the plaintiff attached to leisure. The inability to distinguish decisions based on the disutility of the new location (or new job) from decisions based on the cost of the move or a mixture of the two motives might induce our lawmaker to prefer a single rule governing both problems. A single rule would help an employee to know how much the law expects of her in a job search.\textsuperscript{140} Wonnell provides the usual answer under the avoidable consequences doctrine: the law expects the employee to do as much as she would if she were acting (reasonably) on her own account—that is, if she were not able to claim damages from her employer.\textsuperscript{141} If the demands of the law may differ depending on

\textsuperscript{140}. Heriot comments on the usefulness of rules (as opposed to standards) as devices for guiding individual behavior in cases where litigation may not occur. \textit{See} Heriot, \textit{supra} note 47.

\textsuperscript{141}. Wonnell, \textit{supra} note 31, at 494. Wonnell here focuses on the concern for moral hazard, which he terms the extortion value of a contract and the desire to reduce waste. These rationales underlie the traditional formulation of the avoidable consequences doctrine, but are not as obviously related to the concern for benefits of the breach.
whether the burdens involve disutilities or transaction costs, the employee—even after consulting a lawyer—may have little ability to know what she must do in order to protect her recovery in the event that her job search proves unsuccessful.

The expectation interest does not compel courts to reduce an employee's recovery because she failed to take extraordinary measures to find new work. No one seems likely to propose that result in any event. Even if proposed, the permissible inferences from the plaintiff's decision not to incur substantial burdens, either in the transition or in the new job, do not justify the conclusion that the employee's inaction reveals a preference for leisure over the wages she could have earned by those efforts. The rules generated under the avoidable consequences doctrine, therefore, are completely consistent with the results courts could achieve pursuing the expectation interest. The harmony between the expectation interest and the avoidable consequences doctrine remains intact.

2. **Buyers of Goods**

Buyers require another elaboration of the theory. A buyer who has not fully performed retains money—the epitome of an avoided consequence, not an avoidable consequence. We do not need the theory expounded here to explain why the value of money retained is a fair approximation of the value of the benefit bestowed by the breach; it is as exact a measure as the law of damages (which measures everything in terms of money) can achieve. Neither do we need the avoidable consequences doctrine to explain this result. We are not subtracting the amount of loss that the buyer could have avoided by reasonable action, but the amount that she did avoid by not paying the balance of the price. The expectation interest explains this subtraction quite satisfactorily.

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Part III will take up the consistency (and perhaps the identity) of the two sets of concerns.

142. Since the savings involved here do not consist of the unpaid portion of the price, the analysis that follows applies regardless of whether the buyer has fully performed (by paying the price). The benefits hypothesized reflect subsequent savings or gains which will or will not accrue regardless of how much of the price the plaintiff has paid. Naturally, the portion of the price paid to the seller will figure into damage calculations, but does not affect the analysis of benefits pursued here.
Benefit analysis can explain why a buyer who covers with better goods than those the seller promised should not recover the full difference between cover price and market price. When the plaintiff receives better goods, she receives benefits that she would not have received if the seller had performed. But this has very little to do with the project at hand; the law does not treat cover with superior goods under the avoidable consequences doctrine. Rather, the law relies directly on normal damage rules, the desire not to put the plaintiff in a better position than she would have occupied if the defendant had performed. While calling this difference a benefit of breach might alter the vocabulary slightly, it would not alter the rationale for this result.

For buyers, however, the avoidable consequences doctrine often enters the picture when considering consequential damages, such as the profit lost on resale of the goods or losses caused by delayed production or construction when a critical component did not arrive on time. The buyer who promptly covers with substitute goods may avoid or minimize these losses. The buyer who does not cover may find she cannot recover the actual consequential damages because she failed to take reasonable efforts to avoid them. Here, the lack of an immediately apparent benefit cuts against the explanation based on the expectation interest. This rule seems designed to measure the loss that could have been avoided, not some mysterious gain that actually accrued to the buyer as a result of the breach.

In order to identify the benefit to a buyer from the seller's breach, we must consider why a buyer who could avoid or minimize losses with reasonable efforts would choose not to pursue those efforts.

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144. See, e.g., S.J. Groves & Sons v. Warner Co., 576 F.2d 524 (3d Cir. 1978) (contractor sought damages for delays caused by subcontractor's failure to deliver required amounts of concrete in a timely manner).
145. Cover is the most obvious way for buyers to minimize the loss, but not the only way. For convenience, the text often will refer to "cover" rather than the more cumbersome phrase "cover or other efforts to avoid or to minimize the loss."
146. U.C.C. § 2-715 (1995) (buyer may recover consequential damages "which could not reasonably be prevented by cover or otherwise"). The trial court in S.J. Groves had reduced the plaintiff's recovery on this ground, but was reversed on appeal. 576 F.2d at 530.
147. Where the buyer does pursue reasonable efforts to minimize the loss, no further inquiry is needed. The avoidable consequences doctrine does not require any offset, since any damages that could have been avoided by reasonable efforts presumably were avoided by the plaintiff's reasonable efforts. (The Restatement does not allow the defendant to second-guess the plaintiff's choice of which reasonable measures to pursue; as long as the plaintiff acts reasonably, no reduction in damages occurs. RESTATEMENT (SECOND) OF CONTRACTS § 350(2) (1979).) Since the plaintiff did not choose to forego
mally, plaintiffs will prefer to avoid losses today rather than to recover for the losses after months of negotiation or years of litigation. Thus, even a buyer unaware of the avoidable consequences doctrine should prefer to prevent or to minimize the loss. An informed buyer would take reasonable steps to minimize the loss because she could not count on recovering the loss later; the avoidable consequences doctrine would deny recovery for losses the buyer could have avoided. Thus, a rational buyer generally will prefer to cover and, thus, avoid the loss the breach otherwise might cause.

In some cases, however, the seller's breach may benefit the buyer by opening up some new, more valuable opportunity. By breaching, the seller frees the buyer from having to use the goods. The buyer saves some time and effort that otherwise would have been devoted to the performance of the contract. Instead, the buyer can devote her resources to other projects, which may prove more profitable than the project in which the goods would have been used. The benefit may consist of reasonable measures that would have reduced the loss, the expectation interest does not hypothesize a benefit from the breach—or, at least, has no basis upon which to set a value upon any benefits. 148 Wonnell notes this as a powerful force motivating employees to seek new work. See Wonnell, supra note 31, at 490. While some buyers may have sufficient cash flow to await repayment, the time value of money suggests most prudent business people will avoid losses rather than count on recovery. 149 The breach frees resources for any buyer, regardless of unused capacity. If the buyer, like the lost volume seller, could have performed under this contract (or covered) and pursued the other venture, then the other venture is not a benefit bestowed by the breach of the contract. A buyer with unused capacity, however, could pursue cover in addition to the other project. Thus, the existence of unused capacity enables the buyer to cover, but does not explain why a rational buyer would not cover when faced with consequential losses. Thus, a claim that unused capacity allowed the buyer to pursue both ventures does not require a different application of the expectation analysis. When the buyer with excess capacity chooses not to use it to cover, one cannot easily dismiss the idea that she obtained benefits from the breach—such as the benefit of cutting short a losing venture.

If the plaintiff would have lost money on the venture, neither benefit analysis nor the avoidable consequences doctrine is necessary to explain the result. The breach did not cause consequential losses, but prevented them. In these cases, normal damage rules based on the expectation interest should preclude recovery without any reference to the avoidable consequences doctrine—as long as the defendant can establish the losses with reasonable certainty. (Restitution may produce a different result. For a persuasive argument that restitution should not alter the expectation interest in this situation, see Kull, supra note 32.) We could treat the loss prevented as a benefit of the breach. The characterization seems quite apt, but one does not need to characterize this fortuity as a benefit of the breach in order to reach the appropriate result. Nonetheless, the decision
as little as the time it would take a clerk to write a check and a receiving department employee to direct the goods to the right place. Consequential damages seem more likely, however, in cases when the cost of dealing with the goods is larger. A buyer who plans to resell the goods may save the effort or expense of its sales and delivery forces. A buyer whose operations must shut down because a critical component does not arrive may save the effort or expense of operating.

As in the case of the nonbreaching seller, we can estimate the value the buyer attaches to the benefit by looking at how much she could have saved by covering. The gain from devoting resources to other projects may be intangible or difficult to identify directly. The alternative uses of her resources illuminate the amount of benefit she expects to receive from the use she actually selects. A buyer who elects to devote her resources to transactions other than cover must expect to

of a buyer not to cover when cover was reasonably available might alert courts to the possibility that the project would not have been as fruitful as alleged. Going forward, this section assumes that the buyer can establish the existence of consequential losses. Only then will the avoidable consequences doctrine be necessary in order to reduce the award.

150. Normally, consequential damages arise when the absence of goods jeopardizes some project in which the goods are essential. When no such project exists (that is, when goods will be delivered and sit with no further input of effort from the buyer), no savings may result, but neither do consequential damages result. The loss consists merely of not having the goods, the lost value of the goods themselves. That loss generally is measured by the contract/market differential.

151. Variable costs—such as delivery if the buyer hires independent carriers rather than using employees to deliver goods—may produce direct cash savings. When the expense is temporarily fixed, as by annual contracts with the sales and delivery personnel, the savings may take the shape of less work for the staff. The most obvious benefit of reduced workload is time to devote to other projects. But even without additional projects, a lighter workload may produce subtle benefits, such as higher morale, a better work environment, or fewer mistakes on remaining projects. Some may find these benefits rather speculative or even ethereal. I make no claim that the specific benefits identified here have ever motivated a buyer not to cover. I claim only that if a buyer decides not to cover when reasonable efforts would minimize the loss, she normally has some reason for that decision. If other reasons fail to explain the conduct, perhaps benefits similar to those identified here really exist.

152. Again, the savings may take the form of money (by not paying the employees for days not worked) or time and effort (by paying the employees and having their time available for other projects).

153. The amount of benefit actually realized by employing the resources in any particular alternative pursuit is irrelevant. The expected benefit at the time the buyer decides whether to devote those resources to cover or to another project estimates the benefit of the breach.

154. Cf. Richard A. Posner, Economic Analysis of Law § 6.11 (3d ed. 1986) (discussing evaluating redundant a homemaker-spouse's services by reference to the amount she could have earned at an alternative occupation if she had chosen to pursue it instead of remaining in the home).
benefit from those transactions. If the buyer could reduce losses by cover, she must expect the alternative uses of resources to produce gains large enough to offset the losses she could have avoided. 155 Thus, the buyer provides a fair estimate of the value to her of being freed from the contract. That value equals the gains she expects from the alternative use of her resources. Presumably, if cover (or other measures to minimize the loss) will save more money than alternative projects will gain, the buyer will devote the energies to cover. Only when the alternative projects seem likely to generate a net gain will the buyer forego cover and pursue another project instead. 156

The law could seek to attach a value to these savings directly. The U.C.C. allows offsets for “expenses saved in consequence of the . . . breach.” 157 When the savings take the form of time or effort, however, the cost to attach a value to these savings—or even to prove that the savings occurred—may exceed the benefit of offsetting them in the award. 158 The amount of loss that could have been prevented offers a much more manageable figure. Evidence about that amount is easier to obtain—especially for the defendant, who bears the burden of proof under the avoidable consequences doctrine. 159 The amount is measured in dollars instead of utils. In many cases, the estimation will be preferable to direct efforts to measure the value of the breach to the buyer.

Arguably, the benefits discussed here consist of the benefit of not covering, not the benefit of the breach. If the benefit of not covering

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155. This statement assumes that buyers are rational economic actors. A buyer fails to cover, even though she expects cover to save more money than alternative activities would gain, presents an enigma. The situation seems so counterintuitive that a reasonable lawmaker concerned with measuring benefits realistically could adopt rules based on the assumption that it does not occur at all. To some extent, assuming that the buyer’s actions accurately indicate her subjective value would accomplish this result. See supra text accompanying notes 45-57. This Article addresses intentional externalization of costs shortly. See infra notes 189-90.

156. The word “only” here may claim too much. As noted below, a buyer may decide not to cover for several reasons other than the desire to pursue a different project. See infra text accompanying notes 161-204. I do not intend the word “only” to reject those other possibilities. However, when choosing between two projects (cover and an alternative), a rational buyer will choose the alternative only when the expected gain from the alternative exceeds the expected gain from cover (or other mitigation efforts).

158. See supra note 66.
159. See DOBBS, supra note 9, § 3.9.
consisted only of the time saved by not calling other suppliers, that
might be true. But cover, when effective, puts the buyer in almost the
same situation regarding performance that she would have faced if the
seller had delivered. To prevent consequential damages, the buyer must
proceed to use the substitute goods in the same manner she would have
used the original goods. Thus, the decision not to cover implicates the
value of the resources that would have been employed to utilize the
substitute goods, not merely the resources that would have been
employed to obtain the substitute goods. The former clearly
represent benefits of the breach. The latter are not benefits of the
breach, but rather incidental damages, recoverable in the damage award.
As a result, they should net out of the buyer's calculation, being no net
loss whether she covers or pursues other opportunities. Thus, the
decision to pursue other opportunities rather than cover reflects the
benefits of the breach (the resources needed to use the goods once
delivered), not the benefits of avoiding cover.

Not all buyers long for sellers to breach so that they can abandon their
original projects in favor of new, more profitable projects. Often buyers
will be perfectly happy with their original projects and will be rather
upset with the seller for making those projects harder to pursue. In these
circumstances, however, buyers seem almost certain to make reasonable
efforts to prevent consequential damages by obtaining the goods
elsewhere or otherwise salvaging the project. Buyers have no incentive
to allow acceptable projects to die when reasonable efforts can save
them and no better alternatives exist.

In cases where the breach offers no benefits, we would expect to find
that the buyer has undertaken reasonable efforts to cover or otherwise
minimize the loss. Where she has not made reasonable efforts to

160. Where nondelivery has no consequences other than loss of the benefit of the
goods, this entire discussion does not come into play because the avoidable consequences
doctrine does not affect the recovery.

161. See supra text accompanying notes 80-86.

162. For this reason, we would expect very few cases to employ the avoidable consequences
doctrine to reduce the consequential damages available to buyers of goods. Contract damages generally undercompensate successful plaintiffs. See Wonnell, supra
note 31, at 482; Stewart Macaulay, The Reliance Interest and the World Outside the Law
Schools' Doors, 1991 WIS. L. REV. 247, 250-53; Kelly, supra note 6, at 1811. Epstein's
analysis suggests that undercompensatory damages will lead most contract plaintiffs to
take any reasonable opportunity to avoid the loss rather than accept an inadequate award.
See Epstein, supra note 66. On one hand, this implies that the avoidable consequences
doctrine applies only rarely, making its abolition rather insignificant even if normal
damage rules did not produce the same result. More significantly, however, the
incentive to minimize losses suggests that when buyers do not take reasonable efforts to
minimize the loss, they must have some reason for that decision—and the damage award
seems an unlikely motivation.
minimize the loss, an inference that the buyer benefitted from the breach seems sufficiently plausible for the law to offset the damage award by the nearest estimate of that benefit—the amount of the loss that could have been avoided by reasonable efforts. A buyer might try to explain that failure in a way that negates the inference that she chose to make better use of her resources. The most plausible explanations deserve attention. If the explanations undermine the inference that the buyer benefitted from the breach in the amount of the avoidable loss, then perhaps the presumption should be rebuttable in particular cases. The discussion below concludes that the plausible explanations do not require subjective inquiries into the buyer’s motivations.

Where the buyer attempts to explain the decision not to cover, the buyer still has received benefits from the breach. The buyer’s resources (that would have been consumed by using the goods) have been freed for disposition at her will. The ability to deploy those resources to other endeavors is a benefit to the buyer, much as the ability to decide how to spend one’s time was a benefit to the employee. 163 Where the breaching seller offers direct proof of the amount of the benefit, the U.C.C. may take that into account. Absent direct evidence, however, inferences about the value of the benefit may be impossible to draw. 164 Thus, the court will lack sufficient basis to subtract any particular amount from the award. Interestingly, the benefit analysis finds it difficult to assess the amount of the benefit in precisely those cases where the avoidable consequences doctrine does not require a reduction in damages.

For example, a buyer may decide not to cover because cover is

163. The buyer might have chosen to abandon the original project even after performance by the seller. That decision would entail not only the cost of paying for the goods, but of storing them, insuring them, or otherwise dealing with them until they could be resold or the original project could be resumed. The benefit of breach at least equals those saved costs. The expectation interest, however, provides a more direct reason for denying consequential damages in any case where the buyer would have abandoned the project even if the seller performed: the breach did not cause any consequential damages. Any profits lost on the original project would have been lost anyway, since the buyer would have shifted resources in another direction even if the seller had delivered. The text considers the situation where the fixed costs of paying for and storing the goods would have persuaded the buyer to proceed with the original project despite a preference to shift to another project that, but for those fixed costs, would have produced greater return for the buyer. Under those situations, the ability to choose the alternative project really does result from the breach, not from the buyer’s ability to redirect resources independent of seller’s conduct.

164. See supra note 112 and accompanying text.
impossible. Under these circumstances, the avoidable consequences doctrine requires no reduction in the award. The plaintiff literally could not prevent the loss by cover because she could not cover. In this case, benefit analysis also requires no subtraction. While the plaintiff has freed resources, we cannot estimate their value. The decision not to cover tells us nothing about their value to the plaintiff. Since zero losses could have been avoided by cover, we can infer only that the plaintiff values those resources at least at zero.

Similarly, if cover is possible but will not avoid the consequential losses (say, because timing was critical and the loss cannot now be avoided), neither theory requires a reduction in the award. The plaintiff could not have avoided the loss, so the avoidable consequences doctrine subtracts nothing. Benefit analysis suggests only that the buyer valued the freed resources at least at zero, offering no basis for subtracting more than zero.

The preceding paragraphs do not undercut the basic inference proposed here because they do not address the basic question: why would someone who could prevent losses with reasonable efforts choose not to take those efforts? Rather, the situations above reflect circumstances where the buyer could not prevent the loss with reasonable efforts. In each of these situations, we understand why the buyer might choose not to minimize the loss without hypothesizing some benefit from the breach. To find a case that the normal damage rules treat differently from the avoidable consequences doctrine cases, however, we must explain why a plaintiff who could minimize the loss would choose not to do so when no benefit accrued from the decision not to cover.

Three plausible explanations merit discussion. First, a buyer might find efforts to avoid the loss unduly burdensome. In this situation, the avoidable consequences doctrine will not reduce the loss despite the failure to mitigate—but the expectation analysis might. Second,
a buyer might decide not to cover (or to take other measures to minimize consequential damages) if she did not realize that consequential damages would follow if she failed to cover. Under these circumstances, we cannot assume the buyer expected to benefit from other, more profitable projects. 167 Rather, the buyer simply underestimated the importance of mitigation efforts. Third, a buyer might decide not to cover if she hoped that decision would increase the damages she could collect from the breaching seller. 168 Acting either out of ignorance of the avoidable consequences doctrine or in the hope that the judicial system might apply it imperfectly, the buyer might seek to externalize costs rather than prevent them.

a. Extraordinary Efforts

The avoidable consequences doctrine does not prevent recovery of losses that could have been avoided only by unreasonable efforts. 169 Benefit analysis must work to explain this result. Arguably, the benefit of freed resources exists. Abandoning the project suggests that the buyer values the freed resources more than she values the losses they could prevent. But where the losses could be prevented only by exceptional effort—such as by diverting resources from other important projects into the mitigation effort—then perhaps the inference has less to do with the value the buyer attaches to the resources freed by the breach and more to do with the value the buyer attaches to the additional resources with effecting cover  

166. This possibility, too, does not really explain why a party who could minimize the loss with reasonable effort would refuse to do so. Undue burden implicates the reasonableness of the effort. As long as the estimate of the value of the benefit includes only those losses that the plaintiff could have avoided by reasonable effort, benefit analysis will match the avoidable consequences doctrine. The discussion below, like the preceding section for employees, attempts to explain why the normal damage rules would limit the estimate of the value of the benefit to the amount of the loss avoidable by reasonable effort.

167. Like cases where cover would be futile, the buyer here believes mitigation efforts will save zero because she does not realize that damages will result unless she takes efforts to prevent them. Thus, the only inference we can draw about her subjective valuation of the benefit of the breach is that it at least equals zero.

168. Wonnell labels this the extortion value of a contract. See Wonnell, supra note 31, at 490-91, 494.

169. See Restatement (Second) of Contracts § 350 (1979).
necessary to accomplish the mitigation.\textsuperscript{170}

The analysis here does not differ greatly from the discussion of the employment context, though the specific facts that make loss reduction unreasonable differ in this context.\textsuperscript{171} As a result, a reasonable lawmaker concerned with benefits might choose a different rule for sales of goods than for employment contracts. Specifically, a reasonable lawmaker might choose to infer that the buyer valued the resources freed by the breach at least as much as she valued the amount of loss the buyer could have prevented by extraordinary efforts, as long as the buyer can recover the cost of those extraordinary efforts from the breaching seller. If, however, the lawmaker prefers not to allow recovery for extraordinary costs, the decision not to avoid the loss justifies only the more limited inference that the buyer values the resources freed by the breach more than the amount of loss she could have avoided by reasonable efforts (those for which she can recover).\textsuperscript{172} Thus, the scope of the inference depends on the scope of incidental damages the law allows the plaintiff to recover.

A reasonable lawmaker might choose to limit recoverable incidental damages by a reasonableness standard. A reasonableness limit can protect the foreseeability cap on damages.\textsuperscript{173} At the time of contract

\textsuperscript{170} These two sets of resources are cumulative, not alternative. If the buyer diverts resources in order to cover, the breach will not free resources. Any resources that would have been used to deal with the original goods still must be used to deal with the substitute goods. The resources necessary to effectuate cover add to the total resources devoted to the project, offset only when (and if) damages have been recovered from the breaching seller. Similarly, when cover goods differ from the original goods in some significant detail—including details extrinsic to the goods themselves, such as the delivery date—the resources necessary for the buyer to complete the project may be greater than they would have been if the original goods had arrived as promised. Even when cover requires no significant effort, the loss may be avoidable only by significant diversion of resources committed to other equally important projects.

\textsuperscript{171} For example, a typical buyer facing consequential damages may have better access to capital markets than the typical discharged employee looking for work.

\textsuperscript{172} The transaction cost problem noted earlier, see \textit{supra} text accompanying notes 80-86, precludes the inference that the plaintiff values the benefit more than the loss she could avoid, unless the transaction costs are recoverable. The analysis applies regardless of whether the costs are the incidental costs to effect cover, increased costs for the original project caused by the breach (as, for example, overtime to complete the project on time despite delays caused by the breach), or costs that initially affect other projects, but that would not have been incurred but for the seller's breach. (The last category frequently will consist of opportunity costs of effecting cover, such as losses on other projects caused by diverting resources to cover.) A rational buyer will need to consider all of these costs in deciding whether to minimize the loss, so a rational lawmaker must consider all of these costs in deciding what to infer from the buyer's decision not to minimize the loss.

\textsuperscript{173} See Wonnell, \textit{supra} note 31, at 490. Of course, foreseeability itself might deserve reexamination, but that project lies beyond the scope of this Article.
formation, and perhaps even at the time of breach, a seller may not foresee that the buyer will incur unreasonably large expenses in an effort to mitigate the loss. More important, an inquiry into the recoverability of unreasonably large expenses will require substantial amounts of judicial resources, perhaps more than the result justifies. 174 For instance, if the law retains any concern for moral hazard—the plaintiff who intentionally allows losses to mount because she expects to recover them from the defendant—abolishing the reasonableness cap will require at least an inquiry into the good faith of the plaintiff in expending more than a reasonable amount. 175 In addition, allowing recovery for losses the defendant caused to other projects (by forcing diversion of the resources the plaintiff could devote to those projects) threatens to expand the scope of the litigation. Instead of (or in addition to) demonstrating profits lost on the project to which the defendant’s performance related, the inquiry will focus on some other project. 176 Generally, the law seeks to avoid creating sideshows. 177 Yet in order to ascertain the

174. See Epstein, supra note 66.

175. This Article seeks to justify the existing rule without too much emphasis on factors extraneous to the benefit analysis. Moral hazard is so intimately related to traditional explanations of the avoidable consequences doctrine (such as the effort to discourage waste) that its inclusion here threatens to undermine the independence of benefit analysis. Yet it would be a very strange law that allowed the plaintiff to recover any amount she claims to have spent in an effort to reduce the loss without some inquiry into whether she actually made the expense and, if so, whether it actually related to minimizing the loss in some way. The expectation interest, uninfluenced by issues of waste or moral hazard, would inquire whether the plaintiff would have incurred the expense if the contract had been performed. (In a case of obvious moral hazard, the answer might be, “No, I incurred that expense only because I thought the defendant would be required to reimburse me for it as part of the damages for breach.”) Reasonableness obviates the inquiry into subjective individual motivations and shortcuts the inquiry into whether the breach caused the expenditure.

176. The other project will arise instead of the first when the diversion avoids all losses in the directly affected project but allegedly caused losses to the other project. The other project will arise in addition to the first when the diversion did not avoid all of the losses to the first project—either because the efforts failed or because they merely reduced the losses. In those situations, the losses to both projects—or if diversion affected more than one other project, all of the affected projects—would be recoverable.

177. One reason the Federal Rules of Evidence reject many assertions of past conduct is to prevent diverting attention from the allegations of wrongdoing that allegedly caused the harm at issue in the specific case into the general character of the alleged wrongdoer or the truth of the allegations of other misconduct unrelated to the harm. Fed. R. Evid. 404 & cmt. Other projects allegedly harmed by the breach are not a sideshow in quite the same sense. If the allegations are true, the breach at issue caused the harm, deserving compensation. Nonetheless, a lawmaker concerned with
appropriate offset against damages, the law might need to examine the plaintiff’s entire business operation, not merely the projects directly affected by the defendant’s breach.

Even if transaction costs are recoverable, a reasonable lawmaker might prefer not to infer that a plaintiff values the benefits of the breach more than the amount of avoidable loss to the extent that minimizing the loss requires exceptional efforts. The buyer cannot recover the cost of effectuating cover (or other mitigation measures) immediately. When she does recover them, the loss of use of those resources may be compensated at the legal prejudgment interest rate.\(^\text{178}\) If she otherwise could employ her resources to generate profits that exceed the prejudgment interest rate, a reasonable buyer might choose not to shift them out of a more productive use into a less productive use. The buyer’s analysis will be more complex: the buyer must decide whether the loss that she could avoid (on the project where seller breached) exceeds the losses affecting the other productive use (from which she must draw resources to accomplish mitigation) minus the portion of that loss that she can recover (as incidental expenses and prejudgment interest) and minus the value of the resources freed by the breach.\(^\text{179}\) The introduction of these other elements into the computation removes any confident conclusions about the value to the buyer of the freed resources. While a buyer who does not make reasonable efforts to minimize the loss must have valued the benefit of the breach more than she valued the amount

reasonably efficient operation of the judicial system might seek to achieve the proper level of compensation at the least cost. Opening the damage inquiry to evidence of harm to other projects in order to permit the jury to award unreasonably large incidental expenses, only to offset the recovery by the amount of harm those unreasonable expenses avoided (or could have avoided), seems difficult to justify—particularly when neither the expenses nor the harm avoided will be actual. The avoidable consequences doctrine reduces awards when the plaintiff did not make efforts to avoid the loss. Therefore, the jury will need to reduce the award by the amount it believes the plaintiff could have avoided. First, the jury would need to assess some unreasonably costly measures the defendant argues the plaintiff should have taken to minimize the loss. Then, jurors would need to reduce the offset by the amount that it concludes the plaintiff would have spent (or lost) if the plaintiff had taken those hypothetical measures, including any losses to other projects that might have been affected. If the entire inquiry seems a little speculative, perhaps that is sufficient indication that a reasonable lawmaker would prefer to limit recoveries to reasonable incidental expenses.

178. If the resources fall within the provisions permitting prejudgment interest at all, the court will calculate the loss of use at the prejudgment interest rate. This seems likely when the resources consist of money used to buy other goods. Where the resources consist of time or other resources, courts may balk at calling the amounts “liquidated” or “ascertainable” within the meaning of doctrines limiting the availability of prejudgment interest. See supra notes 83-86 and accompanying text.

179. The computation would be even more complex if the buyer might claim the losses on the other project as consequential damages—a rather unlikely possibility in light of foreseeability doctrine.
of loss she could have avoided by reasonable effort, a buyer who fails to make unreasonably large efforts, even if compensable, may not have valued the benefit as much as the total amount of the loss that could have been avoided by resort to extraordinary efforts.

The normal approach to damages can clarify this result. If the seller had performed the contract, the buyer could have pursued both projects, not just one, with the resources available. Normal damage rules must seek to restore the financial equivalent of that position. The breach forced the buyer to commit additional resources to accomplish that result. Where such resources are reasonably available to the buyer—say, through the capital markets or unused capacity—presumably courts will find it reasonable to expect the plaintiff to devote them to avoiding the loss. Sometimes, however, resources necessary to minimize the loss will exceed the resources available to the plaintiff without sacrificing one of the projects. Since normal damage rules require courts to restore the benefit of both projects to the plaintiff, the decision is not whether to secure to plaintiff the benefit of both projects, but how to do so. The law faces a choice: it may refuse to reduce the recovery by amounts that plaintiff could have avoided only by sacrificing other projects, thus permitting the plaintiff to continue with the project that has been flowing smoothly and confining the losses to the project the breaching party has jeopardized; or the law may compensate for the losses imposed on the

180. Where this is not true, the seller can avoid paying consequential damages by showing that the plaintiff could not have completed the project even if the seller had performed. Since the expectation interest does not allow plaintiffs to achieve a position better than the one they would have achieved if the defendant had performed, the court will deny recovery of the damages independently of the avoidable consequences doctrine.

181. This may not accurately describe the case law. Some cases hint that the avoidable consequences doctrine will not require the plaintiff to pay more than a trivial amount to minimize the loss. See Unverzagt v. Young Builders, 215 So. 2d 823, 827 (La. 1968) (questioning whether $1000 “is such a nominal sum which a nondefaulting party should be required to expend to mitigate damages” and noting no precedent requiring expenditure of more than $200); Schneidt v. Absey Motors, 248 N.W.2d 792 (N.D. 1976) ($1000 not a “trifling sum”). The cases seem to focus on the size of the expense rather than the reasonable availability of resources to meet the expense. The cases cited may simply misread the legal encyclopedias (on which a surprising number of cases rely as authority for details concerning the avoidable consequences doctrine). See 15 AM. JUR. DAMAGES § 27 (1938) (plaintiff “is bound to protect himself if he can do so with reasonable exertion or trifling expense”). Subsequent editions qualified this proposition, stating that “trifling” may vary with the amount of the consequential losses that can be prevented and with the availability of funds to the plaintiff. See 22 AM. JUR. 2D DAMAGES § 501 (1988); 25 C.J.S. DAMAGES § 33 (1966).
other portions of the buyer’s business as a consequence of the breach. Courts, via the foreseeability doctrine, effectively choose the former alternative. Since the defendant arguably could not foresee that breach would lead a plaintiff to make extraordinary efforts to minimize the loss, resulting in consequential losses to other projects, courts probably will reject damages for those remote losses.\textsuperscript{182} Thus, when a plaintiff decides not to make extra efforts to minimize the loss, the expectation interest requires compensation for the full loss incurred. Courts can accomplish this by assessing the value of the benefit at the amount of loss that the plaintiff could have avoided by reasonable effort, without regard to whether extraordinary efforts could have prevented even more of the loss.

\textit{b. Unforeseen Losses}

The second possibility—the buyer who does not expect consequential losses—poses less difficulty. Consequential losses the buyer did not expect probably cannot be recovered regardless of the avoidable consequences doctrine. The plaintiff cannot recover unforeseeable consequential damages.\textsuperscript{183} In fact, the consequential losses must be foreseeable to the defendant at the time she enters the contract. If the plaintiff could not foresee the consequences at the time of breach, it seems implausible to conclude that “the seller at the time of contracting had reason to know” of them.\textsuperscript{184} Thus, neither theory needs to explain

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{182}] In some cases the defendant might pay less damage if the court did not employ the foreseeability doctrine in this way. Assume the plaintiff accurately decides that she will suffer less loss by sacrificing another project in order to minimize the loss to the project the defendant’s breach jeopardized. If the law precludes recovery of losses to the other project as unforeseeable, then the plaintiff may not take that action. If she recovers losses to the project defendant jeopardized (as well she might, since those direct losses are more likely to be foreseeable), she recovers more than she would have without the foreseeability bar. Nonetheless, opening lawsuits up to arguments about which project defendant actually harmed probably would consume more in litigation costs than it would save in these unusual situations. \textit{See} Epstein, \textit{supra} note 66. The opportunity for strategic behavior by plaintiffs, such as trying to link the worst project to a remote breach by the defendant, also urges caution.
\item[\textsuperscript{183}] U.C.C. § 2-715(2)(a) (1995).
\item[\textsuperscript{184}] \textit{Id.}\ The language of § 2-715 permits one quibble that might challenge the conclusion here. It requires that the seller have reason to know of the buyer’s “general or particular requirements and needs,” not necessarily that she know that these needs will produce losses in the event of breach. \textit{Id.} Theoretically, then, a seller could know of the buyer’s needs even in a case where the buyer, at the time of breach, did not realize that those needs would involve losses unless she covered. That situation seems unlikely to arise in reality. In addition, it seems quite at odds with foreseeability as generally understood. Notice of the needs should permit the seller to recognize the importance of performance and take an appropriate level of precaution to ensure performance in accordance with those needs. \textit{See} Lucian A. Bebchuk & Steven Shavell, \textit{Information}
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these circumstances. While courts plausibly could invoke the avoidable consequences doctrine instead of foreseeability doctrine in this situation, mitigation is merely cumulative and unnecessary in order to achieve the result. Similarly, the foreseeability doctrine will produce this result even if expectation analysis fails to posit a benefit in these cases. 185 Nothing in this Article will make unforeseeable consequential losses recoverable.

This problem may conceal another possible objection. If the buyer underestimates the amount of consequential losses that the breach will cause, her decision to forgo mitigation reflects a benefit that exceeds the underestimate, not a benefit that exceeds the actual amount of consequential losses that would have been prevented by cover. By using the loss avoidable by reasonable effort to estimate the value of the benefit to the buyer, this approach may assume too large a value for the benefit. The objection has already been discussed in connection with the seller’s remedies. 186 Normal damage rules seem justified in conclusively presuming that the buyer’s behavior accurately reflects the subjective value of the benefit. The buyer seems the best person to foresee and estimate the value of the project jeopardized by the seller’s breach. Ordinarily we would expect any mistakes to be fairly small. 187 When

185. Expectation analysis could resort to the presumption that the buyer did foresee consequences that she should have foreseen, in effect assuming a benefit equal to the losses she (objectively) could have avoided even though she (subjectively) did not foresee the loss and therefore did not make a subjective decision to retain the benefit of breach rather than minimizing the losses. The advantages of avoiding subjective inquiry in this context have been detailed elsewhere. See supra text accompanying notes 45-57.

186. See supra note 63.

187. If foreseeability limits the plaintiff to the amount of loss the defendant reasonably could foresee, then the plaintiff may not recover for these losses regardless
the buyer's mistake causes the presumption to reduce the value by more than the benefit, perhaps the buyer should bear the consequence of her mistake. That allocation of the burden of the error seems particularly important considering the possibility that buyers might intentionally seek to impose higher losses on the seller. If courts allow buyers who eschew reasonable mitigation efforts to excuse their decision based on their own poor judgment about the amount of loss they anticipated, they create an opportunity for buyers to externalize losses that should have been avoided in the first place. Taking into account the possibility of strategic behavior by litigants, a reasonable lawmaker would seem perfectly justified in adopting a rule (estimating the benefit at the amount of loss that could have been avoided) rather than requiring independent inquiry into the size of the buyer's (subjective) expected benefit in each case.  

\[188\]

c. Moral Hazard

The last possibility—the plaintiff intentionally allowing the loss to increase—borders on the irrational. No matter which rationale one prefers, the law clearly rejects recovery of damages the plaintiff could have avoided by reasonable efforts. Thus, a rational buyer has little incentive to allow damages to mount in the hope that doing so would exact a larger toll from the breaching party. A buyer unaware of the avoidable consequences doctrine might act in this way out of ignorance.  

\[189\]

A buyer aware of the doctrine must also hope that a jury will err and award more damages than she deserves.  

\[190\]

In either event, the of the existence of the avoidable consequences doctrine or the benefits of the breach. In fact, the plaintiff would not raise this issue, since doing so virtually would concede the foreseeability defense. Since U.C.C. § 2-715 does not explicitly require that the amount of the loss be foreseeable, the discussion cannot rest on this point. U.C.C. § 2-715 (1995).

188. Dobbs argues that remedial rules often employ such generalizations. See DOBBS, supra note 10, § 1.2, at 5. He identifies such generalizations at work in the benefits rule as applied to contract cases and notes the close similarities between this application and the avoidable consequences doctrine. Id. § 3.6, at 183. Thus, in tolerating this kind of general rule, this approach does not deviate from existing practice.

189. Both ignorance and a desire to externalize the cost seem necessary to explain this behavior. A buyer unaware of the avoidable consequences doctrine nonetheless would cover or otherwise minimize the loss unless she had some reason to prefer incurring the loss and seeking to shift it to the defendant in litigation. That reason must overcome the time value of money (less any recoverable interest that our ignorant buyer expects to recover), the cost of litigation (including attorneys' fees, unless our ignorant buyer also believes those will be recoverable), and the possibility of an imperfect result to litigation (either victory for the defendant or undercompensation of the loss).

190. A buyer might externalize losses if the finder of fact either underestimates the amount of damages that could have been avoided by reasonable efforts or erroneously
decision not to avoid the loss does not seem to reflect a benefit to the vindictive buyer as a result of the breach. Rather, these possibilities challenge the assumption that the value of the benefit equals the amount that the buyer could have saved by covering.

Again, a reasonable lawmaker concerned with benefits justifiably may resort to the presumption that the plaintiff's objective behavior reflects the subjective value of the benefit to her. Neither ignorance nor willfulness challenges the existence of the benefit. In each case, the buyer does not devote the time and effort necessary to cover or otherwise to avoid the loss.191 In each case, the buyer saves the time and effort of completing work on the project for which the goods were ordered.192 The expectation interest requires some accounting for those benefits. The buyer's motivation, at most, undercuts the inference regarding the amount of the benefit, not the existence of the benefit. The presumption seems a reasonable method of accounting for the benefit, even in this context.193 The presumption may overestimate the value of the benefit in these cases, but that possibility does not necessarily require rejection of the presumption if it reaches appropriate results in most situations.194

The buyer who chooses to allow avoidable losses to occur may receive a different sort of benefit, the value of which exceeds the losses she could have avoided. The buyer seems to anticipate a psychological benefit of exacting vengeance from the breaching seller.195 Although

191. The buyer might go through the motions of attempting to cover in an effort to increase the chance that a factfinder will decide those efforts were reasonable and, therefore, award full damages without reduction for avoidable consequences. It seems unlikely that a buyer intent on not covering would devote the same energy to the search that she would devote if she really wanted to cover.

192. Those savings accrue to the buyer because she does not cover. They exist regardless of the buyer's motivation for not covering.

193. Plaintiffs do not present a sympathetic case by alleging that they were too ignorant or too vindictive for the presumption to apply to them.

194. As an empirical matter, perhaps cases involving moral hazard outnumber cases in which the presumption of benefits produces appropriate results. I am disinclined to assume that this is true.

195. The benefit discussed here is not actual vengeance, but the anticipated vengeance. The buyer has not chosen vengeance at the price of bearing the loss; the vengeance exists only if she does not bear the loss. But the possibility of vengeance seems worth the cost of the possibility of bearing the loss. The mere prospect of
not taking reasonable action to minimize the loss, the buyer expects (or hopes) that the damage award against the seller will cover the full loss anyway. The buyer who acts with an awareness of the avoidable consequences doctrine must anticipate some glee from exacting vengeance. She would not risk bearing the loss herself unless the benefit of externalizing it, multiplied by the probability of externalizing it, exceeded the avoidable portion of the loss, multiplied by the probability of bearing that cost herself.\textsuperscript{196} Buyers who choose not to avoid the loss must attach great value to vengeance.\textsuperscript{197} A presumption that the benefit exceeds the cost avoided seems acceptable in this context.\textsuperscript{198}

vengeance benefits the buyer in a way (and to an extent) for which the buyer seems willing to pay (by accepting the risk of incurring avoidable losses).

\textsuperscript{196} Lest the language be unclear, let me attempt a formula. The buyer may decide not to avoid the loss, despite reasonable means to avoid the loss, if $V_b \times p > L_a \times (1-p)$. Where $p$ is the probability that the factfinder will decide not to reduce the buyer's recovery under the avoidable consequences doctrine, $V_b$ represents the value to the buyer of hurting the breaching seller, and $L_a$ represents the loss that the buyer could have avoided by reasonable efforts. Perhaps the formula should include, either within $L_a$ or as a separate factor, the litigation cost necessary to succeed. At least part of that cost may be inevitable if the buyer would need to sue the seller in order to recover the unavoidable portion of the damages. Without the mitigation issue, the litigation costs might be lower, either because the lower claim would settle earlier or because the expense of litigation increases slightly with each additional issue that requires legal research or testimony from witnesses. At least the incremental cost seems chargeable within $L_a$, since the buyer could have avoided those fees by successful cover.

\textsuperscript{197} If the buyer expects a 50-50 chance of persuading the factfinder not to reduce the recovery under the avoidable consequences doctrine, then we know the value of the benefit (the joy of hurting the seller) exceeds the cost she will bear if she does not succeed in shifting the loss. If the buyer expects less than a 50% chance to shift the loss, then the psychological benefit must exceed the loss she may bear by an even greater margin to make up for the relatively small chance of shifting the loss. If the buyer believes she probably can shift the loss to the seller, then we cannot conclude the benefit exceeds the avoidable loss. But a buyer aware of the avoidable consequences doctrine seems unlikely to expect to shift the loss to the seller more than half of the time. Again, unless our reasonable lawmaker wants finders of fact to accept and evaluate virtually unverifiable evidence of the buyer's perceived likelihood that the jury would reduce the award based on the avoidable consequences doctrine, the law cannot separate those cases where the buyer received an actual psychological benefit exceeding the loss from those where she did not.

\textsuperscript{198} I have avoided suggesting that other policy goals might urge the same result in order to keep the benefit theory independent (to the extent possible) of concerns for minimizing wasteful conduct and other motivations traditionally associated with the avoidable consequences doctrine. These policies might play a secondary role with respect to the choice between a presumption and individualized factfinding without jeopardizing that independence. If that seems plausible, the argument on all three issues in this section becomes much easier. The law might prefer not to encourage laziness, ignorance, or vindictiveness by allowing persons with such motives an opportunity to rebut a presumption that applies generally to plaintiffs who do not suffer these character traits (or flaws). Because reliance on these policies might pollute the benefit analysis, the text will continue to avoid those explanations.
The psychological benefit postulated here does not fit into the model perfectly. The opportunity for vengeance does not resemble the usual benefit of the breach. Yes, but for the breach, the buyer would not have an opportunity for vengeance. But by the same token, but for the breach, the buyer would not have a taste for vengeance (against the seller, at least). Vengeance would not be a benefit at all. This is not like a buyer who, ex ante, might have pursued either of two ventures, each with a potential benefit, and now finds herself with an opportunity to pursue the road not taken initially. This is a new taste, created by the breach. It seems odd to use as a benefit fulfillment of a taste that the breach created, even though the breach simultaneously created the opportunity to pursue that taste.

On the other hand, the buyer’s joy in anticipating large damages against the seller would not exist if the contract had been performed. Thus, to allow the buyer to retain this glee without any offset in the damage award would leave the buyer better off than if the contract had been performed. In effect, this analysis asks that we take into account all benefits, not just those benefits that fit the normal commercial mold. This resembles a proposition rejected in the tort context: that we should offset actual pecuniary losses by calculating incommensurable nonpecuniary benefits. The likelihood of excessive offset seems

199. The same reasoning might suggest that the law should compensate for all costs, including psychological costs arising from the breach. See Pettit, supra note 6, at 419-20 & n.9 (concluding that measurement problems preclude awards for disappointment). In some cases, contract law will compensate for emotional distress. Restatement (Second) of Contracts § 353 (1979) (denying recovery unless the breach caused bodily injury or was “of such a kind that serious emotional disturbance was a particularly likely result”). The foreseeability standard in this section is both looser and stricter than the normal foreseeability rule: looser in that it seems to involve what the breacher can foresee at the time of the breach, since the characteristics of the breach allow recovery for emotional distress, but see Dobbs, supra note 9, § 12.3 (suggesting that foreseeability restricts emotional distress because the defendant’s promise did not include a guaranty against distress); stricter in that emotional distress must seem particularly likely, which may demand more than just “a probable result.” See Restatement (Second) of Contracts § 351 (1979). The limitation to serious emotional distress seems likely to prevent claims for mere disappointment. The degree to which this type of recovery may expand in the future has recently been addressed elsewhere. Douglas J. Whaley, Paying for the Agony: The Recovery of Emotional Distress Damages in Contract Actions, 26 Suffolk U. L. Rev. 935 (1992).

200. When the law expressly takes benefits into account, it normally refuses to mix pecuniary and nonpecuniary components of the harm and the benefit. Thus, the Restatement (Second) of Torts subtracts benefits only if they affect the same interest as
controlled in this context. Instead of asking the jury to assess how much
distress an individual suffered or how much glee she felt in the abstract,
we simply assume the glee equalled or exceeded an objectively
observable quantity: the amount of loss the plaintiff could have avoided
by reasonable efforts. 201

The buyer unaware of the doctrine poses a different problem. She
does not realize that she risks suffering this loss herself. 202 Thus, the
assertion that the psychological benefit offsets the loss falters. But the
law encounters difficulty treating the ignorant buyer differently from the
malicious buyer. In part the problem is evidentiary. Courts cannot
distinguish the ignorant from the malicious with any ease. 203 Thus,
different treatment may permit the malicious to pretend to be merely
ignorant in order to take advantage of different treatment. 204 Public
policy points the same direction. The law does not want to encourage
ignorance by rewarding it. Thus, a rule presuming that the ignorant
received benefits like the malicious might encourage informed behavior.

Opening the door to individualized evaluation of benefits—here or in
other contexts—poses serious dangers. Objective measures avoid absurd
results. For instance, a buyer who retained $70,000 of the purchase
price could not be allowed to claim she valued the money at less than
$70,000 (despite evidence that the marginal utility of money may vary
among people). Nor could a seller who retained property demonstrably
worth $70,000 be allowed to make such a claim. Even if either party

the interest harmed. RESTATEMENT (SECOND) OF TORTS § 920 (1977). "Interests" may
not divide pecuniary from nonpecuniary harms, see Alexander M. Capron, Tort Liability
in Genetic Counselling, 79 COLUM. L. REV. 618, 638-39 & n.91 (1979), though that
seems the better reading of the Restatement provisions. See Kelly, supra note 53, at 521
& n.73; RESTATEMENT (SECOND) OF TORTS § 920 cmt. b, illus. 4-6 (1977). This can
prevent intangible and incalculable benefits (such as emotional benefits) from obliterating
substantial and certain pecuniary losses.

201. The door to measuring distress might better be left uncracked. Yet the two
contexts differ sufficiently to permit the different applications urged here.

202. In effect, her ignorance of the avoidable consequences doctrine leads her to
expect to recover the avoidable losses 100% of the time, perhaps the most plausible
example of a person who might estimate the chance of shifting the loss at greater than
50%.

203. See supra note 47.

204. Perhaps if the law develops a perfect method of finding facts, including facts
regarding a party's subjective state of mind, this concern will disappear. Those with
absolute faith in the jury system—or those willing to pretend such faith because they
share the prejudices juries are likely to exhibit—may prefer to open these issues to the
jury. Today, the avoidable consequences doctrine does not present these issues, since
it imposes a duty on the plaintiff to minimize the loss—a duty ignorance does not
excuse. The expectation interest can perpetuate that result via the presumption urged
here, which establishes the thesis of this Article. Whether the courts should open the
issue of intent up to factfinding after they accept this thesis, I will leave for others to
discuss when that day comes.
showed they traded the money or property for a stick of chewing gum (or any other thing worth much less than $70,000), the subsequent conduct of the party does not change the value of the benefit actually bestowed by the breach. Demonstrating that the other party could have reduced the loss by $70,000 if she had engaged in reasonable conduct requires the same treatment. Prospectively, viewed at the time of the breach, the plaintiff gained an opportunity not previously available to use resources (undelivered goods, services, property, money, productive capacity, or the like) in alternative ways to offset the loss. What she actually does with those resources is irrelevant. At the time of the breach, they have value. That value belongs to the plaintiff; the breach relinquished the defendant’s claim upon the resources. That plaintiff’s mistakes might lead her to underutilize those resources is not legally significant. It resembles any other decision by a party to pay too much (or to ask too little) for one’s property.

In each case, a reasonable lawmaker concerned with accounting for the benefits seems justified in employing an objective rather than a subjective analysis. When asking why the buyer would decide not to take reasonable measures that would have minimized the loss, the law reasonably can presume that the decision reflects some benefit the buyer valued more highly than the loss she incurred by not covering, or otherwise minimizing, the harm from the breach. While that presumption does not perfectly explain every individual’s subjective reaction, it explains the most plausible cases quite adequately and can justify its deviation in the exceptional cases.

3. Summary

The avoidable consequences doctrine duplicates the results the expectation interest would require if courts consciously addressed the benefits that flow from breach of contract. Thus, courts could refocus their attention from concern for the losses the plaintiff could have avoided to the benefits the plaintiff actually received. Those benefits often may require indirect measurement by reference to the losses that could have been avoided. In addition, courts may need to adopt presumptions that the plaintiff acted reasonably in order to avoid entanglement in unmanageable subjective valuations. The expectation interest does not require courts to open the door for plaintiffs to pretend their subjective value differed from the value their conduct implies.
Rather than encourage vindictive plaintiffs to hope for erroneous judgments or manipulative plaintiffs to seek post hoc rationalizations for their wasteful conduct, courts can encourage plaintiffs to become informed and to act rationally to minimize waste by employing a conclusive presumption that breach benefits the plaintiff in at least the amount that the plaintiff could have avoided losing with reasonable effort.

This brief survey of contractual contexts cannot encompass all of the different ways contracts might be breached and avoidable consequences might be raised as a defense. But in each of the contexts discussed, the general principles sketched at the outset have similar and analogous applications. That result should not surprise anyone. Wonnell has demonstrated quite convincingly that the same fundamental principles govern all contracts. The generality of the avoidable consequences doctrine may exceed Wonnell's claim, since the avoidable consequences doctrine also applies to noncontractual actions. While one may find cases that do not conform neatly to the paradigms offered here, the range of cases explainable by the expectation interest suggests a realistic generality to its ability to duplicate the results produced by the avoidable consequences doctrine. In fact, the generality may extend beyond the realm of contract law and into tort law—but that requires a different article.

II. THE INDEPENDENCE OF BENEFIT ANALYSIS

The analysis in Part I depends on the inference that the amount of loss the plaintiff could have avoided by reasonable effort approximates the value of the benefits the plaintiff received as a result of the breach. That inference, in turn, depends on the conclusion that a plaintiff who could avoid losses by reasonable effort would do so absent some benefit she valued more highly. That conclusion, however, may depend on the existence of the avoidable consequences doctrine, creating a chicken/egg problem. If the benefit analysis proposed here must assume the existence of the avoidable consequences doctrine in order to explain how that doctrine actually estimates the benefits of breach, then benefit analysis lacks any independent significance. This section explores the independence of benefit analysis.

To demonstrate the problem, imagine a world in which the avoidable consequences doctrine does not exist. Assume that the law awards

205. Additional illustrations could be presented, but would simply serve to lengthen an already ponderous article.
plaintiffs in contract cases their expectation interest—including incidental damages and an offset for any losses actually avoided—but does not offset any amount for losses that the plaintiff could have avoided but did not avoid.

In this world, the plaintiff's failure to avoid losses does not imply that she valued a benefit of the breach more than the reasonably avoidable loss. The plaintiff will receive her full expectation regardless of whether she actually avoids the loss. If she does not avoid the loss, she receives payment in full from the defendant. If she does avoid part of the loss, she receives the same total amount, but less of it comes from the defendant.207 As a result, if the benefit of the breach exceeds zero, the plaintiff will refrain from avoiding the loss. For example, a seller of goods might decide to keep the goods rather than resell them as long as she valued them more than zero. Even a $1 value would leave the plaintiff better off than if she resold the goods, since she can keep the $1 if she does not resell, but will lose it (via a lower damage award) if she does resell. Similarly, even if a discharged employee attached virtually no value to leisure, any positive value would induce the employee to refrain from substitute work. If she takes substitute work, she receives her expected pay (part from new employment, part from damages) plus zero leisure; if she remains idle, she receives her expected pay (entirely from damages) plus a small value of leisure.208

The argument does not attack the existence of a benefit. The decision not to minimize the loss demonstrates that the plaintiff did value the benefit more than zero. Thus, courts applying the expectation interest logically should seek a means to evaluate that benefit and offset it against the recovery. But the inference that the plaintiff values the benefit as much as or more than the amount of loss she could have avoided no longer follows. It might be true, but one cannot demonstrate its truth in any particular case without independent evidence. Without this inference, the courts arguably could not generate the avoidable consequences doctrine as a means of estimating the benefits of breach. Instead, the court would need to examine evidence of the value of the

207. Wonnell refers to this as a 100% tax on the savings. Id. He also points out that various exceptions to the avoidable consequences doctrine can create the same incentives under existing law. Id. at 494-95.

208. The need to eat every day, rather than in the long run, may preclude employees from actually pursuing this option. See id. at 494-96.
benefit or, if such evidence was not available, ignore the benefit for failure of proof.

The inference that the benefit equals the amount of avoidable loss remains valid in a world that applies the avoidable consequences doctrine. If courts offset the award by the amount of the loss the plaintiff could have avoided, the plaintiff will not recover her full expectation unless she makes reasonable efforts to minimize the loss. In that situation, she will not refrain from reasonable efforts unless the advantage of refraining (the benefit she expects from not continuing to perform) exceeds the amount of loss she can avoid—a point discussed in agonizing detail above. Thus, at least initially, the inference appears to depend on the prior existence of the avoidable consequences doctrine.

The benefit analysis proposed here would retain some importance even if we ultimately concluded that it depends on the prior existence of the avoidable consequences doctrine. At the very least, this Article identifies an additional, previously unrecognized function that the avoidable consequences doctrine performs. In the future, discussion about how to apply the avoidable consequences doctrine would need to consider not only the purpose of preventing waste, but also the purpose of offsetting any benefit of the breach. In addition, the analysis here reconciles the avoidable consequences doctrine to the expectation interest. Instead of seeing the avoidable consequences doctrine as an exception to expectation recoveries, we can recognize how the two doctrines work hand in hand to produce the position the plaintiff would have occupied if the defendant had performed. In short, our understanding of the law and its workings improves once we recognize this subtle role the avoidable consequences doctrine plays in contract remedies.

As the title of this Article implies, however, I hope to establish a more ambitious claim: that we could dispense with the avoidable consequences doctrine. This section will approach that task in two ways. First, the inference at issue here is self-justifying. Once the law proclaims that the award will be offset by avoidable losses, the inference arises. The law can dispense with the original reason for offsetting avoidable losses without undercutting the inference, as long as the law continues to offset avoidable losses against the recovery. Thus, whatever the historical origin of the decision to offset the award by avoidable losses, the law could dispense with the avoidable consequences doctrine and ground the offset entirely on the benefits.

Perhaps more satisfying, this Article also will argue that the common law could have developed the offset of avoidable losses even if it never developed the avoidable consequences doctrine. This conclusion eliminates the chicken/egg problem, arguing that the avoidable consequences doctrine logically need not precede the inference regarding the
value of the benefit. In order to establish this point, the Article will introduce a new wrinkle to the expectation interest: the natural harm caused by the breach. Natural harm seeks to distinguish those losses caused by the breach from those caused by the combination of the breach and the availability of a damage remedy. Losses the plaintiff would not have suffered if the law provided no remedy seem an artifact of the legal system rather than a loss defendants must compensate. A common-law court might choose to implement the expectation interest in a manner designed to remedy the natural harm caused by the breach, without remedying the part of the harm created by reliance on the availability of damages. If so, the court could have generated the offset for benefits, as measured by the amount of avoidable loss, even if the court ignored concerns for minimizing waste. The chicken/egg dilemma may disappear once courts recognize the artificial set of incentives introduced by the availability of damages.

A. The Superfluous Avoidable Consequences Doctrine

The chicken/egg problem identified above implies that the courts could not have created an offset for the amount of reasonably avoidable losses without referring to concerns for minimizing waste or other principles underlying the avoidable consequences doctrine. Going forward, however, the law could dispense with all concern for waste without changing the offset for avoidable losses. The existence of the offset has created circumstances that justify the inference that the plaintiff must value the benefit more than the amount of loss she could avoid by reasonable effort. Because courts do subtract the amount of avoidable loss, the plaintiff who chooses not to take reasonable measures that would reduce the loss must value some benefit of breach more than the amount of avoidable loss. As long as the law continues to subtract the amount of avoidable loss, the inference continues to hold. Thus, the law could dispense with all reference to the avoidable consequences doctrine without changing any case results. By changing the explanation for the offset, but continuing to measure the offset in the same way, the law can implement the lessons of benefit analysis and dispense with the concept of avoidable consequences.

Two objections to this explanation immediately arise. First, it smacks of ipse dixit. The inference (that the amount of avoidable loss equals the benefit of the breach) works because we subtract the avoidable losses
from recovery; we do not subtract the avoidable loss because the inference works. The argument appears to suggest that the law should impose an offset that lacks any prior justification\(^{209}\) simply in order to justify an inference that it otherwise could not make. Second, saying we can dispense with the rationale for the avoidable consequences doctrine does not establish that we should dispense with it. Since minimizing waste has some value to society, there seems no intrinsic benefit to dispensing with that rationale for the offset.

The full response to the second objection must await Part III. The law might not be any worse off if it subtracted avoidable losses in order to discourage waste than if it subtracted avoidable losses in order to account for benefits of the breach. The effort to establish the independence of benefit analysis is not born of antipathy to the goal of minimizing waste. But Part III will suggest that existing rationales for the avoidable consequences doctrine leave the doctrine in an uncomfortable position. They fail to explain some very useful assertions about the doctrine. Specifically, existing rationales do not explain why the plaintiff does not have a duty to minimize the loss or why the doctrine is not simply a manifestation of contributory negligence.\(^{210}\)

The expectation interest can explain these assertions about the avoidable consequences doctrine. If benefit analysis remains parasitic upon the avoidable consequences doctrine, however, benefit analysis seems to take a back seat to the primary rationale for the doctrine. Benefit analysis, instead of offering a powerful explanation of the law, offers an interesting side effect that may or may not deserve consideration when deciding how to apply the avoidable consequences doctrine. Explanations of the doctrine based only on the secondary rationale may not have sufficient power to displace the concepts of duty and contributory negligence.

Benefit analysis seems more likely to generate improvements in the application of the avoidable consequences doctrine if it can explain the doctrine independently, without falling back on the justifications that have tied the doctrine so closely to contributory negligence. If normal damage rules can generate the offset without reference to the avoidable consequences doctrine or its underlying rationale, then benefit analysis can claim an equal footing with the existing rationales for the avoidable consequences doctrine. Thus, this section seeks to establish that we can dispense with further reference to the avoidable consequences doctrine,

\(^{209}\) The avoidable consequences doctrine has other justifications, but I can hardly rely on those justifications in explaining why we can dispense with them.

\(^{210}\) Commentators offer explanations for these points, but Part III argues that those explanations are not persuasive.
but not necessarily that we should do so. Once that has been accomplished, we can assess whether benefit analysis can improve the application of the avoidable consequences doctrine without fear that the weakness of the proposition will undercut its usefulness.

The first objection—that the inference is ipse dixit—reflects intellectual uneasiness more than logical concern. The inference is the effect of the offset, not its cause. We can infer that the benefit equals the amount of the avoidable loss only because we decree an offset in damage recoveries; the decree provides parties the incentive to minimize the loss, upon which we base the inference that the failure to mitigate must reflect a benefit. Since the offset must exist (apparently for other reasons) before the inference becomes valid, it seems odd to turn the table—to treat the effect (the inference) as the reason (or cause) for its own continued existence, even if we dispense with the original cause or reason.

The phenomenon is familiar in the law. Doctrines often outlive their original purpose. Punitive damages once served to compensate for emotional distress, which was not compensable at the time. That rationale no longer applies. Yet punitive damages persist. The law has discovered other uses for them. Perhaps, however, punitive damages survive because they serve a new underlying purpose, not merely because the law declares that they survive.

A closer analogy arises in the doctrine of consideration. Consideration originated based on just this kind of self-fulfilling declaration. At one time the law refused to enforce promises exchanged for other promises until one party had performed, at least in part. Until one party had begun to perform, the other party had not received anything in exchange for the promise. In other words, no consideration existed until the party had received part of the performance; receiving the promise itself was not consideration.

If a promise itself has value, of course, then merely giving a promise in exchange for another promise may constitute consideration. A promise has value if it is enforceable. Thus, if a court could decree

211. See, e.g., Dorsey D. Ellis, Jr., Fairness and Efficiency in the Law of Punitive Damages, 56 S. Cal. L. Rev. 1, 12-20 (1982).
212. See Farnsworth, supra note 2, § 1.5, at 15.
213. A promise can have value even if it is not enforceable. As a moral obligation or a chance that the other party will perform despite the absence of legal coercion,
the return promise enforceable, then it would be consideration for the promise. Each party's promise would be enforceable from the moment it was made if the other party's promise were enforceable from the moment it was made. The circularity should sound familiar: we could subtract the amount of avoidable loss based on the inference that the benefit of the breach equals the amount of avoidable loss, an inference that is justified if we subtract the amount of the avoidable loss.

The law surmounted that problem and today declares that a promise can be consideration for a promise.214 But how the law got here from there remains somewhat cloudy. One suspects a self-fulfilling declaration. Once the court declares that promise-for-promise does satisfy the requirement of consideration, then promises have value and, therefore, they do satisfy the requirement of consideration. We might express some intellectual discomfort with the process by which the law reached this point.215 Yet the result presents no problem going forward.216 An enforceable promise does have value. Something that has value, including an enforceable promise, can be consideration for another promise. Prospectively, the propositions justify the result, even if they might not have justified the result at the time the courts originally announced the result.

The same paradox exists here; the same way out is available. In a world that did not offset awards by the amount of avoidable loss, we might not infer that the plaintiff valued benefits of breach more than the amount of loss she could have avoided.217 But once a court declared that it would subtract the amount of avoidable loss from the recovery, a rational plaintiff would minimize the loss unless the benefits of the breach exceeded the avoidable loss. Thus, the inference would become true after the decree, even though it was not true before the decree. Going forward from that point, courts could evaluate the benefits of the

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people might attach value to unenforceable promises and even be willing to pay for them. That explanation, however, has not been reported as the rationale for moving from *nudum pactum* to promise-for-promise. In a day when consideration needed to be adequate in order to justify enforcement, the mere possibility that the other party might perform out of personal integrity seems unlikely to have produced the consideration courts demanded.

214. See *Restatement (Second) of Contracts* §§ 71, 75.
215. Farnsworth notes the circularity of the explanation. *Farnsworth, supra* note 2, § 1.6, at 17.
216. I do not mean to discount concerns that the law should not enforce promises until some reliance has occurred. See, e.g., *Patrick S. Atiyah, The Rise and Fall of Freedom of Contract* 1-7 (1979). But we have no trouble explaining to our students that an enforceable promise has value and, thus, can be consideration for another promise even before either promise has been performed.
217. Part II.B, *infra*, argues that we could still draw the inference.
breach based on the amount of the avoidable loss. The decree creates its own rationale.

This Article need not urge courts to take a step that would not be justified until after they took it. Courts have already taken the first step; they already reduce damage awards by the amount of loss that the plaintiff could have avoided by reasonable efforts. Thus, the most uncomfortable portion of the process—the initial decree without a priori justification—has already occurred. The inference, thus, is valid. Going forward, we can continue to offset awards as a necessary step to prevent overcompensation under the expectation interest. We could continue to offset awards, even if we concluded that there was no public policy to discourage waste. The expectation interest, refined to include an account for benefits of the breach, would justify the continued application of the offset, even if it never could have justified the offset's initial application.

This section hopes to have established that we can dispense with all references to the avoidable consequences doctrine without changing the outcome of cases now decided under the rubric of the avoidable consequences doctrine. One could try to squeeze more import out of the argument, seeking to establish that the common law would have generated this offset independently of the avoidable consequences doctrine. Common law courts apparently were willing to take a step that lacked advance justification, but that would be justified once taken. Such a court could create the offset for avoidable losses based entirely on the expectation interest. The next section, however, hopes to establish a more persuasive basis for that conclusion—one that does not rest on the assumption that a court would be willing to take self-justifying action.

B. Generating the Offset Without the Avoidable Consequences Doctrine

This section requires that we step into a hypothetical world in which the law has decided to employ the expectation interest as the remedy in

218. To the extent that the avoidable consequences doctrine has independent grounds for its existence, such as discouraging waste, the courts may have had an a priori justification for the decree. That eliminates the discomfort associated with that first step, but does not alter the validity of the second step.
contract cases, but has not yet decided whether to reduce damage awards by amounts that plaintiffs could have avoided by reasonable efforts. A reasonable lawmaker might first consider whether the decision to employ the expectation interest required or, at least, favored the reduction of awards by the amount of loss avoidable.

The concern for benefits of the breach represents one consideration that might influence the decision to deny recovery of losses that the plaintiff could have avoided by reasonable efforts. Failure to account for those benefits (when they exist) would overcompensate the plaintiff, leaving her better off than if the defendant had performed the contract. As already noted, however, the inference that the plaintiff values the benefits of breach at least as much as the amount of avoidable losses would not necessarily follow from her decision not to avoid those losses. If we posit a lawmaker creating a new system of rules before any conduct governed by them has occurred—a realistic prospect in creating a new civil code—perhaps the lawmaker could simply choose a rule that produced the appropriate inference, as suggested in the preceding section. Instead, let us consider a common-law judge ruling on the issue as a matter of first impression: no one has decided whether to subtract avoidable losses because no one has ever decided a case where the defendant proved the plaintiff failed to take reasonable action to avoid part of the loss. How should the reasonable common-law judge decide the case?

The expectation interest provides a well-defined target for the judge: the position the plaintiff would have occupied if the defendant had performed (her rightful position).219 To state the matter another way, the expectation interest requires the court to award the difference between the plaintiff's rightful position and the position the plaintiff would have occupied if the defendant had breached. The rephrasing expresses a previously implicit aspect of the expectation interest. It is not sufficient, in awarding damages, to specify the target; one must also specify the baseline. Only then can the court measure the distance between the two points and calculate an award sufficient to span that distance.

The rephrasing uses a curious construction to identify the baseline: "the position the plaintiff would have occupied if the defendant had breached." The defendant did breach; otherwise the court would not

219. The "rightful position" is Douglas Laycock's convenient shorthand for the position the plaintiff would have occupied if the wrong had not occurred. LAYCOCK, supra note 2, at 15. When discussing the expectation interest, the rightful position becomes the position the plaintiff would have occupied if the defendant had performed the contract—the target we seek to achieve.
need to calculate a remedy. Thus, the award arguably can be calculated based on the difference between the rightful position and the position the plaintiff now occupies. In effect, the position the plaintiff would have occupied if the defendant had breached can be equated to the position the plaintiff does occupy following the defendant's breach. The actual position substitutes for the hypothetical position, lending certainty to the factfinding at that end of the spectrum.\(^{220}\)

The expectation interest, however, does not dictate that substitution. Expectation dictates the target, not the baseline. Thus, calculations of the expectation interest can take into account other variables that might make the position the plaintiff now occupies different from the position the plaintiff would have occupied if the defendant had breached. Specifically, this section will explore the significance of the position the plaintiff would have occupied if the defendant had breached and no damage recovery was available to the plaintiff.

"Natural harm" is a phrase that aptly describes the difference between the plaintiff's rightful position (the position the plaintiff would have occupied if the defendant had performed) and the position she would have occupied if the defendant had breached and no damage recovery was available to the plaintiff. That difference measures the harm that would have occurred in the state of nature, uninfluenced by the existence of legal institutions and damage awards. If the plaintiff's actual position differs from the position she would have occupied if the breach had occurred in this state of nature, our reasonable lawmaker might consider whether the difference exists because the law introduced some artificial incentive that has exaggerated the amount of harm the plaintiff suffered.

A reasonable lawmaker might devote some attention to the concept of natural harm. The law seeks to remedy the loss caused by the breach.\(^{221}\) Losses that would not have resulted from the breach if no

\(^{220}\) Uncertainty may affect the calculation at the other end, as when the evidence does not reveal precisely what would have occurred if the defendant had performed. But at least the court can determine with precision the situation that does exist.

\(^{221}\) While causation is not always mentioned as an element of contract damages, it is implicit in the expectation interest. Losses that had causes independent of the breach—that would have occurred even if the defendant had performed—are not included in recoveries. See, e.g., FARNSWORTH, supra note 2, § 12.1, at 841. The target—the position the plaintiff would have occupied if the defendant had performed—will be lower when some losses would have occurred despite the breach. Given the origins of contract law in tort law, id. § 1.6, it should not surprise anyone to find that causation plays a role in contract actions.
damage award had existed seem somewhat tenuously linked to the breach, just as losses that would have resulted even if the defendant had performed have little connection to the breach. Even when the plaintiff actually did suffer the loss—that is, she actually occupies a position worse than the one used to calculate natural harm—the decision to hold the defendant liable for the difference between the natural harm and the actual harm requires some justification. The lawmaker can award the amount of natural harm without much discussion. Any amount in excess of natural harm requires more deliberation.

The natural harm will not include any amounts that the plaintiff could have avoided by reasonable efforts. If no damage recovery is available, a rational plaintiff will make reasonable efforts to minimize the loss. Any losses she does not avoid will fall on her, providing ample incentive to minimize losses whenever reasonably possible.

That incentive will not produce mitigation efforts if the plaintiff received benefits from the breach that offset the losses she could have avoided. If she valued goods retained more than the market valued them, she might retain them rather than minimize her loss by reselling to another. If she valued leisure more than the market valued her labor, she might not take alternative employment despite the availability of other work. If she had other more valuable projects available, she might not cover with substitute goods despite her ability to prevent consequential losses by doing so. But when the loss would not be borne by the defendant, she would not refrain from reasonable efforts to minimize the loss unless she anticipated some benefit that would offset more of the loss.

Thus, a court focused on natural harm could draw the inference proposed in Part I of this Article: that the plaintiff valued the benefits of breach at least as much as she valued the amount of loss that she could have avoided by reasonable efforts. Natural harm excludes

222. Transaction costs might intercede here. A plaintiff who could not obtain a remedy would not choose to avoid the loss if the benefit of breach equaled the amount of loss avoided minus the cost to avoid the loss. Thus, the law can only infer that the plaintiff valued the benefit as much as the net amount of avoidable loss. Without a damage remedy, transaction costs will not drop out of the equation. Yet this still matches the result the avoidable consequences doctrine produces. Even if a plaintiff does not actually incur incidental costs in an effort to minimize the loss, the law will subtract the amount of loss she could have avoided minus the cost to avoid that loss. See Dobbs, supra note 9, § 3.9, at 271. Dobbs suggests that this application is not firmly established. One can imagine reasons the law might want to allow recovery of incidental damages that the plaintiff did incur, but to penalize plaintiffs who did not attempt to minimize the loss by denying recovery (or offset) for the costs they would have incurred if they had made reasonable efforts. Nothing in the avoidable consequences doctrine, however, suggests a punitive purpose. The doctrine limits the damage award

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avoidable losses.

The plaintiff might urge a different result in one of two ways. First, the plaintiff might object to the concept of natural harm, urging that the actual harm provides the proper baseline for measuring damages. Second, the plaintiff might attempt to explain reasons that she would not have minimized the harm even if no remedy was available. Neither prospect seems particularly likely to succeed—except to the extent that the latter prospect persuades a court that the plaintiff did in fact take reasonable measures to minimize the loss.223

The argument in favor of actual harm as opposed to natural harm must first establish that actual harm differs from natural harm. Actual harm has some initial appeal. A plaintiff left worse off than if the contract had been performed seems relatively more deserving than a breaching defendant. But the law cannot easily assume an award of natural harm would leave the plaintiff worse off than if the contract had been performed. If the plaintiff really did receive benefits that exceeded the avoidable losses, actual harm equals (or may even be less than) natural harm. Thus, the mere fact that the plaintiff has not avoided losses that she could have avoided by reasonable efforts does not establish an actual harm different from natural harm. Sympathy for the injured victim seems premature until we can assess the extent of the injury.224

against the defendant to the amount that would have been assessed if the plaintiff had made reasonable efforts to minimize the loss. The cost of those efforts would have been included in the target damage award. The avoidable consequences doctrine provides no reason to award a plaintiff less than she would have received if she had made reasonable efforts.

223. In effect, this transforms the second argument into reasons that the measures she could have taken to minimize the loss were unreasonably risky, burdensome, or humiliating. When the plaintiff’s explanation takes this form, it does not really reject the inference, but the application of the inference to the facts of a given case. The court could still infer that the failure to take reasonable efforts revealed a benefit of the breach. By explaining the unreasonableness of the efforts under discussion, the plaintiff avoids the conclusion without challenging the rationale for the inference.

224. One might argue that uncertainty should be resolved against the breaching defendant. See Bigelow v. RKO Pictures, 327 U.S. 251 (1946). Even Bigelow, however, conceded that the fact of damage must be certain in order to support recovery. Earlier doctrine insisted that damages must be certain “both in their nature and in respect to the cause from which they proceed.” See Sedgwick, supra note 10, at 23. While it is clear that the natural harm proceeds from the defendant’s breach, that is not as certain for any additional harms claimed. The certainty doctrine exists largely to compel the plaintiff to overcome uncertainty before the court allows recovery. Modern application, while somewhat more generous in formulating a requirement of reasonable
Efforts to demonstrate that actual harm exceeds natural harm edge into the second category of arguments. Each argument the plaintiff raises to demonstrate that she did not receive a benefit faces an immediate inquiry: "Why, then, didn’t you take reasonable efforts to reduce the harm?" Substantive arguments that the goods, leisure, or alternative projects lacked value may never be conclusive until an explanation of the failure to reduce the loss occurs.\(^\text{225}\)

Explanations for the decision not to reduce the loss, however, seem rather difficult to devise. The obvious choice is moral hazard: the plaintiff may claim that she did not minimize the loss because she expected the defendant to pay without her having to minimize the loss. That argument, however, steps slightly outside the hypothetical. We posited this case as one of first impression: no court has yet decided whether to compensate for losses incurred when the plaintiff could have avoided them by reasonable efforts. Thus, the plaintiff had no justification for believing that she could recover these losses. This makes the plaintiff's explanation unlikely, in the sense that few plaintiffs seem likely to have made a conscious choice not to minimize the loss based on a projection that they would recover the full amount in the damage award. But the argument is not impossible to credit; a plaintiff may have made this mistake. The mistake does differentiate natural harm from actual harm: the plaintiff would not have made this mistake in a world where no damage recovery was possible.\(^\text{226}\)

Other mistakes might explain the same result. The plaintiff may have mistakenly believed that reasonable efforts would not have minimized certainty, Restatement (Second) of Contracts § 352 (1979), hardly justifies reversing the obligation to overcome uncertainty.

225. The defendant seems ill-positioned to present evidence that the plaintiff really did attach substantial value to goods, leisure, or alternative projects. These values (and the alternative projects themselves) seem peculiarly within the knowledge of the plaintiff. Thus, the suspicion that we simply cannot discover the real benefit remains to undermine the argument that no such benefits exist.

226. The explanation might go further: the mistake would be entirely reasonable if the background assumptions in the community or the business included the assumption that the breaching party would pay the entire loss, including losses the plaintiff could have avoided. That the law had not considered the issue before is not necessarily an indication that the issue had not been considered and resolved in numerous dealings among people. A common-law court faced with evidence of conventional practice in the community would seem likely to embody that practice in the discovered law. Perhaps the common law's reluctance to ask landowners to seek new tenants following a breach was not based on the unique nature of interests in land, but an underlying assumption that breaching parties should pay the full actual loss, moral hazard notwithstanding. While I have not researched the business mores of the period when the avoidable consequences doctrine originated, I have some doubt about the realism of this assumption. The law's reluctance to apply the same rule to non-land cases suggests a unique reason, rather than one of general applicability.
the loss—that efforts would have been futile or that efforts would have required unreasonably large expenses.

A reasonable lawmaker deciding the issue as a matter of first impression, however, might choose to infer that benefits explain the difference between natural harm and actual (or apparent) harm. The court faces two decisions: first, it must decide whether the plaintiff really made such a mistake or, alternatively, whether the plaintiff actually received a benefit and now seeks enrichment (rather than compensation) from the damage award; second, it must decide what legal effect to give the mistake—whether actual harm in excess of natural harm deserves compensation when caused by the plaintiff’s own mistake.

Attacking the second threatens to lapse into fault arguments. Since the plaintiff’s own failure to minimize the loss proximately caused those losses, the plaintiff (not the defendant) should bear them. Relying on fault to choose the baseline, however, comes perilously close to tort concepts, such as contributory negligence and the duty to minimize the loss. If possible, this Article would rather explain the offset without relying on those principles.

This Article has discussed the alternative explanation before. A common-law court might prefer not to inquire into the reality of the mistake. The mistaken plaintiff does not rebut the existence of benefits. The breach relinquished the defendant’s claim on the plaintiff’s resources, which the plaintiff could have used to reduce the loss. (If no loss was avoidable, the issue of whether to offset the recovery does not arise.) Thus, at the time of the breach the plaintiff received resources she could have exchanged for a dollar value: the amount of avoidable loss. A reasonable lawmaker could (and probably should) assess the value of that benefit based on what the plaintiff could have received for it, not necessarily what she actually received for it. The mistaken plaintiff claims that she did not realize the value of the benefits she possessed. But at the moment of breach she possessed that value. To allow her to recover damages as if she could not have exchanged those

227. See supra Part I.C.

228. This judgment is reflected in existing law. When a seller does not resell after buyer’s breach, damages are offset by the market value of the goods at the time of the breach. U.C.C. § 2-708 (1995). An actual resale is irrelevant, unless reasonable. Id. § 2-706 (“made in good faith and a commercially reasonable manner”). A seller recovers based on objective market conditions, not subjective mistakes about the value.
resources for value would unjustly enrich her—not only in the cases where she actually did (or still can) dispose of the assets for value, but also in the cases where she did not and cannot realize the value any longer. Plaintiff may decide to dispose of her assets by letting them deteriorate; that is a prerogative of ownership. She cannot claim that she never had the value when she, through inaction, exercised that prerogative in a way that did not exchange it for a monetary equivalent. The issue is not fault, but timing. The breach bestowed a benefit which, at the time of breach, had value. The plaintiff would be unjustly enriched to recover damages (without offset) and retain the asset. That property values declined thereafter, making the asset less valuable, is a risk that falls on the owner, not the person who relinquished ownership.

Concern for the plaintiff injured if the presumption proves false may not command much weight—particularly if the court considers the implications for the decision going forward.229 Once the court announced the decision, people would adjust to the law by minimizing losses when reasonably possible. Natural harm will, in fact, equal actual harm for parties aware of the rule. Thus, even if the rule might involve an injustice in the one case now before the court, the rule might achieve better results in future cases than a rule that compelled an inquiry into the bona fides of the plaintiff’s decision not to minimize the loss in order to separate cases of actual harm from cases of extortion. None of this purports to identify the historical origins of the avoidable consequences doctrine. This Article seeks to direct attention to a role that doctrine has played rather than to the reasons it came into being. The avoidable consequences doctrine serves a valuable function in preventing awards from enriching the plaintiff in cases where breach creates benefits. That function is sufficient grounds for continuing to offset awards by the amount of avoidable losses in the future, even if the law changes its mind entirely about the importance of minimizing waste or combating moral hazard. This Section argues further that the role of preventing enrichment could have generated an offset for avoidable losses even if the law had not created the avoidable consequences doctrine for other reasons. Having established the independence of the benefit rationale, this Article will proceed to discuss the advantages of viewing the avoidable consequences doctrine as a corollary of the expectation interest rather than as an exception to it.

229. Of course, the rule might easily have been announced in a case where the court strongly believed no injustice would result in the first place. Once announced, even in a form limited to cases where unjust enrichment seemed likely, the result could influence behavior by plaintiffs and by other courts until it evolved into a conclusive presumption.

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III. Advantages of Rethinking Avoidable Consequences

The preceding sections offer more than an interesting intellectual exercise. The legal basis for the avoidable consequences doctrine has some practical significance. That significance does not necessarily take the form of different results in cases. Indeed, the effort above has been directed largely at explaining how the two approaches produce similar or even identical results. Measuring benefit by reference to the amount of avoidable loss arguably should not change the result of any case that now subtracts the amount of the avoidable loss. Nonetheless, recognizing the avoidable consequences doctrine as a corollary of the expectation interest can alter case outcomes by clarifying how and when the avoidable consequences doctrine should apply to cases. Perhaps it is unnecessary to recharacterize the avoidable consequences doctrine in order to reach the best results in the cases discussed below. Courts might manage to avoid these mistakes by thinking through the implications of the avoidable consequences doctrine as it exists. Yet the reasons these results seem wrong are much clearer and more persuasive in light of the analysis above.

Reconceptualizing the avoidable consequences doctrine also has some significance for legal theory—not only the theory of academics, but also theory at the level practitioners apply it. The theory presented here permits us to simplify discussions of damages. By deriving remedies from a single fundamental principle, rather than requiring a separate doctrine to present the exception, the law dispenses with unnecessary complication. Clarifying the harmony between the expectation interest and the avoidable consequences doctrine can eliminate the perceived conflict between them and obviate efforts to resolve that conflict. Thus, argument in actual cases can focus more clearly on the

230. Few practitioners go to court with arguments based on the work of H.L.A. Hart, Robert Nozick, or John Rawls. Yet, in my experience, practitioners do present arguments to the court based on the rationale for and purpose of particular doctrines. And they do evaluate the consistency of rationales with the results their opponents propose.

231. In this way, Ockham’s razor may cut in favor of benefit analysis. See supra note 74, for a definition of Ockham’s razor. The advantage, however, may be slight. The proposed approach requires the same reference to the amount of loss that reasonably could have been avoided. Thus, in practical effect, all the same calculations must be done whether we derive them from a general principle or a specific one.
facts that make an offset useful or important in that case.

Part A will discuss both types of advantages—theoretical consistency and case outcomes—in a single context. The avoidable consequences doctrine, as now discussed, borders on the doctrine of contributory negligence. In fact, the avoidable consequences doctrine looks like nothing more than contributory negligence as applied to contract cases. Even the language we use to discuss avoidable consequences—the duty to mitigate damages—relies on the tort concept of duty and is reinforced by the reasonableness standard employed to determine when that duty has been breached. Scholars have rejected both the characterization as contributory negligence and the language of duty. But the reasons they provide are not very persuasive. Moreover, their conclusions do not prevent courts from treating the avoidable consequences doctrine as if it embodies the principles of duty and contributory negligence. As a result, courts have refused to apply the doctrine in cases where the avoidable consequences doctrine seems perfectly appropriate. Part A will try to demonstrate that viewing the avoidable consequences doctrine as a corollary of the expectation interest can clarify the error. By explaining the doctrine without recourse to duty or contributory negligence, the approach may prevent courts from rejecting the doctrine in cases where the plaintiff appears to owe no duty to the defendant. The same type of advantage may arise whenever courts must work through intricate applications of the avoidable consequences doctrine. This Article will conclude with one example of the perplexing problems courts might confront: the problem of discharged employees who find substitute work for more pay. When an employee could have earned higher compensation, the employee is better off following the breach. Whether the court should reduce the damages the employer must pay requires some careful analysis. The language of the avoidable consequences doctrine does not really help courts resolve the difficult question of how to treat this surplus. The expectation interest, on the other hand, defines the critical inquiry rather clearly. Thus, recharacterizing the avoidable consequences doctrine in a manner consistent with the expectation interest permits the courts to focus on the issue in a productive manner that is unavailable if the avoidable consequences doctrine is seen as an exception to the general rule.

232. I use compensation rather than pay to allow for differences in benefit packages. A job with higher take-home pay may not actually provide more compensation if reductions in insurance and other benefits exceed the increase in pay.
A. The Avoidable Consequences Doctrine as Contributory Negligence

The similarities between the avoidable consequences doctrine and contributory negligence have been recognized for most of this century, if not longer. Two similarities deserve attention here and should suffice to illustrate the case for unity between the two doctrines. First, the avoidable consequences doctrine, like contributory negligence, determines which of two parties should bear a loss when each of them committed a wrong that caused the loss, at least in a “but for” sense. Second, each doctrine allocates the entire loss to the plaintiff when each party contributed to causing it. Neither doctrine looks to the relative fault of the parties in determining which should bear the loss. Rather than presume that the reader fully accepts these generalizations, a brief discussion of each seems appropriate.

The doctrines come into play when each party has committed a wrong that caused the loss. The wrong involved is negligence, generally defined by the standard of reasonableness. The negligence label is axiomatic in a finding of contributory negligence. The avoidable consequences doctrine imports negligence principles by limiting damages only when the plaintiff unreasonably failed to minimize the loss. The requirement of unreasonable conduct implies a negligence standard.


234. The Restatement (Second) of Torts explicitly defines reasonableness under the avoidable consequences doctrine by reference to the standards applicable in negligence actions. See Restatement (Second) of Torts § 918 cmt. c (1977). The Restatement (Second) of Contracts does not make explicit reference to negligence. Some might argue that the phrase “without undue risk, burden, or humiliation” does not exactly equate with unreasonable conduct. See Restatement (Second) of Contracts § 350(1) (1979). The word “undue” suggests at least a negligence standard. It is difficult to imagine a risk, burden, or humiliation that could be called undue if an ordinary reasonable person under similar circumstances would have accepted that onus in order to minimize the loss. To the extent that this language differs from negligence at all, it may require a higher degree of fault: undue burden may imply something more than merely an unreasonable burden. Also, the words “risk, burden, or humiliation” may limit the types of concerns that excuse the failure to minimize the loss: undue risk, burden, or humiliation justify a failure to minimize damages, but other reasons for inaction, even if reasonable, do not. Again, it is difficult to imagine any explanation that would make the plaintiff’s conduct reasonable but would not fall within the exception for undue risk, burden, or humiliation. Since I cannot illustrate the second possibility, I am inclined to reject that interpretation of the language. Once that possibility disappears, the avoidable consequences doctrine
Negligence constitutes a wrong. In addition, the plaintiff's negligence must have caused the damages, at least in a "but for" sense. The contributory negligence label would make no sense if negligence that did not cause (or contribute to causing) the accident precluded recovery. The avoidable consequences doctrine produces the same result. In subtracting damages because the plaintiff could have avoided them by reasonable precautions, finders of fact necessarily imply that, but for the plaintiff's failure to act reasonably, the loss would not have occurred. The defendant's wrong also constitutes a "but for" cause of the loss. If the defendant's wrong did not cause the loss, the plaintiff could not recover damages for that loss anyway. Thus, the avoidable consequences doctrine confronts two parties, each of whom committed a wrong that caused the loss.

Labelling a failure to minimize the loss a "wrong" may seem anomalous. Arguably, the plaintiff wronged no one but herself. After all, the failure to prevent the loss causes her to suffer the loss, at least initially. In this, however, the avoidable consequences doctrine again resembles contributory negligence. The plaintiff's contributory negligence, to the extent it breached a duty to anyone, must have breached a duty to herself. In each case, however, one must assume the existence of the doctrine in order to negate a wrong to the defendant. The loss falls on the plaintiff only because these doctrines preclude recovery of the losses to which the plaintiff's negligence contributed.

begins with fault (at least negligence) on the part of the plaintiff.

Even if the reader credits the second alternative interpretation of § 350(1), § 350(2) quickly clarifies that no reduction in damages occurs if the plaintiff acted reasonably, even if unsuccessful. The conclusion that the plaintiff unreasonably failed to minimize the loss, even if not explicitly labeled negligence, certainly implies that the plaintiff did something wrong.


236. The causation requirement is well known in tort law. See RESTATEMENT (SECOND) OF TORTS §§ 430-62 (1977). Causation enters contract remedies more subtly through the expectation interest. Contract law seeks to put the plaintiff in the position she would have occupied if the defendant had performed. FARNSWORTH, supra note 2, § 12.1, at 840; MURRAY, supra note 2, § 117; CALAMARI & PERILLO, supra note 24, § 14-4. (Contract law does not achieve this result, in large part because of limitations on recovery of litigation expenses, especially attorneys' fees. See Wonnell, supra note 31, at 482; Macaulay, supra note 162, at 250-53.) The goal dictates denying recovery for losses that would have occurred even if the defendant had performed. FARNSWORTH, supra note 2, at § 12.1. Thus, plaintiff recovers only those damages caused by the breach, those that would not have occurred but for the breach. See Kelly, supra note 6, at 1801.

237. RESTATEMENT (SECOND) OF TORTS § 463 (1977) (discussing plaintiff's failure to take adequate care for her own safety). I leave aside the case where an accident injured both parties. Contributory negligence can apply even if the defendant was not injured in the accident.

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Without the avoidable consequences doctrine or contributory negligence, the cost of the wrong would fall on the defendant, whose wrong also caused the loss. If the plaintiff unreasonably acts (or fails to act) in a way that causes monetary harm to the defendant (who foreseeably will pay the damage award), the plaintiff arguably wrongs the defendant. Particularly since the avoidable consequences doctrine generally operates only after the plaintiff knows about the defendant’s wrongful conduct, the plaintiff’s decision not to prevent some losses could comprise a wrong against the defendant. The avoidable consequences doctrine cannot claim the absence of a duty because the plaintiff wronged only herself. Rather, the plaintiff wronged only herself because the avoidable consequences doctrine imposes a duty to protect the defendant’s interest by keeping the loss as small as possible.

The avoidable consequences doctrine, like contributory negligence, makes the plaintiff bear the entire loss for which the parties share responsibility. Contributory negligence applies when the accident might have been prevented entirely if one party or the other had acted reasonably—say, by defendant driving at a lawful speed or by the plaintiff looking both ways before crossing the street. Because each party contributed to the entire injury, contributory negligence deals with the entire injury. This amounts to barring the action. Because the plaintiff’s negligence contributed to causing the accident, the plaintiff bears the entire loss that resulted from the accident.

238. Since the harm to the defendant might consist entirely of a loss of money (the need to pay damages), recovery in tort might be precluded by the economic loss doctrine. See, e.g., Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019 (5th Cir. 1985) (en banc), cert. denied, 477 U.S. 903 (1986). If we characterize the requirement of physical injury or property damage as a limitation on the duty to avoid unreasonable conduct, perhaps the plaintiff indeed owes no duty to the defendant. Contributory negligence, under these circumstances, would need to become either another exception to the economic loss doctrine or an extinct limitation on recovery. The avoidable consequences doctrine would face the same conundrum in tort law. Because contract law allows recovery for purely economic loss, the difficulty is less acute in the context most pertinent to this Article.

239. If contributory negligence consists of actions or inactions taken where the defendant’s negligence was not foreseeable, a duty to the defendant may be harder to explain.

240. The word “accident” may slant this discussion heavily toward tort, even though this Article focuses on the use of the avoidable consequences doctrine in contract law. Nonetheless, in discussing contributory negligence, tort language seems the most natural.

241. RESTATEMENT (SECOND) OF TORTS § 467 (1977). Comparative negligence differs by distributing responsibility among the parties who contributed to causing it in
The avoidable consequences doctrine also imposes on the plaintiff the entire loss for which the parties share responsibility, but does so in a slightly different factual setting. The plaintiff's unreasonable conduct did not contribute to the occurrence of the accident, but to the losses that resulted from it—and perhaps to only some of those losses. Thus, after denying recovery for all of the losses for which the plaintiff shares responsibility, some losses may remain attributable solely to the defendant's wrong. Nothing in either contributory negligence or the avoidable consequences doctrine suggests that the plaintiff should bear a loss to which her negligence did not contribute. The portion of the loss that the plaintiff could have avoided, however, is entirely unrecoverable. Although the parties share responsibility for causing that portion of the loss, the loss falls entirely on the plaintiff.

The difference between the situations where the two doctrines apply explains the superficial nature of at least one distinction often drawn between the avoidable consequences doctrine and contributory negligence. No one misses the fact that contributory negligence bars recovery while the avoidable consequences doctrine merely reduces recovery. This distinction between the procedural consequences of the two doctrines has enormous practical significance. It does not, however, carry much theoretical significance. We treat contributory negligence as a total bar to recovery out of habit, not out of necessity. The law could just as easily treat contributory negligence as an offset. Because contributory negligence almost always arises in cases where the plaintiff's negligence contributed to the entire injury, the offset usually will be total. Thus, it is convenient to treat the doctrine as a bar to recovery. But to explain why the avoidable consequences doctrine differs from contributory negligence, we must discover a difference in their function, not in the labels we normally attach to their procedural effects.

Consider how easily contributory negligence could explain the seat belt cases, if only we did not treat it as a bar to recovery. Each party's proportion to their fault. Comparative negligence, like contributory negligence, ordinarily deals with the accident as a whole rather than addressing discrete portions of the injury.

242. Presumably, the law could apply comparative negligence principles to avoidable losses, dividing them among the parties who contributed to causing them. Problems such as increased litigation costs, decreased incentive for either party to actually prevent the loss, and difficult comparisons between fault for causing the accident as opposed to not curing the effects probably justify the complete inattention this idea has received.

243. See, e.g., DOBBS, supra note 10, § 3.7, at 188; RESTATEMENT (SECOND) OF TORTS § 918 cmt. a (1977).
negligence contributed to some of the injuries (those that could have been prevented by wearing the seat belt). Any injuries a seat belt would not have prevented are attributable only to the defendant; the plaintiff did not contribute to the cause of those injuries. Thus, even if we impose upon the plaintiff all of the injuries for which she shares responsibility, the defendant remains liable for the unavoidable injuries. 244 The difficulty with this explanation rests in the mechanical habit of treating contributory negligence as a bar to the action because, so often, the parties share responsibility for all of the injuries. 245 In fact, contributory negligence may handle the seat belt cases more easily than the avoidable consequences doctrine. The Restatement (Second) of Torts limits the avoidable consequences doctrine to loss the plaintiff "could have avoided by reasonable effort or expenditure after the commission of the tort." 246 Seat belts, to be effective, must be fastened before the accident. 247 As a result, some courts have refused to apply the avoidable consequences doctrine to the failure to fasten a seat belt. 248 The difference again focuses on a procedural rather than essential aspect of the two doctrines to determine whether they apply. Taken together, the two procedural quirks suggest that the failure to fasten a seat belt cannot affect a damage award—no matter how unreasonable the conduct and no matter how much loss it could have

244. I do not propose this as the fairest result; dividing the jointly caused loss among the two contributors might be fairer. But contributory negligence could be applied to this type of case without barring recovery.

245. Alternatively, the last clear chance doctrine may leave responsibility with the defendant whenever her negligence comes after the plaintiff's. See, e.g., Shanahan v. Patterson, 539 P.2d 1289, 1290 (Colo. Ct. App. 1975). But that doctrine, too, arose in reaction to the perceived injustice of treating contributory negligence as a complete bar to recovery. It might have less appeal in a case where the plaintiff recovered for injuries the defendant alone caused, even if the plaintiff could not recover for injuries to which her own unreasonable conduct contributed.

246. RESTATEMENT (SECOND) OF TORTS § 918 (1977) (emphasis added).

247. Where the tort involves defects in the plaintiff's car, such as product liability or negligent repair, perhaps the tort also occurs before the accident—and before the plaintiff should have fastened the safety belt. The drafters of the Restatement (Second) of Torts, however, might prefer an interpretation that the tort occurs when the injury occurs—the interpretation usually used for statute of limitation purposes and for explaining why plaintiffs cannot recover nominal damages where defendants' negligence causes no actual harm. That would accord with the idea that the plaintiff must minimize the loss once she knows about the losses, but need not worry about minimizing losses that might never occur in the first place.

248. See, e.g., Clarkson v. Wright, 483 N.E.2d 268 (Ill. 1985).
Perhaps more revealing is the fact that the avoidable consequences doctrine can bar the entire recovery. In a case where a plaintiff can immediately and costlessly prevent the entire harm that the defendant's wrong otherwise might cause, the avoidable consequences doctrine arguably permits no recovery of damages. In such a case, the difference between contributory negligence and avoidable consequences disappears—unless we locate a difference more explanatory than the superficial description of the consequences each doctrine produces. When the avoidable consequences doctrine bars recovery, it works exactly like contributory negligence in all aspects, right down to the effects. If we have no better explanation for why contributory negligence and the avoidable consequences doctrine differ, we must call the avoidable consequences doctrine contributory negligence in this case. The minute we look beneath the surface, we confront the similarity of the doctrines, not the differences: each allocates the entire loss to the plaintiff when both parties' negligence contributed to the loss.

Other explanations offered to distinguish the avoidable consequences doctrine from contributory negligence focus on equally superficial...
aspects of the doctrine. For example, one commentator argues that the avoidable consequences doctrine must not be the same as contributory negligence because the avoidable consequences doctrine applies in contract cases and intentional torts, where contributory negligence does not apply.253 That, however, is the conclusion, not the rationale. If the avoidable consequences doctrine and contributory negligence are simply two names for the same principle as it applies to different situations, then contributory negligence does apply to contract cases, but under a different name. Pointing out that the law has changed the doctrine's name does not help us determine whether the doctrine itself differs or remains the same.

Similarly, the timing of the plaintiff’s negligence does not establish the difference between the doctrines. The Restatement (Second) of Torts limits the avoidable consequences doctrine to plaintiff's conduct after the tort.254 But that simply describes the facts to which the doctrines apply, not the workings of the doctrines themselves. The doctrines could be identical despite the law's decision to use a different name in the two contexts. Moreover, no reason is given for why the doctrines impose a pre-tort or post-tort limitation. More recently, Dobbs has recognized that the distinction is only "sometimes correct,"255 apparently a bow to seat belt cases that apply the avoidable consequences doctrine to a plaintiff’s unreasonable conduct before the accident.256 Dobbs also recognizes that timing of the conduct "does not touch the essence of the difference" between comparative negligence and the avoidable consequences doctrine.257

254. Restatement (Second) of Torts § 918 (1977).
255. Dobbs, supra note 9, § 3.9, at 275.
256. For this reason, Prosser and Keeton on the Law of Torts rejects timing as a distinguishing feature. That work distinguishes not the doctrines, but the facts to which they apply: "[T]he distinction which exists is rather one between damages which are capable of assignment to separate causes, and damages which are not." Keeton et al., supra note 252, § 65, at 459.
257. Dobbs, supra note 9, § 3.9, at 275. This does not rule out the possibility that Dobbs believes the distinction explains the difference between the avoidable consequences doctrine and contributory negligence. Dobbs's new treatise addresses differences between the avoidable consequences doctrine and comparative fault in a much more satisfactory fashion. He recognizes the difference between apportioning a loss between two parties, each of whom contributed to that loss (comparative negligence), and assigning the entire loss to one party if that party contributed to the loss at all (the avoidable consequences doctrine). Id. § 3.9, at 275-76. Dobbs does not address
Similar difficulties plague discussion of the duty to mitigate damages. Many commentators deny that such a duty exists, but they rely on a single reason: since the defendant cannot maintain an action against the plaintiff for damages caused by breach, no duty exists.\textsuperscript{258} Again, the argument focuses on the procedures through which we effectuate the avoidable consequences doctrine, not the substance of the doctrine itself. As a matter of procedure, the law elects to treat the avoidable consequences doctrine as a defense that offsets some of the plaintiff’s damages. But that election is neither inevitable nor central to the workings of the avoidable consequences doctrine.\textsuperscript{259}

The tenuous link between duty and damages further weakens the argument against the existence of a duty to minimize the loss. A duty can exist even if no action for damages exists to enforce that duty. Perhaps it makes little sense to speak of legal duties if no remedy exists by which to vindicate the duty.\textsuperscript{260} However, the avoidable conse-

differences between the avoidable consequences doctrine and contributory negligence in the new edition.

Dobbs’s original treatise also differentiates the avoidable consequences doctrine from contributory negligence on the ground that negligence takes on a more subjective meaning when dealing with the avoidable consequences doctrine. See Dobbs, supra note 10, § 3.7, at 187–88. The Restatement (Second) of Torts declares that the same rules govern negligence and the avoidable consequences doctrine. Restatement (Second) of Torts § 918 cmt. c (1977). Nothing in the Restatement (Second) of Contracts suggests a different approach. Thus, the law on paper recognizes no greater subjective component to reasonableness under the avoidable consequences doctrine than other objective negligence rules. Dobbs’s observation may reflect a difference between theory and practice. This Article, however, attempts to explain the theory—the justification of or the rationale for the avoidable consequences doctrine. Since the American Law Institute does not choose to differentiate the two doctrines on this basis, this Article will not consider the implications of this distinction. However, using an objective standard in the avoidable consequences doctrine may produce unacceptable results in tort cases. This latter concern will be addressed in my forthcoming work, Living Without the Avoidable Consequences Doctrine in Tort Damages.\textsuperscript{258} See, e.g., Dobbs, supra note 10, § 3.7, at 188; McCormick, supra note 10, § 33, at 128.\textsuperscript{259}

An alternative procedure is outlined after the next two paragraphs.\textsuperscript{260}

The conclusion is not inevitable. Courts have denied damage remedies to children injured by genetic counselling torts even when they have no difficulty concluding that the defendant owed a duty to the child as a foreseeable victim of careless conduct. See, e.g., Walker v. Mart, 790 P.2d 735, 739 (Ariz. 1990); Pitre v. Opelousas Gen. Hosp., 530 So. 2d 1151, 1157 (La. 1988). See generally Kelly, supra note 53. Horton and Alexander identify a range of ways the law can give force to contracts between spouses without necessarily allowing a damage action. See Paul Horton & Lawrence Alexander, Freedom of Contract and the Family: A Skeptical Reappraisal, in The American Family and the State 229 (1986). Similarly, even though government officials have immunity from suit in some circumstances, we do not say they have no duty to act within the law. Victims of their misconduct may not receive damages or perhaps even injunctive relief. But the duty to act within the law remains a useful concept. Perhaps the last example is inapt, since arguably the duty

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quences doctrine provides a remedy for the plaintiff’s breach (of the duty to minimize the loss), but not a remedy in the form of a damage action. Rather, the defendant must accept an offset reducing his own liability to the plaintiff.261

The absence of an independent damage action is inevitable, even if we recognize a duty. The harm to the defendant exists only if the plaintiff shifts the losses caused by the breach to the defendant. Until the plaintiff recovers damages from the defendant, the plaintiff’s failure to minimize the loss has not caused the defendant any harm. Thus, an independent damage action by the defendant against the plaintiff makes no sense. In effect, denying a cause of action reflects procedural concerns for ripeness and compulsory counterclaims more than it reflects the absence of a duty to minimize the loss. By limiting the defendant’s claim that the plaintiff breached a duty to minimize the loss to a defense in the plaintiff’s suit, the law resolves the two claims in a single action rather than dealing with them separately.

In fact, it takes very little imagination to see the avoidable consequences doctrine as creating a counterclaim for the defendant. The plaintiff seeks recovery for the defendant’s wrong, which caused all of the damages. The defendant counters by pleading that the plaintiff’s unreasonable conduct caused the damages to be higher than necessary. We actually treat that pleading as an affirmative defense, but we could treat it as a counterclaim. The court could enter judgment for the plaintiff in the full amount of the loss. That done, the plaintiff’s breach has damaged the defendant by exposing her to a larger judgment than necessary. The court then could enter judgment for the defendant on the counterclaim, awarding the amount of avoidable losses that the plaintiff negligently failed to avoid.

This procedural revision illustrates the weakness of focusing on the

remains, but flows to their superiors in the political hierarchy rather than to victims. Nonetheless, courts decide the cases on the grounds of immunity, not on the basis that no duty exists to these plaintiffs. Duty does not drop out of the picture merely because the courts provide no remedy.

261. The distinction here makes no difference. The defendant’s wealth improves regardless of whether she pays less or receives more. Starting from the assumption that the defendant must pay the plaintiff something (in exchange for what she received or as compensation for the wrong she has done), paying less (by reducing the damages awarded) is no different from paying more (by not subtracting avoidable consequences) but receiving more in exchange (damages for the plaintiff’s breach of the duty to minimize the loss).
procedural embodiment of the doctrine in order to characterize its essence. A counterclaim offers no advantages over the existing procedures for embodying the avoidable consequences doctrine. It would turn a simple, one-step offset into a complex, multi-step process. But nothing in the avoidable consequences doctrine would change if the procedure changed. In fact, the imaginary procedures may clarify why courts insist that a defendant prove the amount of the offset, rather than forcing the plaintiff to prove it as part of the evidence of damage.

The objection to the language of duty falters here. It deals with the form of the doctrine, not its substance. Having focused on the method by which we employ the avoidable consequences doctrine, the argument ignores the essence of the doctrine. That essence requires the plaintiff to act reasonably and imposes consequences for the failure to act reasonably—a duty by any other name.

The existing procedures also provide some fairly strong indications that plaintiffs really do have a legal duty to minimize the loss. Pattern jury instructions reveal near unanimity in telling jurors that the plaintiff has a duty to minimize the loss. The words of appellate courts and legislatures make very little difference if the actual decisionmakers, to whom all reviewers must defer, are told to hold the plaintiff to a duty to minimize damages. True, the instructions also tell the jurors to subtract avoidable losses from the award, not to make a separate award to the defendant in that amount. But they reduce the award because the plaintiff breached a duty.

The language chosen for jury instructions may be an imperfect source

262. See, e.g., DOBBS, supra note 9, § 3.9, at 272; RESTATEMENT (SECOND) OF CONTRACTS § 350 cmt. c (1979) (but noting different treatment for cases where basic damage calculation already includes mitigation).

263. This is not the only reason to allocate the burden of proof to the defendant, but if the procedures actually followed the counterclaim route, that probably would be a sufficient reason.

264. Pattern jury instructions expound a duty to mitigate damages; they almost never call it the avoidable consequences doctrine. See, e.g., COMMITTEE ON STANDARD JURY INSTRUCTIONS, CIVIL, SUPERIOR COURT OF L.A. COUNTY, CALIFORNIA JURY INSTRUCTIONS: CIVIL §§ 14.67-.68 (1994); EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS: CIVIL §§ 85.13, 86.08 (1987); COMMITTEE ON PATTERN JURY INSTRUCTIONS, DISTRICT JUDGES ASS'N, FIFTH CIRCUIT, PATTERN JURY INSTRUCTIONS (CIVIL CASES) § 15.15 (1993); COMMITTEE ON PATTERN JURY INSTRUCTIONS, DISTRICT JUDGES ASS'N, ELEVENTH CIRCUIT, PATTERN JURY INSTRUCTIONS: CIVIL CASES §§ 7.1-.3 (1990). Whether judges risk reversal by amending or supplementing these instructions to remove or explain references to the duty to mitigate would require investigation far beyond the scope of this paper. Such study also seems unlikely to produce any useful information, even if the results proved surprising.
of the law. It reflects the clearest and briefest way to produce an intelligent result from persons untrained in the law. Courts might refer to duty not because they think the avoidable consequences doctrine entails a duty, but because calling it one communicates effectively with the people who must decide the case, producing an appropriate outcome. The references to duty in numerous judicial opinions also may simply represent a comfortable shorthand for a doctrine the audience already understands. Adding a phrase like "sometimes called the duty to mitigate damages" may help people who, like me, made it through law school without having heard of the avoidable consequences doctrine. More troubling are the courts who turn this around: the duty to mitigate damages, "also called the doctrine of avoidable consequences." Perhaps, however, Dobbs is correct to suggest that no one is likely to be misled.


266. See, e.g., Wartzman v. Hightower Prods., Ltd., 456 A.2d 82, 88 (Md. Ct. Spec. App. 1983) (section heading: "Duty to Mitigate Damages"); S.J. Groves & Sons v. Warner Co., 576 F.2d 524, 528 & n.5 (3d Cir. 1978) (referring to "the general duty to mitigate damages" in text, but dropping a footnote stating that "it has been said that there is not a duty on the part of a plaintiff to mitigate damages"); Ford Motor Co. v. EEOC, 458 U.S. 219, 231 (1982) (referring to the "statutory duty to minimize damages"). While S.J. Groves and Ford involve statutes codifying the avoidable consequences doctrine, neither the U.C.C. nor Title VII of the Civil Rights Act of 1964 uses either "duty" or "mitigate" to set forth the doctrine. See U.C.C. § 2-715(2)(a) (1995); 42 U.S.C. § 2000e-5(g) (1988). The courts, however, have so internalized the notion of a duty to mitigate damages that other language cannot conceal from them the nature of the principle at stake.

References to the duty to mitigate damages seem to outnumber references to the avoidable consequences doctrine. A quick survey of Westlaw on August 2, 1993, revealed 370 cases in the Allstates database use the phrase "avoidable consequences," while 736 use the phrase "duty to mitigate damages." The latter phrase, of course, will miss cases that refer to the duty to minimize damages, Dobbs's preferred usage. See WEBER, supra note 10, § 3.7, at 188; WEBER, supra note 9, § 3.9, at 380 n.5. It also will miss cases that rearrange the words, insert an extra word, or misspell a word. Nearly twice as many cases (1,478) use "duty" and "mitigate" in the same sentence in a paragraph that mentions "damages.


269. WEBER, supra note 9, § 3.9 n.5.
If the language simply reflected loose talk, it would deserve brief notice and comment. Lawyers must use language precisely in order to accomplish their clients' ends. Too often when one is tempted to assume or to say, "You know what I mean," the other party truly does not know what you mean—or, perhaps worse, thinks she does know what you mean when that is not what you meant at all. Such a general lesson could end here, not requiring any further comment, let alone a complete re-explanation of the avoidable consequences doctrine.

More troublesome, however, are the indications that the avoidable consequences doctrine really is falling into the pattern described here. Jeffrey Riffer and Elizabeth Barrowman recently called attention to an entire line of cases in which courts have refused to apply the avoidable consequences doctrine to federal regulators of failed financial institutions when the regulators pursue actions against former officers and directors. The two scholars identify three reasons courts state for not applying the doctrine: (1) the regulators owed a duty to the public, but owed no duty to the former officers and directors of the institution; (2) public policy required protecting deposit insurance funds by maximizing recovery by the regulators; and (3) the government had not waived sovereign immunity (under the Federal Tort Claims Act or otherwise) for claims against regulators by former officers and directors. The first rationale explicitly depends upon interpreting the avoidable consequences doctrine to include a duty to mitigate damages. The third rationale goes further; it applies only if that duty consists of a claim against the government for damages. The underlying assumptions employed by these courts demonstrate the continuing image of the avoidable consequences doctrine as a manifestation of contributory negligence.

These cases have little direct relevance to this Article. They involve

271. Riffer & Barrowman, supra note 9, at 411. The exact nature of the mitigation claims does not appear in the article. At least one footnote suggests the government has spent more than necessary to manage the affairs of the failed financial institutions. Id. at 412 n.7 (commenting on excessive payments to accounting firms employed by the regulators). Often, however, the mitigation claims relate to government decisions regarding the sale of various assets of the institution. See, e.g., FDIC v. Stanley, 770 F. Supp. 1281 (N.D. Ind. 1991) (alleging unreasonable loan collection practices by the FDIC after it seized the bank).
272. The second rationale seems equally satisfied by applying the avoidable consequences doctrine, thus giving the regulators an incentive to be frugal, rather than excusing their wastefulness by assessing unnecessarily large damages against others. The policy rationale, however, reflects considerations outside the avoidable consequences doctrine that arguably justify ignoring it. Those policies lie outside the scope of this Article. The other two rationales purport to interpret the proper application of the avoidable consequences doctrine, presenting issues directly relevant here.
claims for statutory violations and breach of fiduciary duty, not breach of contract. They invoke public policies specific to the regulation of banks that may not affect the application of the avoidable consequences doctrine in other contexts.

Courts deciding these cases, however, have not limited their pronouncements to the context involved. They hold that the applicable state law rests the avoidable consequences doctrine on the existence of a duty to mitigate. 273 The implication that the avoidable consequences doctrine rests on the existence of duty in all cases threatens a broader impact than the relatively limited range of banking cases described by Riffer and Barrowman.

Refusing to apply the avoidable consequences doctrine in cases where the plaintiff owed no independent duty to the defendant could nearly obliterate the avoidable consequences doctrine. Since plaintiffs often do not owe defendants a duty, the avoidable consequences doctrine could disappear in a significant number of cases. The danger seems greatest in tort cases, where the victim commonly owes no duty to the wrongdoer who injures her—unless the duty arises because of the injury. 274 Contract cases may not present the same difficulty: each party to a contract owes duties to the other, though some may already have been performed. The duty of good faith and fair dealing inherent in every contract may support a duty to minimize the loss—if that duty extends beyond the breach. Material breach of a contract, however, generally excuses remaining duties the nonbreaching party owed to the other. Thus, courts may find it difficult to identify a duty that remains following the breach. 275 Absent some fiduciary relationship, only


274. If the injury itself imposes duties upon the victim, it is hard to distinguish the federal regulators. The government and the guaranty fund, as victims, would seem to come within the same duty.

275. Section 237 of the Restatement makes a party's duties under a contract conditional on the absence of any "uncured material failure" to perform by the other party. RESTATEMENT (SECOND) OF CONTRACTS § 237 (1979). A condition is defined as an event that must occur before performance becomes due. Id. § 224. Thus, no performance by the plaintiff is due following an uncured material breach. The language is general, suggesting no exception for either the duty to act in good faith or a duty to minimize the loss by reasonable means. To my knowledge, no court has ever excused the plaintiff's failure to take reasonable measures to minimize the loss on the ground that
precedent seems likely to keep the avoidable consequences doctrine alive if courts begin to reject it where they cannot find an independent duty that the victim owed to the wrongdoer.276 These dire consequences seem as unlikely as they are extreme. The cases misapplying277 duty language have been quite limited to date.278 Nonetheless, the avoidable consequences doctrine works quite well when we do not conceive of it as a duty to minimize the loss or as a counterclaim alleging that the plaintiff's negligence contributed to causing the loss. The problem with the conventional wisdom lies in its weak support, not the conclusions themselves.279 Rather than discard the conclusions, perhaps we should strive for better reasoning—a better theoretical basis upon which to rest the avoidable consequences doctrine.

The expectation analysis of the avoidable consequences doctrine provides a theoretical basis that explains existing pronouncements about the avoidable consequences doctrine—at least in contract cases, and probably in a broad array of cases involving property rights. If the avoidable consequences doctrine accounts for the benefits a plaintiff received as a result of the breach, then no duty to minimize damages

the plaintiff no longer owed a duty to the defendant following the defendant's material breach. Yet that suggests that the avoidable consequences doctrine is not born of a duty—or, at least, not a duty under the contract. Thus, the duty to minimize the loss either arises because of the injury (as suggested for tort) or does not exist at all.

276. This may not be entirely bad. My thoughts on the avoidable consequences doctrine in tort cases require lengthy explanation that will not conveniently fit within this Article. Rest assured (or, perhaps, tremble with fear at the prospect) that an article setting forth those views will appear shortly. Michael B. Kelly, Living Without the Avoidable Consequences Doctrine in Tort Remedies (forthcoming 1997).

277. To the extent that the existing dogma surrounding the avoidable consequences doctrine remains tied to tort concepts, arguably the courts applying tort principles actually have the better view of how to apply the duty to mitigate damages. They have seen through the veneer of scholarly disavowal to the essence of negligence doctrine lying at the roots of the duty to mitigate. But this does not suggest that they have produced the better result.

278. The cases primarily involve actions by regulators of financial institutions against former officers and directors. Policy arguments unique to this relationship or to the recent savings and loan crisis may explain or even justify decisions not to apply the avoidable consequences doctrine. But see Riffer & Barrowman, supra note 9, at 419-34 (rejecting policy arguments relied on by the courts deciding these cases).

279. Riffer and Barrowman amass an impressive array of authority to support the conclusion that the avoidable consequences doctrine does not involve a duty to mitigate damages. Riffer & Barrowman, supra note 9, at 411. After reading that compilation, however, one is left with two impressions: (1) that the authorities offer very little justification for the conclusion, relying almost exclusively on the consequences of the defense (as an offset rather than a damage award); and (2) that the authorities nowhere provide an explanation of what the avoidable consequences doctrine is, contenting themselves with the conclusion that it is not a duty to mitigate. Given the rather shallow attacks on the use of "duty" to describe the avoidable consequences doctrine, perhaps the persistence of the terminology is understandable.
arises. We offset the recovery not because the plaintiff should obtain benefits by entering a substitute contract, but because she has obtained benefits by receiving the opportunity to enter into a substitute contract. We truly do not care whether the employee gets another job or the seller finds a new buyer. They may take their benefit as leisure or goods instead of money for the resale of their time or wares. As long as the law awards them the amount of the loss they could not have avoided by reasonable efforts, it has placed them in the position they would have occupied if the defendant had performed the contract. The recovery is smaller not because they could have received more, but because they did receive more. Thus, the expectation interest urges that we discard all reference to a "duty" to minimize the loss.

In addition, the theory proposed here severs the link between the avoidable consequences doctrine and contributory negligence. The law subtracts losses as a necessary component of restoring the position the plaintiff would have occupied if the defendant had performed, not as a means of allocating to the plaintiff losses to which her own fault contributed. In fact, the benefit analysis suggests that the failure to minimize the loss did not produce a net loss at all, since the benefits at least offset the avoidable portion of the loss. The two doctrines still produce the same results, but for entirely different reasons. Concern for the plaintiff's fault disappears; concern for the plaintiff's benefits takes its place.

The approach suggested here permits us to set aside tort language. This Article re-explains the avoidable consequences doctrine in a way that does not depend on tort concepts. To the extent that scholarly proclamations denying a duty to mitigate have a very thin acceptance because they do not explain the existence of the doctrine in any other

280. To some extent, these statements overlook the objectifying presumptions proposed in the earlier portions of this article. See supra Part I. Some individuals may not have received as much as the law has assumed they received because they did not know about the law, they miscalculated (either the effect of the law or the market value of their benefit), or they did not act in a rational manner. These relatively rare exceptions undermine the unqualified statements in the text without undermining the desirability of reformulating the explanation of the avoidable consequences doctrine. After all, the avoidable consequences doctrine itself imposes the ultimate objectifying presumption by denying recovery to anyone who reasonably could have avoided the loss. The objectifying presumptions suggested here do not exclude anyone who could have recovered under the avoidable consequences doctrine as now formulated. Rather, they bring the new rationale into line with the existing practice.
way, this Article can fill that void. If conceptualized as a manifestation of the expectation interest, the avoidable consequences doctrine needs no reference to tort concepts to explain its existence. Provided courts accept this new rationale, perhaps fewer cases will misapply the avoidable consequences doctrine in the future.

**B. Improved Judicial Focus: Substitute Employment for More Pay**

The expectation interest may offer some subtle assistance to courts applying the avoidable consequences doctrine. If the avoidable consequences doctrine primarily seeks to re-create the position the plaintiff would have occupied but for the breach, courts may find easier approaches to some intricate questions that can arise under the avoidable consequences doctrine. The advantage need not stem from focusing on the benefits of the breach, though that focus also may help. Rather, some advantage comes from discarding the notion that the avoidable consequences doctrine seeks to vary the position the person would have occupied but for the wrong. By recognizing the fundamental harmony, or perhaps unison, between the expectation interest and the avoidable consequences doctrine, courts may approach some problems in more useful ways. This section explores one such intricate situation.

When a discharged employee finds new work (or could have new found work) at a higher salary than she received from the breaching employer, the court must decide how to treat the surplus.\(^{281}\) When the employee promptly finds a better job, courts have little difficulty concluding that the plaintiff can recover only nominal damages.\(^ {282}\) The employee resembles a seller who finds a buyer willing to pay more than the contract price for the goods. She is better off after the breach than she would have been if the buyer (or employer) had performed. In

\begin{footnotesize}
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\item [281] When the plaintiff actually earns higher wages, the problem involves avoided consequences rather than avoidable consequences. Even then, however, courts must decide whether surplus earnings after the employee takes new work should be applied to offset the damages for the weeks before the employee found the new job. The same problem can arise if the employer argues that the employee could have found work at a higher rate of pay if she had conducted a reasonable job search. The two situations deserve identical treatment; the amount that was earned, like the amount that could have been earned, is a proxy for the value of returning the employee's time to her. The Article will continue to discuss actual earnings because cases exist addressing that situation. Apparently, very few employers who discharge employees later contend that the employees were so good that they could have earned more in a new job. Perhaps employers seek to maintain a consistent litigation posture, contending the employee was so bad that they had to fire her. Perhaps employers simply do not want to state publicly that they underpaid the employee. In any event, cases exemplifying employees who earn more following discharge are rare.
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such cases, the most remarkable fact is that the employees would sue at all.283

A better substitute job presents an enigma when the wages cover only part of the contract period, perhaps beginning a few weeks after discharge or ending before the original contract term would have expired. Consider, for example, the following situation: an employer discharges an employee earning $2000 per month, two months before her contract would have expired. The employee spends one month out of work diligently looking for a new job. She finds a better job and earns $2500 in the remaining month before her original contract would have expired.

283. One case involved a doctor denied entry to a medical residency program. While his actual earnings greatly exceeded the pay he would have received in the program, he sought compensation for consequential damages—the lost income over his life from being deprived of the education and training he would have received in the program. In effect, the plaintiff sought damages as a buyer of education, while the defendant preferred to characterize the contract as employment. These different expectations explain why a plaintiff benefitted in terms of salary might nonetheless sue for damages.

Another line of cases arises from an exception to the avoidable consequences doctrine for public officials. Some states treat pay collected by public officials as an incident of office rather than as compensation for the services, even suggesting that a public official's entitlement to a salary does not “partake of the nature of contracts, nor have . . . the remotest affinity thereto.” Coble, 116 A.2d at 116 (quoting Commonwealth v. Bacon, 6 Serg. & Rawle 322, 323 (1820)). Teachers have sued despite finding better work elsewhere, apparently hoping to take advantage of this exception. The Coble court refused to apply this exception to public employees (like teachers) as distinguished from public officials (such as the mayor involved in Bacon)—despite a statute stating “there shall be no abatement of salary or compensation” in such cases. 116 A.2d at 115. A similar distinction in statutory language prevented a superintendent of schools from taking advantage of the exception for public officials. Mullen v. Board of Educ., 195 A.2d 195, 199-200 (N.J. Super. Ct. App. Div. 1963) (no mitigation applied when legislature used the word “compensation” instead of the word “salary”).

The entire exception for public officials, if it has any merit at all, depends on policies quite alien to the avoidable consequences doctrine as now formulated. One might construct explanations based on the expectation interest, but only with unusual assumptions, such as that elected officials become entitled to the salary for the full year by virtue of election, regardless of their service in office. (This virtually treats the salary as a prize for winning the election.) The theory proposed here might require an additional assumption: that public officials remain entitled to earn additional income from outside sources during their term. This may reflect public office as conceived in earlier times—and may remain plausible in some areas. The exception and its reasoning, however, probably merit reexamination in light of changes since Bacon was decided in 1820. This Article will not provide that re-examination; it will focus on results dictated by the avoidable consequences doctrine, rather than statutory exceptions that do not purport to pursue the same purposes.
On one hand, the higher wages represent the fruits of an employee's labor. She, not the breaching employer, generated the surplus and deserves to enjoy it. Courts can produce this result by awarding the employee $2000 salary for the month she was out of work (plus other elements of damages, if any), but cutting off liability when she found the new job. By recovering $2000, the employee in effect earns $4500 for the two-month period, instead of the $4000 she would have received if she had remained employed.

On the other hand, this puts the employee in a better position than if the employer had performed. Allowing the employee to receive $4500 for a time when she had been promised only $4000 may deviate from the expectation interest. The employee probably would not have received that surplus if the contract had been performed. The employer, having never promised to pay this much, arguably should not be compelled to pay damages that increase her total compensation to this level.

The desirability of these two approaches may vary with the example chosen. People who prefer to allow the employee to retain the surplus may lean toward the first option. Changing the example, however, may produce a different reaction. Suppose that the employee immediately found a better job, but lost it (for innocent reasons not attributable to the fault of any party) after one month. An approach that cut off liability when the employee took a better job would produce zero recovery. Thus, the employer would pay nothing, even though the employee would have received $4000 in the two-month period instead of $2500. The second approach, however, continues to provide a $1500 recovery in damages, leaving the party in the position she would have occupied but for the breach.

Courts could approach the choice mechanically, as an issue of the proper time frame to consider. The court could consider the remainder of the contract period as a single unit or as several distinct pay periods. An award for the two-month period (taken as a whole)


285. The word "probably" leaves open the possibility that she could have found and taken the new job while continuing to work for the first employer, then persuaded the first employer to release her from her promise to work the last month.

286. Dicta suggest that the entire period consists of a whole. See Mullen, 195 A.2d at 197 (characterizing the issue as a choice between "whether 'compensation' referred to in the statute means full salary during the period of illegal dismissal before the right to reinstatement accrued to appellant, or such salary reduced by the wages he received in his [better job] during that period"). Interestingly, the court affirmed a decision that employed neither of these approaches, but cut off damages when the plaintiff received a better job, thus not reducing the damages by the surplus earnings he subsequently received. Id. at 200. The court apparently did not recognize the difference between
would give the employer the benefit of the improved job. The employee should have received $4000 for that period, but actually received only $2500. She should recover the remaining $1500 from the employer, but no more. An award calculated for each month individually produces a different result. For the first month, the employee deserved $2000, but received nothing. For that period, the employer must pay $2000. For the second month, the employee expected $2000, but actually received at least that much, leaving no balance for the employer to pay.

The avoidable consequences doctrine as generally formulated does not dictate either result. More important, it does not provide courts with an analytical framework in which to consider the appropriate result. The avoidable consequences doctrine might treat the issue by considering the extent of the duty to mitigate damages owed by the employee. Alternatively, courts could resort to the purpose of the avoidable consequences doctrine, considering which result would provide the best incentive to minimize waste. Yet under either approach, either result seems plausible.

As noted earlier, the prevailing view of the avoidable consequences doctrine closely resembles a counterclaim for contributory negligence. Viewed as a duty to reduce the consequences the former

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287. For an age discrimination case calculating back pay for the entire period, see Kolb v. Goldring, Inc., 694 F.2d 869 (5th Cir. 1982). The employee was out of work only two months before finding a job that began at $22,000/year (the same salary he earned before discharge, but without bonuses) and eventually rose to $34,500/year, more than the raises the court found realistic from the former employer (maximum $28,000/year, plus benefits). Id. at 871. The court found a jury verdict of $45,000 excessive. Id. at 874. The court, however, avoided allocating the surplus earnings to the employer by cutting off liability on the date when the plaintiff's new salary exceeded the old salary. Id. The court then calculated total earnings at the old job and total actual earnings at the new one for the entire period (about three years). Id. at 871-75.

288. See EEOC v. Spokane Concrete Prods., 534 F. Supp. 518, 526 (E.D. Wash. 1982). This approach arguably allows the court to avoid the problem posed in the preceding paragraph. It may not matter whether the month of better employment comes before or after the month of unemployment. Each month consists of a whole, for which an award is calculated separately. The approach does not require a carryover (either backward or forward) from one month to the next. Using monthly units to facilitate calculation is fairly common. To my knowledge, no court has addressed arguments about the propriety of periodic calculations in a case where it would affect the award.

289. See supra Part II.A.
contract partner will suffer because of the breach, the doctrine seems to require the court to award any surplus to the breaching employer. But to some extent, that appearance depends on the scope of the duty to mitigate damages. We could limit the duty to an obligation to seek and to accept alternative employment. Presumably, the employee fulfills that duty when she begins work at the higher paying job. The duty to the employer then ceases, as does the duty of the employer to the employee. Alternatively, however, the duty could continue for the

290. See CHARLES FRIED, CONTRACT AS PROMISE 131 (1981) (treating the avoidable consequences doctrine as a duty that survives the contract). This Article has suggested a similar analogy, at least in connection with employment contracts. See supra text accompanying notes 101-05. At times the duty will apply only during the term that would have been covered by the original contract (as in the example of employment for a specified term). At times the duty may extend beyond the original contract term (such as a duty not to compete or a duty to resell goods reasonably, which generally arises only after the original contract has ended, whether by its terms or by one party’s material breach).

291. The employee unreasonably failed to minimize the loss if she refused a job that would have paid more money. Therefore, the amount that the employee could have earned must be subtracted from the employee’s claim.

292. See supra text accompanying note 103.

293. See Smith v. Beloit Corp., 162 N.W.2d 585 (Wis. 1968). The same result may apply to employment discrimination actions, but perhaps for different reasons. Discrimination cases often involve employment that had no set duration, but could have continued for the life of both parties. In that setting, some cut-off date for continued liability seems necessary unless the employer becomes the guarantor of lifelong employment for all employees who suffer discrimination. The Supreme Court expressed concern for the duration of back pay liability, especially given the prolonged nature of many employment discrimination proceedings. See Ford Motor Co. v. EEOC, 458 U.S. 219 (1982). In response, some courts stop damages when the employee obtains “comparable” employment elsewhere. See Sims v. Mme. Paulette Dry Cleaners, 638 F. Supp. 224, 230 (S.D.N.Y. 1986); State Dep’t of Correction v. Finley, 575 N.E.2d 1026, 1029 (Ind. Ct. App. 1991) (dicta). Employment at a higher salary seems likely to qualify as comparable employment under most circumstances. Even when the job is quite different, the employee seems unlikely to claim it was not comparable if that will mean reducing the amounts the employer owed for any earlier period. See Sims, 638 F. Supp. at 230. (If the job is not considered comparable, the court must subtract the earnings as interim earnings. Since the employee now earns more per month than she earned at the original job, damages diminish as long as the employee continues to earn the higher wages. Of course, an employee who lost the comparable job might not prefer a cut-off date. See, e.g., Finley, 575 N.E.2d at 1028.) When the employee, given a choice, almost certainly would have relinquished the old job for the new, the requirement of comparable employment seems satisfied. In fact, one suspects that comparable employment might include some jobs not quite as good as the original job. See Ford Motor Co., 458 U.S. at 231-32 (worker forfeits back pay if he refuses a job substantially equivalent to the one he was denied).

Cases involving breach of contract for a definite period provide their own duration term. The employee arguably deserves wages until the contract expires, regardless of how often she may find and lose other employment in the interim. Thus, the decision to cut off damages in Smith v. Beloit Corp. must rely on a different rationale, one more closely (if implicitly) attuned to the argument in the text. 162 N.W.2d 585.
entire term of the breached contract. The courts so hold when the employee takes a lower paying job; the employer’s obligation to make up the difference continues.\footnote{294} Similarly, the employee may demand that the employer continue paying wages if the substitute job ends before the original contract period expires.\footnote{295} The employee retains a reciprocal duty to make reasonable efforts to keep the substitute job or to find another if she loses the first substitute job.\footnote{296} The duties imposed by the avoidable consequences doctrine have no inherent cut-off date prior to the conclusion of the breached contract. These continuing duties suggest that the employee continues to serve the employer, but in a remote capacity. As such, any surplus from the employee’s labor should inure to the employer (by decreasing the amount of damages she must pay), just as surplus from the employee’s labor in working for the employer inured to the benefit of the employer.

The avoidable consequences doctrine offers no suggestion on this rather detailed, practical issue. The doctrine dictates that the employee act reasonably, but does not delineate the duty any further. In fact, scholarly discussions of the avoidable consequences doctrine reject the notion of duty altogether.\footnote{297} In addition, the avoidable consequences doctrine exists at a level of generality that does not relate to the specifics posed here. No one discusses whether courts should assess reasonableness on a monthly or weekly basis. Such computational issues generally are entrusted to juries, operating under the most general instructions.\footnote{298}

\begin{footnotes}
\item[295] For example, no one suggested that the employer’s liability ended when the employee found temporary employment at a better wage in Paragon Hotel Corp. v. Ramirez, 783 S.W.2d 654 (Tex. Ct. App. 1990) (tort of retaliatory discharge for filing a worker’s compensation claim). Nor did temporary work at the same salary end the employer’s liability under Title VII in Sims v. Mme. Paulette Dry Cleaners, 638 F. Supp. 224 (S.D.N.Y. 1986). While breach of contract may involve a less severe wrong than tortious discharge or employment discrimination, the avoidable consequences doctrine does not provide any internal rationale for treating the cases differently.
\item[296] Brady v. Thurston Motor Lines, Inc., 753 F.2d 1269 (4th Cir. 1985); Sims, 638 F. Supp. at 229 (citing Ford Motor Co. v. EEOC, 458 U.S. 219, 231 & n.15 (1982)).
\item[297] See supra note 10 and accompanying text.
\item[298] The pattern jury instructions dealing with mitigation of damages—they almost never call it the avoidable consequences doctrine—present the issue at the most general level, apparently leaving counsel to explain how the general principles will apply in any given case. See, e.g., COMMITTEE ON STANDARD JURY INSTRUCTIONS, CIVIL, SUPERIOR COURT OF L.A. COUNTY, CALIFORNIA JURY INSTRUCTIONS: CIVIL §§ 14.67-.68 (1994);
\end{footnotes}
As a result, decisions seem more likely to follow either the court’s intuitions or mechanical decisions that conceal their consequences.

The generality of jury instructions may strike some as an objection to the entire project. What difference does it make how the law characterizes or particularizes the avoidable consequences doctrine if the decisions ultimately come from juries who have not been instructed in these details of the law? The objection, however, overlooks several important points at which courts and, more particularly, lawyers must focus on the appropriate measure of damages without the shield of an uninstructed jury. In the first place, many cases are decided without a jury. In those cases, the judge must apply the avoidable consequences doctrine on her own, answering all the detailed questions posed here. Her

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EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS: CIVIL §§ 85.13, 86.08 (1987); COMMITTEE ON PATTERN JURY INSTRUCTIONS, DISTRICT JUDGES ASS’N, FIFTH CIRCUIT, PATTERN JURY INSTRUCTIONS (CIVIL CASES) § 15.15 (1993); COMMITTEE ON PATTERN JURY INSTRUCTIONS, DISTRICT JUDGES ASS’N, ELEVENTH CIRCUIT, PATTERN JURY INSTRUCTIONS: CIVIL CASES §§ 7.1-3 (1990). Sitting judges may particularize the pattern instructions to lay out the workings of the avoidable consequences doctrine in more detail, as appropriate to the case at hand. The risk of reversible error may lead judges to stick with instructions that already have been approved rather than attempt to innovate.


Some employment contracts place cases before arbitrators—particularly union contracts, which commonly include guarantees of continued employment (until the employee gives cause for discharge). Arbitrators are not bound to follow judicial doctrines (such as the avoidable consequences doctrine) at all, let alone apply them in the way the common-law courts might prefer. Cf. Lentine v. Fundaro, 278 N.E.2d 633, 636 (N.Y. 1972) (quoting Exercycle Corp. v. Maratta, 174 N.E.2d 463, 466 (N.Y. 1961)) (“Arbitrators may do justice. It has been said that, short of ‘complete irrationality, they may fashion the law to fit the facts before them.’”). But see Garrity v. Lyle Stuart, Inc., 353 N.E.2d 793, 795 (N.Y. 1976) (rejecting arbitrator’s decision to award punitive damages as against public policy). Nonetheless, to the extent the avoidable consequences doctrine identifies an important factor involved in shaping a just result, arbitrators may seek out scholarly or judicial input concerning the best way to apply it—or, guided by skilled advocates, they may create similar results independently, leading rather than following.
decisions, like those of a jury, will be subject to review on appeal. The appellate court, in order to discern whether the jury reached a verdict supported by the evidence, may need to decide how the avoidable consequences doctrine should be applied. Applying it the wrong way may produce a verdict that the court must reverse as outside the range of verdicts permissible under the evidence. In jury trials, lawyers must know how to argue before the jury. No matter how general the instructions, the jurors may need to perform some very specific calculations. The attorney must help them understand what they should do—and perhaps even persuade them to employ one approach as opposed to another. Naturally, efforts to limit what the opposing lawyer may accomplish can arise via motions in limine (to exclude evidence of higher paying jobs), motions to strike, motions for partial summary judgment on mitigation issues, and similar motions or evidentiary objections that shape the evidence and the argument the jury hears. Calculating the settlement value of a case also involves some prediction of what a jury will do, prediction that must begin with knowledge of what the jury can and cannot consider. In short, lawyers and judges cannot ignore the details involved in the workings of legal doctrines, even when juries may apply them quite loosely. While some decisions may be made with only the most general guidance, other aspects of law and lawyering require attention to minute detail.

The expectation interest suggests a different framework for analyzing this problem. It asks, quite simply, what would have happened if the breach had not occurred. That inquiry might produce either result, depending on the facts of a given case. But the inquiry identifies the pertinent facts and the outcome appropriate in each case. Consider three possible scenarios:

1. The employee might have been able to locate a new, higher

300. United States v. Hatahley, 257 F.2d 920 (10th Cir. 1958), presents a fairly insightful look at the amount of detail appellate courts may expect of trial courts when they decide damage issues without a jury. Jury cases also may offer the court a fairly clear view of the amount awarded for lost earnings, either because the trial court submitted special interrogatories to the jury, see Paragon Hotel Corp. v. Ramirez, 783 S.W.2d 654 (Tex. Ct. App. 1990), or because earnings constituted the only legitimate element of damages in the case. See Smith v. Beloit Corp., 162 N.W.2d 585, 569 (Wis. 1968).

301. Sometimes the jury may not perform any calculations, but instead reach a nice round number that sounds about right. But one does the jury an injustice to assume that they never pay attention to detail in discussing damage issues.
paying job while continuing to work for the original employer and to reach an accord with the employer permitting her to resign early in order to take the better job.\footnote{302}

2. The employee might have been unable to locate the new, higher paying job while working for the original employer.\footnote{303}

3. The employee might have located the new job while working for the original employer, but might have refused the job.\footnote{304}

The first possibility supports a cut-off date when the employee began the new job. But for the breach, the employee would have earned her normal salary for the period before she located the substitute job, but would have earned the higher salary thereafter. Similarly, the employee would have no recourse to resume work for the employer if the substitute job disappeared.\footnote{305} As a result, the employee, not the employer, deserves the benefit of the surplus generated by the new job. Even if the employee did not take the higher paying job (but should have, if she had acted reasonably) the employer would have paid the employee until the new job materialized and cannot claim a reduction in damages below that amount.\footnote{306}

\footnote{302} The employer, whose breach indicates some willingness to dispense with the employee’s services, seems likely to have jumped at the chance to replace the employee early. While some employers might seize an opportunity to extort concessions from the employee desperate to leave, those situations seem likely to be relatively rare. When they occur, they implicate the third scenario listed here.

\footnote{303} This seems likely if she located the job only because she had her days free as a result of the employer’s breach.

\footnote{304} While this possibility may seem remote, several possible motivations might produce this result, including loyalty to her employer, a sense of moral obligation to fulfill her contractual promises, or a preference to minimize change in her life. While differences in the terms and conditions of employment also might explain the decision, they introduce new variables that complicate the analysis. For now, assume that the jobs involved are identical in all respects except salary.

\footnote{305} This scenario posits that both parties were willing to terminate the original contract in light of the employee’s new offer. That termination would have ended any claim the employee had against the employer on the date she left, leaving her at risk if the new job proved temporary. An employee might not have given up a secure job (one for a guaranteed term) even for a higher paying job that lacked such security. That possibility, however, falls within the third scenario rather than this one.

\footnote{306} Because the employee continued working for the employer until discharge, we fairly can presume that she would have continued past discharge at least until the better offer came along. Perhaps we must revise the assessment of the benefit of leisure upward once the employee rejects (or unreasonably fails to discover) a job that would pay her $2500/month (all other things being equal). Unwillingness to work for $2500 implies unwillingness to work for $2000, perhaps even suggesting that she would have quit after the first month. (The alternative assumption—bad faith by the employee—does nothing to improve her claim to a second month of pay.) Nonetheless, the discussion of benefits here offers no basis to estimate the value of leisure until the date upon which the employee could have obtained a new job. Thus, unless we conclude that she could have earned at least $2000 in the first month (but unreasonably did not),
The second possibility makes the opportunity to earn more money a benefit of the breach. But for the breach, the employee would have not have located the higher paying job. Allowing her to receive $4500 for the two-month period puts her in a better position than she could have occupied if the employer had performed. Thus, the entire $2500 earned should offset the recovery. She would, however, have earned her full salary for the remainder of the contract term—regardless of when the better job would have begun or how long it would have lasted. Thus, no cut-off date for damages (short of the duration term in the contract) will end the employer’s liability. The same result applies to the employee who unreasonably fails to take the better job.

The third possibility duplicates the second in all significant respects, but arguably requires different language. The opportunity to earn the higher salary is not a benefit of the breach; the employee could have found the job while employed. Nonetheless, the earnings are a benefit of the breach, because the employee would have turned down the job and earned only her original salary if the employer had performed the contract. Thus, the entire $2500 should offset the recovery.\footnote{The employee who refuses the job for $2500 after discharge poses an enigma: a person who valued her leisure less than the $2000 for which she would have sold it to the original employer, but more than the $2500 for which she refused to sell it to the prospective new employer. The decision to value her leisure at $2500 remains appropriate. Whatever the rationale that might permit a person presently employed to reject a better offer, it does not inherently apply to an unemployed person faced with the same offer. The decision to reject the offer while employed suggests that the employee did not prefer either $2500 or leisure over $2000 plus loyalty, $2000 plus honor, or $2000 plus stability. (From another point of view, we must subtract the psychic cost of disloyalty, oathbreaking, or disruption from the value of leisure or alternative wages to the employee who remains on the job instead of quitting, either to play or to work elsewhere.) The discharged employee has no similar factors. She owes no loyalty to the breaching former employer. No loyalty to the unemployment office compels her to continue to draw benefits rather than take a job. She is not honor bound to remain unemployed rather than break her commitment to either the unemployment office or the breaching former employer. Returning to work does more to restore stability to her life than to destroy it, if we may use the \textit{status quo ante} as her preferred starting point for inertia. Even differences in the conditions of employment, which may have made a decision to stay with the original employer reasonable, do not justify rejecting the job once discharged by the original employer unless the differences make the new job unduly burdensome, risky, or humiliating. While other motivations could have been proposed in note 304, \textit{supra}, they should allow similar distinctions here between the employed person and the discharged employee. Thus, the decision unreasonably to
In each case, the inquiry focuses on the position the employee would have occupied if the employer had performed the contract as promised. The expectation interest itself, not some limitation on the expectation interest, drives the result. Because the facts of each case may vary, the expectation interest does not dictate a rule specifying a particular result.308

The expectation interest thus leads us to the appropriate inquiries and provides relatively clear guidance once the factual matters have been determined. By comparing the position the plaintiff would have occupied but for the breach with the position she now occupies, including the benefit of any leisure, the court can resolve matters without recourse to a mechanical (and arbitrary) decision regarding the appropriate time periods into which to divide the period of unemployment. The court need not even resort to the indeterminate policies behind the avoidable consequences doctrine in order to achieve appropriate results. In this way, recourse to general damage principles may help clarify the issues courts confront when considering difficult questions concerning the proper application of the avoidable consequences doctrine to less common fact patterns.

CONCLUSION

Judges, lawyers, and scholars may benefit from revising the way we think and speak about the avoidable consequences doctrine. While principles of contributory negligence and causation may explain the origins of the doctrine, those principles will not necessarily provide the best guide to resolving cases. For this entire century, and perhaps longer, courts and the academy have concurred in the view that the avoidable consequences doctrine differs from contributory negligence.

reject (or not to seek) a job at $2500/month should give rise to the normal inference that the plaintiff valued a month of leisure more than she valued $2500.308 This Article frequently has proposed objective rules to replace subjective inquiries into the employee's actual preferences. This may seem like a suitable place to propose another objective rule to eliminate the third possibility—that the employee would have refused the higher paying job for subjective reasons if she had received the offer while still working for the employer. But an objective rule will not distinguish between the first two scenarios, which do not vary with the subjective preferences of the employee, but with the ability of the employee to locate the higher paying job while still employed by the employer. To the extent that the ability to search for a new job while performing another job varies with the subjective abilities of the employee, an objectifying assumption may be appropriate. We should ask whether the employee could have located the better job if she had used reasonable efforts while still employed by the employer. But the definition of reasonable efforts seems likely to vary from person to person to a degree that the objectifying assumption may contribute very little in this context.
and does not give rise to a duty to minimize the loss—though the degree
to which those conclusions have been internalized varies significantly.
Unfortunately, our devotion to these conclusions has preceded any
coherent explanation of how the avoidable consequences doctrine can
exist independently of a duty to minimize the loss. Thus, we continue
to manifest contributory negligence principles in the avoidable conse-
quences doctrine, even as we pay lip service to their irrelevance.

This Article proposes that the expectation interest can explain the
avoidable consequences doctrine in contract damages without any
reference to contributory negligence or to duty. In fact, we can live
without the avoidable consequences doctrine. The expectation interest,
when properly applied, can achieve the same result without any reference
to the avoidable consequences doctrine. If we recognize that a plaintiff’s
decision about whether to avoid the loss turns on the relative merits of
using resources to avoid the loss or using them in some other manner,
then the choice not to minimize the loss evinces benefits that damage
recoveries must take into account. The size of the benefits, though often
difficult to measure directly, can be inferred from the decision not to
avoid the loss. The plaintiff must expect the benefits of using resources
in other ways at least to equal the benefit of minimizing the losses
causeth by the breach. Thus, we have reasonable evidence that the net
loss suffered by the plaintiff does not exceed the full loss minus the
portion of the loss that she could have avoided by reasonable efforts.
The avoidable consequences doctrine, by reducing damages in this
amount, accomplishes a result that the expectation interest would require
in any event.

Recharacterizing the avoidable consequences doctrine as an incident
of the expectation interest does not require substantial modifications in
the way we apply the avoidable consequences doctrine. The existing
rules capture the essential requirements of the expectation interest quite
effectively. Recognizing the nature of the avoidable consequences
doctrine, however, may help courts decide when to apply it. Exceptions
to, or refinements of, the avoidable consequences doctrine require
justification not in terms of duty, but in terms of benefits or by reference
to the situation that would have occurred if the contract had been
performed. Similarly, problems at the margin of the avoidable
consequences doctrine may receive clearer resolution if courts consider
the position that the plaintiff would have occupied if the wrong had not
occurred.
Subtracting avoidable losses does not compromise the goal of full compensation for losses actually suffered. Rather, it helps us accurately assess the losses actually suffered in cases where some of those losses would be exaggerated by neglecting the benefits of breach. The avoidable consequences doctrine is not an exception to the rightful position, but a corollary of it. We can implement the rightful position fully if we acknowledge the need to subtract avoidable losses in our efforts to avoid overcompensation.