SYMMETRICAL USE OF UNIVERSAL DAMAGES PRINCIPLES—SUCH AS THE PRINCIPLES UNDERLYING THE DOCTRINE OF PROXIMATE CAUSE—TO DISTINGUISH BREACH-INDUCED BENEFITS THAT OFFSET LIABILITY FROM THOSE THAT DO NOT

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Table of Contents

Remedies as a field . . . is trans-substantive, and universal within the scope of civil litigation.

Laycock[1]

I. INTRODUCTION

"Remedies" is its own area of law,[2] the focus of which is "the bottom line."[3] It is the source of law that determines just what a prevailing plaintiff in a civil case wins and, conversely, just what the defendant in that case loses.[4] In many cases, this bottom line is determined by a deceptively simple, but critically important, principle: the "rightful position" principle.[5] Whether the plaintiff's claim is based on the

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† Professor of Law, Thomas M. Cooley Law School. B.S., 1981, *summa cum laude*, Michigan State University; J.D., 1989, *magna cum laude*, University of California, Davis, School of Law. I'd like to thank a former Remedies student, Theresa A. Paparella, who stopped at the podium after class one day to ask a question that led to writing this article. Theresa noted that our casebook's treatment of the collateral-source rule relied exclusively on torts cases and asked, very simply, whether the rule also applies to contracts cases. When I found myself at a loss for a clear answer, I thanked her for waiting until after class to ask the question.

1. Douglas Laycock, Remedies in the Legal System and in the Curriculum, AALS Workshop, (Jan. 3, 2007), *available at* http://www.aals.org/am2007/wednesday-/remedies.htm (access by selecting "view outline" on webpage) (last visited Jan. 30, 2010). This perspective is also reflected in Professor Laycock's remedies casebook, which "contains no chapters on remedies for particular wrongs or particular kinds of injury." DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES xxix (3d ed. 2002). The book instead "attempts to explore general principles about the law of remedies that cut across substantive fields." *Id.* For a different academic perspective, see ROBERT S. THOMPSON, ET AL., REMEDIES: DAMAGES, EQUITY, AND RESTITUTION v (4th ed. 2009) (stating that its authors "regularly compare and contrast remedies available for different types of wrongs . . . particularly tort and contract").

2. *See* LAYCOCK, MODERN AMERICAN REMEDIES, *supra* note 1, at 8 (describing "remedies" as "neither procedural nor substantive, but somewhere in between").

3. *See id.* at 2.

4. *See id.* at 1-2.

5. The expression "rightful position" is a short hand for "the position [the plaintiff] rightfully would have come to but for defendant's wrong." *See id.* at 16 (attributing the source of the phrase to a judicial opinion authored by Judge Wisdom, *Local 189, United Papermakers v. United States*, 416 F.2d 980, 988 (5th Cir. 1969); Judge Wisdom in turn

defendant's breach of a duty imposed by law or a duty undertaken by contract, the rightful-position principle usually directs an award of money—i.e., compensatory damages—that is supposed to place the plaintiff, as nearly as a sum of money can, in the position that he or she would have occupied but for the breach.[6]

This trans-substantive approach to compensation is rooted, theoretically, in the basic moral precept that one who harms another ought to make things right.[7] Analytically, it is rooted in an axiomatic, counterfactual test of causation, which makes us responsible when, and to the extent, our breach of a legal duty makes the world a worse place than it would have been "but for" the breach.[8]

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took the phrase from a student note written by Carl David Elligers, Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260, 1268 (1967)).

6. *See* Chronister Oil Co. v. Unocal Ref. & Mktg., 34 F.3d 462, 464 (7th Cir. 1994) ("The point of an award of damages, whether it is for a breach of contract or for a tort, is, so far as possible, to put the victim where he would have been if the breach or tort had not taken place."). *See also* Michael Moore, *For What Must We Pay? Causation and Counterfactual Baselines*, 40 SAN DIEGO L. REV. 1181, 1183 (2003) (describing as "legion" damage awards that have been aimed at restoring the victim to the position he or she would have occupied but for the breach); *id.* at 1183-92 (offering ten illustrative applications of the point to various types of civil claims, including claims of tort and breach of contract).

7. "The traditional argument for restoring plaintiff to his rightful position is based on corrective justice. Plaintiff should not be made to suffer because of wrongdoing, and if we restore plaintiff to his rightful position, he will not suffer." LAYCOCK, MODERN AMERICAN REMEDIES, *supra* note 1, at 17. *See also* Moore, *supra* note 6, at 1183 (describing a view of compensation rooted in the "hard core of our moral obligations . . . that we do no harm"—a view that holds us responsible when and to the extent that "we make the world a worse place . . . compared to the way [it] would have been without our actions"). *But see* Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439, 443 (1990) (stating that corrective justice is just "one of two dominant theoretical approaches . . . the other [being] law and economics").

8. "For corrective justice theorists, causation . . . is 'the most pervasive and enduring requirement of tort liability over the centuries.'" Schroeder, *supra* note 7, at 444 (quoting Richard Wright, *Actual Causation vs. Probabilistic Linkage: The Bane of Economic Analysis*, 14 J. LEGAL STUD. 435, 435 (1985)). Even if counterfactual, causation analysis is considered improper for determining whether the plaintiff was injured, one may well accept it as at least a relevant factor for purposes of determining the extent of damages upon a finding of injury. *See, e.g.*, Stephen Perry, *Harm, History, and Counterfactuals*, 40 SAN DIEGO L. REV. 1283, 1309-1311 (2003) (advocating use of a historical-worsening test for purposes of ascertaining injury, but conceding that an appropriate factor for purposes of "quantifying damages . . . is what we might call 'net-worseoffness,' which is the difference, as ascertained by a counterfactual inquiry, between the plaintiff's current circumstances and the circumstances he or she would have been in had the wrong not occurred").

When applying the rightful-position principle, reciprocal adjustments are often made for "offsetting benefits" caused by the breach.[9] This adjustment, which is also premised on the axiomatic, counterfactual test of but-for causation,[10] likely applies, for example, to a wrongfully discharged employee who, as a result of being unemployed, is able to avoid the costs of travel to and from the workplace.[11] Similarly, the adjustment likely applies to a wrongfully discharged employee who, as a result of losing one job, is able to earn wages or salary from another

9. *See* LAYCOCK, MODERN AMERICAN REMEDIES, *supra* note 1, at 101. Some authors use the term "mitigation" to describe the reduction to damages that results when the plaintiff takes advantage of a beneficial opportunity created by the breach. *See, e.g.*, JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 14.18, at 511 (6th ed. 2009) (suggesting that a reduction for income that a wrongfully discharged employee "has earned" from a replacement job is explained by "the employee's burden of mitigation"). For the sake of clarity, however, this Article will confine the "mitigation" usage to another closely related reduction to compensatory damages—sometimes called a failure to mitigate damages—that occurs when the plaintiff actually fails to take advantage of the breach-induced opportunity, and does so unreasonably. For a general discussion of the mitigation doctrine, see *infra* notes 35-40.

10. Use of the "but for" test as a prerequisite to the offset is often implied. *See, e.g.*, LAYCOCK, MODERN AMERICAN REMEDIES, *supra* note 1, at 101 (illustrating the offsetting-benefits doctrine by noting that "[a]ny claim to lost wages, whether for personal injury, wrongful discharge, or employment discrimination, will be offset by the wages plaintiff earns in other jobs *that could not have been held if he had not lost the first job*") (emphasis added). *See also, e.g.*, JOHN E. MURRAY, JR., MURRAY ON CONTRACTS § 122, at 800 (4th ed. 2001) (noting the need to offset wrongful-discharge damages when the plaintiff has "earned a second salary *which he could not have earned had the [initial employment] contract not been breached*") (emphasis added). For a general discussion of the offsetting-benefits principle, see *infra* notes 41-43.

11. If the discharge was in breach of contract, an offset to the plaintiff's lost salary or wages would seem to be called for under the general measure of damages set forth in the contracts Restatement, which prescribes the offset as to "any cost or other loss that [the non-breaching party] has avoided by not having to perform." *See* RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981). Similarly, in the case of tortious job termination, an offset to the plaintiff's lost salary or wages would seem to be called for under the torts Restatement, which prescribes the offset "[w]hen the defendant's tortious conduct . . . has conferred a special benefit to the interest of the plaintiff that was harmed." RESTATEMENT (SECOND) TORTS § 920 (1979). *See also* Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 534 (1983) (stating that "unreimbursed costs, such as transportation to work" should be deducted when estimating the lost stream of income of one who is wrongfully unemployed).

job.[12] Indeed, an aim to precisely restore the employee's rightful position would seem to compel netting out the offsetting benefits in such cases.[13]

However, not every benefit caused by a breach will serve to offset a plaintiff's recovery,[14] just as some harms caused by a breach will not serve to enhance it.[15] Sometimes, in other words, the plaintiff is entitled to keep a breach-induced benefit without offset, just as sometimes the plaintiff must suffer a breach-induced harm without compensation.[16]

For example, imagine a first-year associate at a reputable law firm who is fired because powerful partners at the firm discover that the associate had learned of misconduct on their part and threatened to inform authorities about the partners' misconduct.[17] Suppose that this whistleblower later writes a very profitable book inspired by the

12. If the employee recovers the wages or salary from the breached contract, in addition to the second salary, clearly "he would be placed in a much better position than he would have been in had the contract been performed." *See* MURRAY, *supra* note 10, § 122, at 800.

13. These straightforward illustrations are perhaps the type that Professor Laycock had in mind when he wrote, "It usually seems obvious that the principle of restoring plaintiff to his rightful position requires that offsetting benefits be taken into account." *See* LAYCOCK, MODERN AMERICAN REMEDIES, *supra* note 1, at 101.

14. Consider this interesting example: "A knocks down B, as a result of which B is prevented from taking a ship that later sinks with all on board." RESTATEMENT (SECOND) TORTS § 920A, cmt. d, illus. 8 (1979). Given that B would have died "but for" the battery, should B's damages for the battery be diminished by his escape from death? The answer, according to the Restatement, is no, apparently because the battery was not a "legal cause" of the benefit. *See id.* § 920A cmt. d. For further discussion of this illustration, see *infra* notes 107-08 and accompanying text.

15. An interesting example might involve another victim of a battery who, as a result of being hospitalized for a few days to recover from his injuries, delays what would have been a safe and enjoyable journey on a cruise ship, only to later end up on a different ship that sinks with all passengers on board. Damages probably would not include losses incident to the battery victim's drowning, unless the battery is found to be a "legal cause" of the drowning. *See* RESTATEMENT (SECOND) TORTS § 917 (1979). Notably, the Restatement expressly contemplates the symmetry captured by the illustrations set forth in this footnote and the previous one. *See id.* § 920A cmt. d (explaining that "[t]he rules of causation applicable to the creation and extent of liability . . . apply to the diminution of damages"). For a discussion of this symmetrical application of the "legal cause" requirement—also known as the "proximate cause" requirement—see *infra* Part III.B.1.

16. In other words, the battery victim who missed the boat that later sank is entitled to enjoy, without offset, the benefit conferred by the battery, i.e., the rest of his life; conversely, in the case of the battery victim who ended up on the doomed boat, the damages paid by the batterer will probably not be enhanced by the victim's drowning death. *See supra* notes 14-15 and accompanying text.

17. One might imagine intriguing misconduct of the sort depicted in a popular movie about sinister partners at a law firm who assisted the elaborate money-laundering efforts of certain wrongdoing clients. *See* THE FIRM (Paramount Pictures 1993). Or one might imagine more mundane misconduct of the sort also depicted in the same movie, which involved the same partners' practice of over-billing clients. *See id.*

experience.[18] Even assuming that the book would have never been written but for the experience (and the time to write while unemployed), should the profits from the book be treated as an offsetting benefit that reduces the firm's liability for the wrongful discharge?[19] Or suppose that, instead of writing a book, the whistleblower tells his rich aunt about the experience, and she then decides to give him precisely the amount of his lost earnings until he finds substitute employment. Even if it is assumed that the aunt never would have made such a gift but for the wrongful discharge, should the gift be offset against the subsequent damage award against the firm?[20] Should answers to these questions depend on the abstract theory that the whistleblower asserts—i.e., disallow an offset if the firm is charged with a tort or statutory violation, but allow an offset if the firm is charged with the breach of a contract provision requiring "good cause" to fire the employee?[21]

Many readers would at least think twice about applying the offset to the breach-induced benefits in such cases, no matter the theory of liability, perhaps grasping for some means of escape from the formal logic of "but for" causation. This Article offers a means of escape, and in the process it identifies a trans-substantive approach to determining the scope of the offsetting-benefits principle in wrongful-discharge cases. In other words, this Article offers an approach that applies to all wrongful-discharge cases, no matter the substantive basis of the claim, and no matter what form the offsetting benefit takes—from lucrative book deals and gifts from rich aunts, to pension and unemployment benefits caused by the breach.

The trans-substantive approach offered here borrows on traditional liability-limiting principles that have long been used by the courts to limit the affirmative scope of a defendant's liability—i.e., principles underlying doctrines like "proximate cause" in tort and "specific foreseeability" in contract.[22] Simply put, the theory offered here is that, just as such doctrines limit the scope of losses for which a defendant can be held liable, the principles underlying these doctrines symmetrically

18. One might imagine a smash-hit novel of the sort that led to the movie referred to in the previous footnote. *See* JOHN GRISHAM, THE FIRM (Random House 1991).

19. For a response to a similar question, see *infra* Part III.B.3.b.

20. For a response to this question, see *infra* Part III.B.3.b.

21. For a critique of the tort-contract distinction used by some courts for such questions, see *infra* Part IV.B.

22. For discussion of these liability-limiting doctrines, see *infra* Part III.A.

apply to limit the scope of benefits that can offset the plaintiff's recovery.[23]

This symmetry theory is framed in Part II of this Article, which explains generally how compensatory damages are determined in civil cases. The theory is then advanced in Part III, which draws primarily on three sources: (1) scholarly recognition of a "symmetry principle" in cases of extremely fortuitous breach-induced benefits;[24] (2) hints of a symmetry principle underlying conventional treatment of the offsetting-benefits doctrine;[25] and (3) hints of a symmetry principle underlying a judicial tradition of rejecting an offset when the benefit takes the form of a payment to the victim from a "collateral source."[26]

Part IV of this Article further explores the symmetry theory by examining its application to a particular issue. The issue has been presented in a controversial line of cases that categorically abolishes the collateral-source rule in cases of wrongful discharge based on breach of contract, thus allowing an offset for collateral-source payments in contract cases, while categorically applying the rule in cases of wrongful discharge that are tortious, thus disallowing such an offset in torts cases.[27] As will be explained, the symmetry theory counsels against this sort of tort-versus-contract litmus test.

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23. For a brief look at this symmetry principle, see the illustrations discussed *supra* notes 14-16. For a more complete discussion of the symmetry principle, see *infra* Parts III.A-B.

24. An express recognition of the symmetry principle recently occurred among a group of torts and remedies scholars who met at a conference held by the University of San Diego Institute for Law and Philosophy. *See* Symposium, *Baselines and Counterfactuals, in the Theory of Compensatory Damages: What Do Compensatory Damages Compensate?*, 40 SAN DIEGO L. REV. 1091 (2003). As one conferee explains, the gist of the "'symmetry' principle . . . is that, just as a wrongdoer should not be held responsible for fortuitously caused harms, so too, he should not be able to claim credit for fortuitously caused benefits." John C.P. Goldberg, *Rethinking Injury and Proximate Cause*, 40 SAN DIEGO L. REV. 1315, 1334 (2003). For further discussion of this point, see *infra* Part III.B.1.

25. *See infra* Part III.B.2.

26. *See infra* Part III.B.3.

27. As of 1983, this line of authority consisted of just two "deviant" cases. The number of purportedly deviant cases, however, continues to grow. *See, e.g., infra* notes 204-05. For cases on the other side of this growing split of authority (i.e., cases rejecting the tort-contract distinction), see, for example, the cases cited *infra* note 243.

II. UNIVERSAL PRINCIPLES OF COMPENSATORY-DAMAGE CALCULATION: RIGHTFUL POSITION; AVOIDABLE CONSEQUENCES; AND OFFSETTING-BENEFITS

This section briefly describes compensatory-damage calculation in civil cases generally. This overview is intended to frame a more detailed examination of various limiting principles applicable to damage calculation, which are addressed in the next section.

There are three closely related principles that shape any effort to state generally how to measure compensatory damages in civil cases. The first and perhaps most basic of these is the "rightful position" principle.[28] Whether the case is based on tort, breach of contract, or violation of a statute, the rightful-position principle usually directs an award of damages that aims to place the plaintiff in the position that he or she would have occupied but for the breach.[29]

Of course, uniform use of the rightful-position principle does not mean that *application* of the principle always results in the same measure of damages regardless of the plaintiff's substantive theory. Consider, for example, a buyer who pays five thousand dollars for what appears to be a Rolex watch worth ten thousand dollars, but turns out to be a worthless

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28. A comprehensive treatment of the subject of compensatory damages typically begins with a discussion of this principle. *See, e.g.*, DAN B. DOBBS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION § 3.1, at 210 (2d ed. 1993) (introducing the subject of damages by describing the remedy as "an instrument of corrective justice, an effort to put the plaintiff in his or her rightful position"). For details about the origin and general meaning of the expression "rightful position," see *supra* note 5.

29. For authorities generally supporting the trans-substantive nature of the rightful-position principle, see *supra* note 6. For a specific statement of the principle in the context of tort law, see RESTATEMENT (SECOND) OF TORTS § 901 cmt. a (1979) (stating that the "the law of torts attempts primarily to put an injured person in a position as nearly as possible equivalent to his position prior to the tort"). For specific statements of the principle in the context of contract law, see RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. a (1981) (stating that "[c]ontract damages are ordinarily based on the injured party's expectation interest and are intended to give him the benefit of his bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed") and *id.* § 349 (offering "[a]s an alternative to the [ordinary] measure of damages" a measure based on costs incurred in "reliance" on the contract). For a specific statement of the principle in the context of a statutory remedy, see, for example, Franks v. Bowman Transp. Co., 424 U.S. 747, 764 (1976) (stating that the antidiscrimination provisions of Title VII are "intended to make the victims of unlawful employment discrimination whole" and that meeting this objective "requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination") (quoting Section-by-Section Analysis of H.R. 1746, accompanying the Equal Employment Opportunity Act of 1972 Conference Report, 118 CONG. REC. 7166, 7168 (1972)).

fake that falls apart shortly after the sale.[30] If the buyer sues for fraud, arguably the measure of damages is five thousand dollars because, but for the fraud (i.e., had seller told the truth about the watch being a worthless fake), the buyer probably would not have spent any of that amount to buy the watch.[31] On the other hand, if the buyer sues for breach of contract, the measure of damages would seem to be ten thousand dollars because, but for the breach of contract (i.e., but for the failure of the watch to be a Rolex, as warranted), the buyer would have a watch worth that amount.[32] Again, this tort-versus-contract discrepancy results from a difference only in the *application* of the rightful position principle—a discrepancy that occurs only if the breach itself is conceptualized differently by the substantive law.

Indeed, even the application of the principle is consistent across differing substantive bases if, for any given basis, the *conduct constituting the breach* is the same. Consider, for example, the wrongful-discharge illustration offered at the beginning of this Article, involving the law firm associate who was fired when partners at the firm discovered that the associate was going to blow the whistle on them for

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30. This example is based on *Smith v. Bolles*, 132 U.S. 125, 125 (1889), which presented a buyer who paid $1.50 per share for stock that allegedly would have been worth $10 per share had the investment been as the seller represented, but turned out to be "entirely worthless."

31. The trial court in *Bolles* actually instructed the jury that if it found the stock to be worthless, then damages should be equal to the amount that the stock "would have been worth if it had been as represented by the defendant." *Id.* at 129. On appeal, the Supreme Court characterized this measure of damages as more suited for a claim of "breach of contract," which was not alleged by the plaintiff. *Id.* Finding instead that the "gist of the action" was fraud, the Supreme Court in *Bolles* held that damages could be awarded only for losses incurred in reliance on the allegedly fraudulent representations, "such as the moneys the plaintiff had paid out." *Id.* Notably, however, more recent authorities often allow plaintiffs to recover the contract measure of damages in fraud cases. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 549 (1977) (allowing a fraud victim to recover "damages sufficient to give him the benefit of his contract . . . if these damages are proved with reasonable certainty"). This trend has been explained as a response to the anomaly of using the typically more conservative, out-of-pocket measure for fraud, which involves an intentional or reckless misrepresentation, while using the typically more liberal, benefit-of-the-bargain measure for breach of warranty, which can result from an innocent mistake. *See* LAYCOCK, MODERN AMERICAN REMEDIES, *supra* note 1, at 55.

32. As explained in the previous footnote, the Court in *Bolles* apparently would have accepted a benefit-of-the-bargain measure had the case sounded in contract. *Bolles*, 132 U.S. at 125. Likewise, the Uniform Commercial Code applies such a measure to breaches of warranty. *See* U.C.C. § 2-714(2) (2003) ("The measure of damages for breach of warranty is the difference . . . between the value of the goods accepted and the value they would have had if they had been as warranted . . . .").

misconduct on their part.[33] No matter the substantive basis of the claim, the breach is the job termination. Thus, whether the termination was wrongful because it breached an employment contract that limited the grounds for job termination to "good cause," or was wrongful because it was contrary to public policy and was therefore tortious, or was wrongful because it violated a statutory prohibition against firing whistleblowers, the rightful-position principle will attempt, in every case, to put the plaintiff in the position that he would be in had he not been fired. For example, it will attempt to restore to the victim any salary he may have lost during the time it took to find another job.[34]

A second related principle that frames this discussion is one that denies recovery for losses that could have been avoided—i.e., "mitigated"—by the exercise of reasonable care by the plaintiff.[35] Perhaps more accurately referred to as the doctrine of "avoidable consequences,"[36] this damages principle also applies basically the same way regardless of whether the plaintiff's claim is based on tort, contract, or statute.[37] For example, consider again the whistleblower case described at the beginning of this Article, but suppose for the moment

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33. *See supra* note 17.

34. "A wrongfully discharged employee is entitled to the salary that would have been payable during the remainder of the term reduced by the income which the employee has earned, will earn, or could with reasonable diligence earn in similar employment during the unexpired term." PERILLO, *supra* note 9, § 14.18, at 511.

35. Sometimes the doctrine is described as a "duty . . . to mitigate" damages. *See* E. ALLAN FARNSWORTH, CONTRACTS § 12.12, at 779 (4th ed. 2004). *See also* VICTOR E. SCHWARTZ, ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS 547 (11th ed. 2005) (discussing the "so-called duty to mitigate damages in tort law").

36. As Professor Murray explains:

> While courts often characterize the principle of avoidable consequences as a "duty," it is not a duty. Breach of a duty makes one liable to another party with a correlative right. A breaching party has no enforceable right against an injured party who fails to mitigate damages. The effect of such a failure is "merely to reduce the damages otherwise recoverable."

MURRAY, *supra* note 10, § 122, at 799. *See also* LAYCOCK, MODERN AMERICAN REMEDIES, *supra* note 1, at 96 (noting that "it is not quite accurate to say that plaintiff has a 'duty' to mitigate").

37. For a description of this principle in the context of tort claims, see RESTATEMENT (SECOND) OF TORTS § 918 (1979) (stating that "one injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort"); in the context of contract claims, see RESTATEMENT (SECOND) OF CONTRACTS § 350 (1981) (stating that "damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation"); and in the context of a particular statutory claim, see *Ford Motor Co. v. Equal Employment Opportunity Comm'n*, 458 U.S. 219, 234 (1982) (discussing a "statutory obligation to minimize damages" that applies to persons asserting claims of employment discrimination under Title VII).

that the fired associate had rejected a new job offered to him one week after he was fired from the old job, and then he ended up unemployed for many months while diligently looking for another job. If the job that was offered one week after he was fired was comparable to his old job in terms of rank, pay and location,[38] and if the associate would not have been able to work both jobs had there been no wrongful discharge from the old one,[39] the decision to reject the offered job likely would be deemed an unreasonable failure to avoid months of unemployment, for which he would not recover damages; that is, his damages would be limited to the apparently unavoidable week of unemployment.[40]

Conversely, if the whistleblower had taken the job that was offered one week after he was fired from the old job, the benefits actually earned on the new job likely will be offset against the benefits lost from the old job.[41] This is the result of the third basic damages principle—another principle universally applied to claims of tort, contract, and violation of statute—which is aptly known as the "offsetting benefits" principle.[42] The principle of offsetting benefits actually shares a reciprocal relation

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38. *See* PERILLO, *supra* note 9, § 14.18, at 511-12 (stating that, when mitigating damages, "the employee need not seek or accept a position of lesser rank, or at a reduced salary, or at a location unreasonably distant from the former place of employment.").

39. Damages for wrongful discharge are not reduced when the rejected employment opportunity would have been merely supplemental to the original job. *See* authorities cited *supra* note 10.

40. As Professor Murray explains:

> [A]n employee who is wrongfully discharged cannot sit idly by and recover the promised wages or salary, if it is possible to secure other employment of the same general character and without undue hardship. In such a case, the defaulting employer is entitled to deduct from the promised salary whatever the injured employee could have earned in such other employment.

MURRAY, *supra* note 10, § 122, at 800.

41. As previously noted, "A wrongfully discharged employee is entitled to the salary that would have been payable during the remainder of the term reduced by the income which the employee has earned [or] will earn . . . during the unexpired term." PERILLO, *supra* note 9.

42. *See generally* LAYCOCK, MODERN AMERICAN REMEDIES, *supra* note 1, at 101-03 (discussing applications of the principle to various tort and contract cases). For a specific description of the offsetting-benefits principle in the context of torts claims, see RESTATEMENT (SECOND) OF TORTS § 920 (1979) ("When the defendant's tortious conduct . . . has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable."); in the context of contracts claims, see RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981) (stating that the non-breaching party's damages generally include losses caused by the breach "less . . . any cost or other loss that he has avoided by not having to perform"); and in the context of a particular statutory claim, see *Ford Motor Co.*, 458 U.S. at 232-33 (describing an adjusted remedy if a Title VII plaintiff, who was previously unemployed, eventually obtains employment).

with the principle of avoidable consequences. Again, if the whistleblower rejects the new job, the salary foregone will be deducted from his recovery against the former employer under the avoidable-consequences principle; conversely, if he takes the new job, the salary earned will be deducted from his recovery under the offsetting-benefits principle.[43]

Combined, these three basic and universal principles of compensatory damages—the rightful-position, avoidable-consequences, and offsetting-benefits principles—can be reduced to a deceptively simple formula that hinges entirely on causation. Under this general formula, compensatory damages might be thought to equal (1) the value of losses actually caused by the breach, that is, losses that the plaintiff would not have suffered but for the breach;[44] minus (2) the value of benefits that the plaintiff either did or reasonably should have enjoyed as an actual result of the breach, that is, benefits that otherwise would not have been available but for the breach.[45] The next sub-section explores more deeply this symmetrical treatment of breach-induced losses and

43. The upshot of the two principles—avoidable consequences and offsetting benefits—is that the benefit (here, the new job) "is an opportunity that plaintiff must take advantage of if she wishes to be fully compensated." *See* LAYCOCK, MODERN AMERICAN REMEDIES, *supra* note 1, at 101. *See also Ford Motor Co.*, 458 U.S. at 234 (stating that a Title VII claimant's acceptance of alternative employment after a wrongful discharge "preserves . . . the claimant's right to be made whole").

44. Of course, as another universal damages principle, the fact and extent of the losses actually caused by the breach must be proven with reasonable certainty. *See* RESTATEMENT (SECOND) OF TORTS § 912 (1979) (stating that a plaintiff is "entitled to compensatory damages . . . if, but only if, he establishes by proof the extent of the harm and the amount of money representing adequate compensation with as much certainty as the nature of the tort and the circumstances permit"); RESTATEMENT (SECOND) OF CONTRACTS § 352 (1981) (denying recovery of damages "beyond an amount that the evidence permits to be established with reasonable certainty").

45. Conversely, the fact and extent of any given offset caused by the breach must also be proven with reasonable certainty. *See* RESTATEMENT (SECOND) OF TORTS § 920 cmt. d (1979) ("The rules of causation applicable to the creation and extent of liability . . . apply to the diminution of damages."); RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. d (1981) (limiting liability offsets to discretely ascertainable costs and losses avoided as a result of the breach). This two-part damages construct is reflected in both the torts and contracts Restatements. For the torts context, see generally RESTATEMENT (SECOND) OF TORTS § 903 cmt. a (1979) (explaining the aim to compensate for economic and non-economic losses caused by the tort); *id.* § 918 (reducing the award for losses that the plaintiff could have avoided by the exercise of reasonable care); *id.* § 920 (reducing the award for benefits conferred by the tort). For the contracts context, see generally RESTATEMENT (SECOND) OF CONTRACTS § 347(a)-(c) (1981) (allowing compensation for direct and consequential losses caused by the breach); *id.* § 347(d) (reducing the award for losses that the non-breaching party actually avoided by not having to perform); and, *id.* § 350 (reducing the award for losses that the non-breaching party could have avoided by the exercise of reasonable care).

benefits. It also explains, however, that "but for" causation is really just a starting point when determining the scope of the relevant losses and benefits.

III. SCOPE OF LIABILITY: LIMITING PRINCIPLES APPLICABLE TO BOTH SIDES OF COMPENSATORY-DAMAGE CALCULATION

A. Limitations to Damage Enhancement

Continue to consider the case of the wrongfully discharged whistleblower.[46] For present purposes, assume that he accepts substitute employment at a new workplace one week after the wrongful discharge. But this time, also assume that this individual's bad luck actually worsens at the new workplace; indeed, when reporting for his first day of work, while walking across a parking lot toward the worksite, he is struck by lightning. The lightning strike causes him some painful injuries necessitating costly medical care and an absence from work for a month. Notably, the incident would not have occurred but for the wrongful discharge; that is, had this unfortunate individual not been fired from his prior job, he would have reported for work at his prior workplace and would not have been hit by lightning.

Despite the but-for causal relation between the wrongful discharge and the losses incident to the lightning strike, your intuition might suggest that compensatory damages for those losses should not be assessed against the prior employer given the utter fortuity of the lightning strike.[47] Indeed, the illustration may well be stirring up memories (perhaps unpleasant ones) about liability-limiting principles that you encountered in law school when studying chestnuts like *Hadley v. Baxendale*[48] for a contracts class, or *The Wagon Mound*[49] for a torts class, or perhaps some analogous case for a statutorily based class.[50]

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46. *See supra* note 17.

47. *See* Goldberg, *supra* note 24, at 1334 (discussing a "common intuition about the right result in [a similar example] if fortuitousness does affect, or ought to affect, our attributions of responsibility for harms").

48. Hadley v. Baxendale, (1854) 156 Eng. Rep. 145. This case offered, as "the proper rule," the following scope of liability for breach of contract:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

Id. at 151.

If the chestnuts by name do not come to mind, perhaps echoes of their lessons support an intuition against holding the wrongful-discharge defendant liable for the results of the lightning strike. For example, echoes from those cases might have you thinking, in so many words, that the losses incident to the lightning strike are not compensable because they did not "aris[e] naturally, i.e., according to the usual course of things," from the termination of the former employee's job;[51] or the losses incident to the lightning strike could not "reasonably be supposed to have been in the contemplation of [the former employer and employee], at the time they made the [employment] contract, as the probable result of the breach of it";[52] or the losses incident to the lightning strike were not losses, as "judged by the standard of the reasonable man, that [the former employer] ought to have foreseen";[53] or the losses incident to the lightning strike were not "of the type the [substantive] laws [e.g., a statute prohibiting the discharge of a whistleblower[54]] were intended to prevent."[55] Or perhaps you simply

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49. Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'g Co. (*The Wagon Mound*), [1961] A.C. 388. The case offered, as "a principle of civil liability," the following scope of liability in tort:

> [A] man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civili[z]ed order requires the observance of a minimum standard of behaviour. . . . [I]f it is asked why a man should be responsible for the natural or necessary or probable consequences of his act (or any other similar description of them) the answer is . . . since they have this quality, it is judged by the standard of the reasonable man that he ought to have foreseen them.

Id. at 422-23.

50. For example, in an antitrust case brought against market entrants whose presence illegally threatened to lessen competition or create a monopoly, the Supreme Court offered the following scope of liability under the Clayton Act:

> [T]o recover treble damages on account of [the statutory] violations, [plaintiffs] must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful . . . . The injury . . . should, in short, be "the type of loss that the claimed violations . . . would be likely to cause."

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) (internal citation omitted).

51. *Hadley*, 156 Eng. Rep. at 151.

52. *See id.*

53. *The Wagon Mound*, [1961] A.C. 388 at 423.

54. *See, e.g.*, MICH. COMP. LAWS ANN. §§ 15.361-.364 (West 2004) (providing an employee with a cause of action against his or her employer if the employer discriminates against the employee because he or she reported or was about to report a suspected violation of law to a public body).

55. *Brunswick Corp.*, 429 U.S. at 489.

regard the lightning strike itself as an independent, intervening "act of God" that cannot fairly be attributed to the wrongful discharge.[56]

To be sure, various standards might be offered to rationalize an intuitively felt need to limit liability in this hypothetical situation—the particular standard used perhaps depending on whether the case is based on contract or tort,[57] and if the characterization is tort, perhaps depending on whether the tort was or was not intentional.[58] Underlying the various standards, however, are some common limiting principles that shape, universally, the scope of liability for all civil wrongs.[59] Three such

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56. *See* DAN B. DOBBS, THE LAW OF TORTS § 191, at 476 (2000) (explaining that some courts "have rejected liability for harm resulting from an unforeseeable force of nature where the harm caused was not the kind risked by the defendant").

57. Although noting that liability limitations in tort and contract are "analogous," Professor Dobbs points out that the limitations in tort are usually "expressed in rules of proximate cause or legal cause," whereas the limitation in contract is usually expressed in the "contemplation of the parties rule" from *Hadley*. *See* DOBBS, *supra* note 28, § 3.4, at 235-36. Professor Eisenberg similarly discerns a common thread between the two limitations—an "element of foreseeability" is required by both—but points out that the *Hadley* standard requires a greater degree of foreseeability (i.e., "likelihood"), and that the *Hadley* standard, unlike the tort standard, assesses foreseeability as of the time of contracting rather than the time of the breach. Melvin A. Eisenberg, *Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law*, 93 CAL. L. REV. 975, 994-95 (2005). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 351 cmt. a (1981) (stating that the contract liability "requirement of foreseeability is a more severe limitation of liability than is the requirement of substantial or 'proximate' cause in the case of an action in tort").

58. *Compare* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 29 (Proposed Final Draft No. 1, 2005) (limiting "liability for tortious conduct" to "harms that result from the risks that made the actor's conduct tortious"), *with id.* § 33(a) (stating that "[a]n actor who intentionally causes physical harm is subject to liability for that harm even if it was unlikely to occur"), *and id.* § 33(b) (stating that "[a]n actor who intentionally or recklessly causes physical harm is subject to liability for a broader range of harms than the harms for which that actor would be liable if only acting negligently").

59. Some scholars, for example, have commented on the universality of a "foreseeability" principle that defines the scope of liability in both torts and contract cases. *See* Eisenberg, *supra* note 57, at 994 (discerning a common "element of foreseeability" underlying both the proximate cause rule of tort law and the contemplation-of-the-parties rule of *Hadley*); Peter A. Alces, *On Discovering Doctrine: "Justice" in Contract Agreement*, 83 WASH. U. L.Q. 471, 484-85 (2005) (explaining that the *Hadley* rule of forseeability offers a "calculus . . . similar to what we encounter in the tort cases so far as proximate cause is concerned"). Similarly, the degree of the defendant's moral culpability is an overarching variable that shapes the scope of liability. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 33 cmt. e (Proposed Final Draft No. 1, 2005) (describing a scope of liability that is greater for intentional and reckless torts than for negligent ones and that is determined by the tortfeasor's "moral culpability"; also stating that this "greater-scope-of-liability principle . . . is universally accepted").

principles are advanced here as the most fundamental, albeit with much concern about oversimplification.[60]

1. Culpability Nexus

The first of these fundamental limiting principles is culpability nexus—that is, the remedial fit between the defendant's blameworthiness and the given item of loss for which the plaintiff seeks compensation. This variable is illustrated by the tendency toward a wider range of liability for intentional torts than for unintentional torts,[61] and toward a wider range of liability for unintentional torts than for breaches of contract.[62]

Indeed, it has been suggested that use of the term "wrongful" to describe a job termination without right should be confined to discharges that constitute a tort or that violate a statute, and that, conversely, job termination in breach of contract is not "wrongful."[63] Justice Holmes once shared a similar perspective about the amoral nature of one's duty under a contract generally[64]—a perspective which "has since been developed into the 'efficient breach' theory of contractual remedies."[65] Such sweeping generalizations, however, describe only a tendency, for there certainly are occasions to treat some breaches of contract as more "wrongful" than others and, accordingly, enhance the remedies imposed.[66]

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60. To be sure, topics such as proximate cause have "managed to defy repeated efforts at characterization and explanation." Goldberg, *supra* note 24, at 1315.

61. *See supra* note 58.

62. *See supra* note 57.

63. *See* Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1661-62 (1996) (suggesting that the discharge of an employee in breach of an implied contract or implied covenant of good faith is not a "wrongful" discharge because such doctrines, unlike antidiscrimination and antiretaliation doctrines, are not based on "a particular wrongful motive on the part of the employer").

64. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897) ("Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract. . . . The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else.").

65. Shyamkrishna Balganesh, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL'Y 593, 633 (2008).

66. *See* Richard Craswell, *When is a "Willful" Breach Willful? The Link Between Definitions and Damages*, 107 MICH. L. REV. 1501, 1501 (2009) ("[C]ourts sometimes do award higher damages, under various legal doctrines, if the behavior of the [contract] breacher seems especially culpable. When they do, they may describe the breacher's behavior using labels such as willfully, or in bad faith, or fraudulently, or maliciously . . . ."); Steve Thel & Peter Siegelman, *Willfulness Versus Expectation: A Promisor-Based Defense of Willful Breach Doctrine*, 107 MICH. L. REV. 1517, 1517-18 (2009) ("[W]hile

For example, damages for emotional distress, which generally are thought to be unavailable for a breach of contract, are indeed available if "the breach is of such a kind that serious emotional disturbance was a particularly likely result."[67] A remarkable illustration of this point presents a hotel keeper who, in breach of contract, wrongfully ejects a guest and, while doing so, "uses foul language and accuses [the guest] of immorality."[68] Query whether the foul-mouthed hotel keeper is any less culpable than the employer who, arbitrarily and in breach of contract, fires a longstanding employee for trumped up reasons aimed at concealing the breach.[69]

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the promisee's expectation is not affected by the willfulness of the breach, expectation can often be measured or interpreted in many ways, and when a breach is found to be willful, the defendant's bad behavior grants license to pick the most generous definition of the plaintiff's expectation."); *see also, e.g.*, Robert A. Hillman, *Contract Lore*, 27 J. CORP. L. 505, 509 (2002) (observing that, "in construction contracts, the degree of willfulness of a contractor's breach helps courts determine whether to grant expectancy damages measured by the cost of repair or the diminution in value caused by the breach, the latter often a smaller measure"). Even Judge Posner, a renown efficient-breach theorist, recognizes that "we might as well throw the book at the promisor" who commits an "opportunistic" breach of contract. POSNER, ECONOMIC ANALYSIS OF LAW § 4.9, at 118 (6th ed. 2003).

67. *See* RESTATEMENT (SECOND) OF CONTRACTS § 353 cmt. a (1981).

68. *Id.* § 353 cmt. a, illus. 2.

69. As Professor Fleming has stated: "Wrongful dismissal is simply not a breach of contract which courts will view with the detachment advocated by apologists of the 'efficient' breach; its potentially devastating effect on the employee is attested by the pejorative use of the term 'wrongful' from the tort vocabulary . . . ." John G. Fleming, *The Collateral Source Rule and Contract Damages*, 71 CAL. L. REV. 56, 81 (1983). Similarly, Professor McCormick, long before the development of modern wrongful-discharge jurisprudence, suggested that courts should,

> expand their measure of compensation for breach of the employment *contract* by recognizing that deprivation of a job, if more than a casual one, not only affects usually a man's reputation and prestige, but ordinarily may so shake his sense of security as to inspire, even in men of firmness, deep fear and distress.

CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 163, at 639 (1935) (emphasis in original). *But cf.* E.I. DuPonte de Nemours & Co. v. Pressman, 679 A.2d 436, 447 (Del. 1996) (confining the tort of bad-faith breach of contract to insurance cases, and distinguishing arbitrary employment termination on the grounds that "[m]arket forces will not allow an employer consistently to treat valued employees in . . . a shabby manner"); Foley v. Interactive Data Corp., 765 P.2d 373, 391 (Cal. 1988) (stating that "the clear majority of jursidictions have either expressly rejected the notion of tort damages for breach of the implied covenant in employment cases or impliedly done so by rejecting any application of the covenant in such a context").

2. Risk Nexus

A second fundamental principle that shapes the scope of civil liability is risk nexus—i.e., a relatedness, if you will, between the defendant's wrong and the plaintiff's loss that might be described as "proximate" or "foreseeable."[70] This principle underlies the tendency to confine tort liability to those losses risked that made the defendant's conduct tortious to begin with,[71] and that similarly underlies the tendency to confine contract liability to those losses that the breaching party had reason to foresee at the time the contract was formed.[72] Once again, the tort-contract distinction described here is merely a tendency, for there certainly are occasions for applying the contract principle to torts cases,[73] and vice versa.[74]

Another tendency that illustrates the risk-nexus principle is the law's greater skepticism toward damages described as "consequential" or

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70. For traditional articulations of this nexus, see *supra* notes 48-49.

71. Torts authorities typically call this nexus requirement "proximate cause" or "scope of liability," and they usually equate the scope of liability with the scope of harms risked. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 29 (Proposed Final Draft No. 1, 2005) (limiting the "scope of liability" for unintended physical harm to "those physical harms that result from the risks that made the actor's conduct tortious"); *see also, e.g.*, DOBBS, *supra* note 56, § 183, at 452 (suggesting that the question of proximate cause, in most cases, can be resolved by asking "whether the injury that occurred was within the risk created by the defendant"); Goldberg, *supra* note 24, at 1337 (discussing "modern formulations" of proximate cause in negligence cases, "which require the plaintiff to prove either that she suffered a harm of a type that was reasonably foreseeable to the defendant at the time of acting, or that the harm consists of the realization of at least one of the risks that rendered the defendant's conduct careless").

72. Contracts authorities typically describe this nexus requirement as a rule of specific foreseeability. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 351 cmt. a (1981) ("A contracting party is generally expected to take account of those risks that are foreseeable at the time he makes the contract. He is not, however, liable in the event of breach for loss that he did not at the time of contracting have reason to foresee as a probable result of such a breach."); U.C.C. § 2-715(2) (2004) (stating that a seller is liable for losses that he or she "had reason to know" of "at the time of contracting"). This specific-foreseeability rule traces back to *Hadley*. *See supra* note 48.

73. *See, e.g*, Evra Corp. v. Swiss Bank Corp., 673 F.2d 951, 955-58 (7th Cir. 1982) (Posner, J.) (deciding that Illinois courts would apply the *Hadley* standard to deny liability in a torts case presenting a bank whose negligent mishandling of a fax caused plaintiff to miss a payment on, and thus to lose, a valuable asset).

74. *See, e.g.*, Ganoung v. Daniel Reeves, Inc., 268 N.Y.S. 325, 329 (N.Y. City Mun. Ct. 1933) (holding that damages for breach of implied warranty of merchantability are not limited to those damages contemplated at the time of contracting, but instead extend to "all damages resulting as a direct and natural consequence of the breach"); *see also, e.g.*, U.C.C. § 2-715(2) ("Consequential damages resulting from the seller's breach include . . . injury to person or property *proximately resulting* from any breach of warranty.") (emphasis added).

"special" as opposed to "direct" or "general."[75] The traditional reason for this skepticism is that consequential or special damages tend to be "more speculative, less certain, more remote, and more likely to have been avoidable if the plaintiff had been more diligent."[76] Indeed, the more consequential the causal connection between the loss and the breach, the more skepticism a judge is apt to have about allowing recovery for the loss.[77]

3. Policy Considerations

The third and final liability-limiting principle discussed here is something of a catch-all, and it is actually not a *principle* at all. To the contrary, it is a variety of *policy* constraints on liability that can arise even if the defendant is quite culpable and the victim's injury is quite connected to the defendant's wrong.[78] Consider, for example, a defendant who negligently spills a large quantity of toxic material into a major waterway.[79] The spill kills much of the water's marine life, which in turn disrupts commercial fishing, which in turn disrupts many other business activities—including the business activities of those at the water's edge who support commercial fishing, as well as the business activities of those beyond the water's edge who process and distribute fish, who sell fish in grocery stores, and who prepare and serve fish in restaurants.[80]

Despite the defendant's culpability and the foreseeability of all the harms that followed,[81] a judge may well feel constrained to draw a line

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75. *See, e.g.*, U.C.C. § 1-106(1) (2004) (stating that "neither consequential or special nor penal damages may be had except as specifically provided in this Act or by other rule of law"); *see also, e.g.*, FED. R. CIV. P. 9(g) ("If an item of special damage is claimed, it must be specifically stated.").

76. *See* LAYCOCK, MODERN AMERICAN REMEDIES, *supra* note 1, at 59.

77. A famous articulation of the proximate cause doctrine, for example, includes among various factors the question whether there was a "direct connection" between the breach and the loss, "without too many intervening causes"; also to be considered is whether the causal connection is "not too attenuated" and not "too remote." *See* Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 104 (N.Y. 1928) (Andrews, J., dissenting).

78. In negligence cases, for example, a court might "use the rubric of duty" to deny liability "for reasons of principle or policy" when the defendant, a social host, served far too much liquor to a guest who foreseeably drove home from the party and had an accident. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 7 cmt. a (Proposed Final Draft No. 1, 2005).

79. *See, e.g.*, Pruitt v. Allied Chem. Corp., 523 F. Supp. 975 (E.D. Va. 1981).

80. *See id.* at 976 & n.1.

81. *See id.* at 977 (suggesting as "rarely apposite" a limit to liability in such cases on the grounds that any of the losses are "not foreseeable" or are "too remote").

somewhere.[82] And the line drawn might not be based on any coherently articulated principle.[83] Perhaps a judge might say that liability should stop at the point where some notion of an optimum level of care would no longer be advanced by any further liability,[84] or where some notion about who is best able to insure against injury shifts to those injured,[85] or where some notion of common sense simply says that's enough.[86]

Notably, similar policy-based constraints might apply in a contracts case. Consider, for example, the limited scope of liability of the carrier in *Hadley*.[87] The carrier had agreed to a next-day delivery of a miller's crankshaft to a repair shop, after specifically being "told . . . that the mill was stopped, and that the shaft must be sent immediately."[88] The carrier then inexcusably delayed delivery and, as a result, the mill lost profits far in excess of the fee it paid for delivery of the crankshaft.[89] If the carrier did indeed know at the time of contracting that late delivery would likely result in these "special damages," there would seem to be no principled basis to deny liability for those damages.[90] But a judge might

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82. *See id.* at 979-80 (pointing out the potential for an "almost infinite" number of plaintiffs, and thus suggesting that "some limitation to liability, even when damages are foreseeable, is advisable").

83. *See id.* at 980 (acknowledging "a perceived need to limit liability, without any articulable reason for excluding any particular set of plaintiffs").

84. *See id.* at 978 (resorting to an "economic rationale" that would stop liability at the point where prevention costs exceed accident costs, but noting difficulties applying the idea).

85. *See, e.g.*, State of Louisiana *ex rel.* Guste v. M/V Testbank, 752 F.2d 1019, 1029 (5th Cir. 1985) (en banc) (denying recovery by persons who suffer purely economic harm because they are better able to insure against such losses than are the waterway polluters), *cert. denied*, 477 U.S. 903 (1986).

86. *See Palsgraf*, 162 N.E. at 104 ("It is all a question of expediency. There are no fixed rules to govern our judgment. . . . . There is in truth little to guide us other than common sense."). In *Pruitt*, the line was drawn at water's edge; i.e., those who fished the waters and those who assisted fishing from the water's edge could recover for their economic losses, while those working beyond the water's edge could not. *Pruitt*, 523 F.Supp. at 980.

87. *See Hadley*, (1854) 156 Eng. Rep. 145.

88. *Id.* at 147.

89. *Id.* at 146-47.

90. The court's decision to deny liability for the mill's lost profits purportedly was based on the lack of foreseeability of those lost profits. *Id.* at 151. However, as Justice Scalia has pointed out:

> [E]ven according to the [court's] new rule—that only reasonably foreseeable damages are recoverable—the miller rather than the carrier *should* have won the case. The court's opinion simply overlooks the fact that the carrier was *informed* that the mill was stopped; it must have been quite clear to the [carrier] that restarting the mill was the reason for the haste, and that profits would be lost while the mill was idle.

nevertheless want to disallow those special damages because they are simply too big, perhaps based on some notion that the contract price charged by the carrier doesn't seem to cover the allocation of this risk.[91] Or maybe the judge would find the special damages too big based on some notion of how little it would have cost the miller to avoid the loss by, for example, keeping on hand a spare crankshaft.[92]

In sum, the enhancement side of damages calculation does not extend to all losses caused by the breach in the actual, "but for" sense of causation. Additional prerequisites to damage enhancement include a remedial fit between any given loss for which the plaintiff seeks compensation, on the one hand, and, on the other hand, (1) the blameworthiness of the defendant's wrong, and (2) the scope of losses risked by the defendant's wrong. And even as to losses with sufficient nexus along these lines, the remedial fit might still be defeated on policy grounds that are not always is capable of completely coherent articulation.

B. Limitations to Damage Offsets

The theory offered here is that, just as nexus principles and policy concerns limit the scope of losses for which the defendant can be held liable, the very same considerations limit the scope of benefits that can offset the plaintiff's recovery. In other words, both sides of the damage calculus—losses that enhance recovery and benefits that reduce it—are subject to symmetrical application of the principles and policies underlying doctrines such as proximate cause.

To illustrate the point dramatically, consider again the whistleblower situation offered at the beginning of this Article,[93] and again assume that he took alternative employment at another worksite one week after he was wrongfully discharged from the old job. But this time, rather than

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ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 6 (1997).

91. *See* RESTATEMENT (SECOND) OF CONTRACTS § 351(3) (1981) ("A court may limit damages for foreseeable loss by excluding recovery for loss of profits . . . if it concludes that in the circumstances justice so requires to avoid disproportionate compensation.").

92. As Judge Posner once explained:

> [T]he animating principle of *Hadley v. Baxendale* . . . is that the costs of the untoward consequence of a course of dealings should be borne by that party who was able to avert the consequence at least cost and failed to do so. In *Hadley* the untoward consequence was the shutting down of the mill. The carrier could have avoided it by delivering the engine shaft on time. But the mill owners . . . could have avoided it simply by having a spare shaft.

Evra Corp. v. Swiss Bank Corp., 673 F.2d 951, 957 (7th Cir. 1982).

93. *See supra* Part I.

assume a lightning strike that injures him at the new workplace, assume instead that lightning strikes his old workplace and ignites an explosion that kills everyone in his old work area. Indeed, but for the wrongful discharge, he would have been in that prior work area and certainly would have been killed, too. So the question now is whether the employer is entitled to have this fortuitous benefit—to be sure, a "but for" result of the wrongful discharge—offset liability for that discharge.[94]

1. Scholarly Recognition of a Symmetry Principle in Cases of Extremely Fortuitous Benefits

A hypothetical situation similar to the one offered above received considerable attention among several attendees at a symposium held a few years ago, in 2003.[95] Their hypothetical, which is also quite odd, presents a "careless cab driver who crashes and causes his passenger a broken leg, in turn causing the passenger to miss a doomed airplane flight."[96] Among the symposium attendees who considered the situation, "the strong intuition [was] that the driver should not be granted an offset against the broken leg equal to the value of the substantial benefit he conferred by causing the passenger to avoid death in the plane crash."[97] The bigger challenge presented by the question was explaining their reasons for this strong intuition.[98]

The explanation that apparently garnered consensus was dubbed the "symmetry principle."[99] This label is shorthand for the notion that, "just as a wrongdoer should not be held responsible for fortuitously caused harms, so too, he should not be able to claim credit for fortuitously caused benefits."[100] One attendee in particular elaborated on the explanation by characterizing the taxi case as one for negligence,[101] and then suggesting that the offsetting-benefits question might be subject to the same tests of "proximate cause" that are used on the question of

94. To be sure, adjustments for offsetting benefits are often much more routine than this unusual example might suggest. *See, e.g.*, Part I. The unusual example, however, will help flesh out a full account of the subject, which faces "many complexities . . . as to when offsets are, or ought to be, permitted and when they will affect . . . judgments as to the appropriate level of compensatory damages." *See also* Goldberg, *supra* note 24, at 1333 (working with a similarly unusual hypothetical situation).

95. Goldberg, *supra* note 24, at 1333.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 1334.

100. *Id.*

101. Goldberg, *supra* note 24, at 1333 (presuming a "basis for an action in negligence").

damage enhancement.[102] He stated that modern accounts of proximate cause "require the plaintiff to prove either that she suffered a harm of a type that was reasonably foreseeable to the defendant at the time of acting, or that the harm consists of the realization of at least one of the risks that rendered the defendant's conduct careless."[103] Of course, these are essentially risk-nexus formulations of the sort described above. Application of them was ultimately left to the reader: Was the benefit in the taxi case—preventing the plaintiff from boarding a doomed airplane flight—either a reasonably foreseeable benefit of, or within the scope of benefits made more likely by, the defendant's careless driving?[104] Clearly, it was neither.

The same lack of risk nexus is just as clear if the taxi case happened to be grounded on breach of contract, for example, for the cab driver's breach of a promise either to transport his rider to the airport on time, or to attempt to do so without violating any rules of the road. To be sure, the jargon surrounding the offsetting benefits question might differ with the shift to a contract basis. Symmetrical use of the familiar foreseeability test applicable to contract damages, for example, might yield this question: At the time the cab driver and passenger entered the contract, did the driver know or have reason to know that a failure to perform would prevent the passenger from boarding a doomed airplane flight?[105] Again, clearly, he or she did not.

Dramatic illustrations of breach-induced benefits that lack risk nexus have also been offered by other scholarly legal authorities—indeed, both the *Restatement of Contracts (Second)* and the *Restatement of Torts (Second)*. The torts Restatement offers this unusual illustration: "A knocks down B, as a result of which B is prevented from taking a ship that later sinks with all on board."[106] Although B surely would have died but for the battery, the torts Restatement says that B's damages for the battery be should not be diminished by his escape from death because, according to the Restatement, the battery was not a "legal cause" of the

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102. Professor Goldberg's elaboration begins: "Of course the symmetry principle will only support the common intuition about the right result in the taxi example if fortuitousness does affect, or ought to affect, our attributions of responsibility for harms. And here, finally, we arrive at the issue of *proximate cause* . . . ." *See id.* at 1334 (emphasis added).

103. *See id.* at 1337.

104. The symmetry principle was parenthetical to the primary aim of Professor Goldberg's article, which "sketches an account of the rationale for a proximate cause limitation on responsibility for harms (and, if the symmetry principle holds, an equivalent limitation on credit for benefits conferred)." *See* Goldberg, *supra* note 24, at 1342.

105. For a description of this familiar test, see *supra* note 72.

106. RESTATEMENT (SECOND) OF TORTS § 920A, cmt. d, illus. 8 (1979).

benefit.[107] Of course, the "legal cause" jargon captures the same limitation labeled above as "proximate cause,"[108] and it is indeed the same type of jargon that would be employed for purposes of limiting damage enhancement if, for example, the battery victim, as a result of being hospitalized a few days to recover from his injuries, had delayed what would have been safe and enjoyable journey on a cruise ship, only to later end up on a different ship that sinks with all passengers on board.[109] Notably, the torts Restatement expressly contemplates this symmetry, explaining that "[t]he rules of causation applicable to the creation and extent of liability . . . apply to the diminution of damages."[110]

The contracts Restatement also offers an extreme illustration along the same lines:

> A contracts to build a machine for B and deliver it to be installed in his factory by June 30. A breaks the contract and does not deliver the machine. B's factory is destroyed by fire on December 31 and the machine, if it had been installed there, would also have been destroyed.[111]

Although surely the machine would have been destroyed in the fire but for A's breach, the contacts Restatement says that the factory fire "is not considered in determining B's damages."[112] In other words, if the machine's value was $100,000 greater than the contract price on the day delivery was due, B apparently is entitled to damages in that amount, even if the value of B's actual loss was some small fraction of that amount which B paid as a fair rental price for a comparable machine—for six months.[113] The only reason given for this outcome, according to the contracts Restatement, is that the factory fire was an "unrelated

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107. *See id.* § 920A, cmt. d (explaining its rejection of the offset here with a cross-reference to the Restatement's section 917, which, conversely, applies a "legal cause" limitation to harms that enhance the measure of damages).

108. *See* SCHWARTZ, *supra* note 35, at 293 (observing that the torts Restatement "substituted the term 'legal cause' for proximate cause").

109. *See* RESTATEMENT (SECOND) OF TORTS § 435A (1965) (rejecting liability "where the harm results from an outside force the risk of which is not increased by the defendant's act").

110. RESTATEMENT (SECOND) OF TORTS § 920A cmt. d (1979).

111. RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. d, illus. 10 (1981).

112. *Id.*

113. Under the Restatement's general measure of contract damages, B is entitled to "the value . . . of [A's] performance" less "any cost [such as payment of the contract price] . . . that [B] has avoided by not having to perform." *See id.* § 347.

event."[114] In other words, the loss avoided (destruction of the machine), though clearly caused by A's breach in fact, is not a benefit deserving of the label "proximate" or, if the language of *Hadley* is preferred, "foreseeable."[115] Although not saying so expressly, the contracts Restatement's conclusion, like the analyses offered in similar cases above, is best explained by the symmetry principle.

This conclusion is bolstered by another illustration from the contracts Restatement presenting a *related* post-breach event that *would* be taken into account in limiting the non-breaching party to actual losses.[116] In this illustration, an employee to a six-month personal service contract wrongfully repudiates the contract and then, a month after the employment period would have begun, becomes so ill that he would not have been able to work the remaining five months anyway.[117] According to the contracts Restatement, this post-breach event *is* taken into account; that is, the employer's damages are limited to the one month of lost services actually caused by the breach.[118] The continuing relationship of the parties to the contract perhaps best explains this result. In light of the continuing personal services contemplated by the contract, unlike the one-time delivery of a machine, the post-breach impossibility of performance is indeed a *related* event[119]—i.e., an event more deserving of the label "proximate" or "foreseeable."

2. *Hints of a Symmetry Principle Underlying Conventional Treatment of the Offsetting-Benefits Doctrine*

As just explained, extreme illustrations of fortuitous breach-induced benefits dramatically induce an intuitively felt need to limit the offsetting-benefits doctrine to those benefits that are somehow more "related" to the breach. The need for such a nexus, however, is not limited to extreme cases. Indeed, conventional offsetting-benefits doctrine impliedly requires such a nexus in all cases.

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114. *See id.* § 347 cmt. d.

115. *Hadley*, 156 Eng. Rep. at 145.

116. *See* RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. e, illus. 15 (1981).

117. *Id.*

118. *Id.*

119. *See id.* § 347 cmt. e (stating that when "an event occurs that would have discharged the party in breach on grounds of impracticability of performance or frustration of purpose, damages are limited to the loss sustained prior to that event").

a. Conventional Tort Doctrine Regarding Offsetting Benefits

That a breach-induced benefit might accrue to some *unrelated* interest, and thus not offset the plaintiff's recovery, is the very basis of the torts Restatement's black-letter rule regarding offsetting benefits generally.[120] According to that general rule, a breach-induced benefit offsets a defendant's liability only if it accrues "to the interest of the plaintiff that was harmed" by the breach.[121] Under this "same interest" rule, for example, a plaintiff's recovery of damages for "pain and suffering" caused by an unauthorized surgical procedure could be offset by "averted future suffering" also caused by the surgery.[122] Conversely, the same-interests rule disallows an offset, for example, when a victim of false imprisonment who claims damages for "pain, humiliation and physical harm" also "obtained large sums from newspapers for writing an account of the imprisonment."[123]

Such illustrations strongly hint of symmetrical application of a risk nexus required for damage enhancement under the "proximate cause" rubric. Recall that under the proximate-cause rubric, liability generally is confined to those losses risked that made the defendant's conduct tortious to begin with.[124] Essentially, the torts Restatement's same-interest rule focuses exclusively on the specific range of compensable interests jeopardized by the defendant's tortious conduct, and it symmetrically confines liability offsets to benefits accruing to precisely the same interests (to the extent that those interests were actually harmed by the defendant's tortious conduct).[125]

The symmetry of the risk-nexus principle is perhaps most vivid when its purely logical application produces anomalous results. Recall how the risk-nexus principle—while thought to create a generally fair scope of liability for any given breach—occasionally raises the prospect of intolerable damage enhancement (extending to, for example, all losses

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120. The complete black-letter rule states:

> When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.

RESTATEMENT (SECOND) OF TORTS § 920 (1979).

121. *Id.*

122. *See id.* § 920 cmt a.

123. *Id.* § 920 cmt. b, illus. 6.

124. *See supra* note 71.

125. *Cf.* Marciniak v. Lundborg, 450 N.W.2d 243, 248 (Wis. 1990) (stating that "the drafters of the Restatement felt that the 'same interest' limitation contemplates a narrow definition of 'interest'").

foreseeably caused by a toxic spill[126] or late delivery of a crank shaft[127]). To be sure, a similar problem can arise when the risk-nexus principle is applied symmetrically to the liability-offset side of damage calculation. In other words, purely logical use of the torts Restatement's same-interest rule can raise the prospect of intolerable liability offsets. In the false imprisonment scenario, for example, formalistic application of the same-interest rule would seem to call for an offset for the victim's news-story earnings—i.e., cash—if the defendant's tort was so severe that it disabled the victim from earning cash at his usual job, or if it was so severe as to result in the victim's expenditure of large sums of cash for much-needed psychiatric care.[128] Commentators and courts have railed against liability offsets in such cases,[129] just as they have railed against damage enhancement when the logic of the proximate cause doctrine produces a scope of liability regarded as too big.[130]

Notably, the torts Restatement's same-interest rule is subject to an open-ended qualification that can trump risk-nexus logic that grants too much liability offset, just as loosely articulated considerations of policy can trump risk-nexus logic that produces intolerably large liability.[131] According to the torts Restatement's black-letter rule, offsets for benefits caused to the same interest are allowed only "to the extent that this is equitable."[132] Relevant equitable considerations include the defendant's culpability; accordingly, benefits conferred by more culpable tortfeasors—e.g., those whose conduct was "knowingly tortious"—are less likely to offset the defendant's liability, even if the benefit accrues to the same interest that was harmed.[133] In other words, the tortfeasor who

126. *See supra* notes 79-86 and accompanying text.

127. *See supra* notes 87-92 and accompanying text.

128. The problem similarly has been proposed as follows: "Suppose that . . . plaintiff also sued for the two-weeks' wages he lost while falsely imprisoned. Would the addition of that claim of lost income enable defendant to offset the newspaper profits? That is the plain implication of [the same-interest rule]." LAYCOCK, MODERN AMERICAN REMEDIES, *supra* note 1, at 101.

129. *See, e.g., id.* (suggesting that an offset of newspaper profits, in any case, makes no "sense"); *see also, e.g.*, United States v. House, 808 F.2d 508, 509 (7th Cir. 1986) (rejecting an offset against funeral expenses caused by a convict who stabbed to death a fellow convict and had the "chutzpah" to argue that "[t]he slaying saved the government money" it would have spent to feed and house the victim).

130. *See, e.g., Pruitt*, 523 F.Supp. 975; *Evra Corp.*, 673 F.2d 951.

131. For discussion of various policy-based limitations on liability, see *supra* Part III.A.3.

132. For the full text of the rule, see *supra* note 120.

133. RESTATEMENT (SECOND) OF TORTS § 920 cmt. f, illus. 10 (1979) (discussing various "[e]quitable considerations," including whether the defendant's conduct was "knowingly tortious," when, for example, assessing the availability of an offset for a defendant who trespasses onto plaintiff's land and erects a building of substantial value).

egregiously imprisons the plaintiff might *never* be heard to argue, in so many words, that he did the plaintiff the favor of providing a lucrative news story.

Moreover, the torts Restatement's open-ended qualification takes into account the extent to which a tort-induced benefit is thrust upon the plaintiff "against his will."[134] A poignant illustration is the widowed spouse who remarries and thus enjoys the "benefits" of a new spouse—after the defendant has tortiously killed the prior spouse. To be sure, the new spouse may well provide the same sort of companionship and income-stream that the deceased one did,[135] but is it "equitable" to give a credit to the defendant who imposed these benefits by tortiously killing the plaintiff's prior spouse?[136]

Burden to the plaintiff would also seem to be a factor that is relevant to the question whether it is equitable to treat a tort-induced benefit as reducing the defendant's liability. For example, consider again the case of a wrongful-death plaintiff who remarries, and just imagine the kind of burden presented if the law of damages actually pressures him or her to testify in court to the effect that the new spouse is not nearly as good as the deceased one. Is that "equitable?"[137]

The hints of a symmetry principle are vivid in the torts Restatement's black-letter treatment of the offsetting benefits doctrine. Its "same interest" rule, as explained, assures that benefits will offset liability only if they accrue to interests that were proximately jeopardized and actually harmed by the tortious conduct.[138] And the torts Restatement's qualification for offsets only insofar as it is "equitable" to do so provides a basis for taking into account the sorts of culpability- and policy-based considerations accounted for on the liability-enhancement side of damage calculation when the risk-nexus principle leads to anomalous results.[139]

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134. *See id.* § 920 cmt. f (not permitting "the tortfeasor to force a benefit on [the plaintiff]" when, for example, the tortfeasor has improved the plaintiff's property, without the plaintiff's consent, in a way that the plaintiff finds necessary to reverse in order to restore the property to a prior state that served the plaintiff's particular purposes).

135. *See* LAYCOCK, MODERN AMERICAN REMEDIES, *supra* note 1, at 102 (observing that "[r]emarriage provides a new source of financial support, companionship, society services, and so on").

136. *See id.* (noting that most jurisdictions "conceal the fact of remarriage from the jury, or instruct the jury to ignore it").

137. *See id.* at 103 (rhetorically asking whether "we really want plaintiff testifying about the ways in which her new husband is inferior to the old").

138. Restatement (Second) of Torts § 920 (1979).

139. *Id.*

b. Conventional Contract Doctrine Regarding Offsetting Benefits

To be sure, the Restatement of Contracts does not articulate the symmetry principle as clearly as the Restatement of Torts. Nevertheless, the Restatement of Contracts is not entirely devoid of the principle. Indeed, as explained above, a required risk nexus would seem to underlie the contracts Restatement's refusal to offset benefits that result from "unrelated" post-breach events.[140]

Additionally, the Restatement of Contracts expressly acknowledges that considerations of "policy" might preclude offsetting a benefit caused by the defendant's breach.[141] The illustration offered in support of this point presents a wrongfully discharged employee who, as a result of the breach, is able to collect unemployment benefits.[142] According to the Restatement of Contracts, preclusion of an offset for benefits from such "collateral sources is less compelling in the case of breach of contract than in the case of a tort."[143] The Restatement of Contracts ultimately concludes, however, that whether such collateral-source benefits should offset recovery for breach of contract "depends on the state legislation under which it was paid and the policy behind it."[144]

3. Hints of a Symmetry Principle Underlying a Judicial Tradition of Rejecting Offsets for Payments from "Collateral Sources"

The "collateral source" issue just alluded to is indeed more commonly raised in torts cases than in contracts cases.[145] Collateral-source benefits are the benefits conferred on a tort victim from sources other than the defendant.[146] The traditional common-law rule is that such benefits "do not have the effect of reducing the recovery against the defendant."[147] Notably, this rule appears in Section 920(A) of the Restatement of Torts as an exception to Section 920, which reduces

140. *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981).

141. *Id.* § 347 cmt. e.

142. *Id.* § 347 cmt. e, illus. 14.

143. *Id.* § 347 cmt. e.

144. *Id.* § 347 cmt. e., illus. 14.

145. Perhaps this is so because the victim of a tort, as opposed to a breach of contract, often suffers physical harm to her person or property, and these types of harms are often compensated by insurance policies that either were purchased by the tort victim with her own funds or were earned by the tort victim on her job. *See* RESTATEMENT (SECOND) OF TORTS § 920A cmt. c (1979) (listing first among typical collateral-source benefits "(1) [i]nsurance policies" and "(2) [e]mployment benefits").

146. RESTATEMENT (SECOND) OF TORTS § 920A cmt. c (1979).

147. *Id.* § 920A cmt. b.

recovery against the defendant for benefits accruing to the "same interests" as those harmed by the defendant.[148] Under this exception, a wide variety of collateral-source benefits to the same interest harmed do not reduce recovery against the defendant.[149] For example, the collateral-source rule, at least in the case of a tort or violation of statute, would not allow a damages offset for state-funded unemployment benefits paid to a wrongfully discharged employee—even if the unemployment benefits are regarded as replacing the same lost wages paid as damages by the breaching employer.[150]

This traditional exception to liability offset for collateral-source benefits[151] is, according to the theory advanced here, actually animated by symmetrical application of the same principle- and policy-based constraints that are applied to the liability-enhancement side of damage calculation. More specifically, the theory here is that any given benefit subject to the collateral-source rule actually lacks sufficient relation to the defendant's tort for either or both of these reasons: (1) the benefit is especially "collateral" and thus lacks sufficient risk nexus with the tort to allow liability offset, as might be the case if a wrongfully discharged employee coincidentally happens to have a rich and generous friend or relative who gives her money in lieu of lost wages while she is unemployed; or (2) policy concerns arise if the defendant is credited for something like state-funded unemployment benefits received by a former employee whom the defendant-employer had tortiously fired. The second

148. *Id.* § 920.

149. Included among the Restatement of Torts' list of collateral-source benefits are payments made pursuant to any insurance policy not procured by the defendant; various employment benefits, such as worker's compensation benefits that might be paid to the plaintiff if she or he was tortiously injured (by someone other than the employer) while at work; gratuities, such as free medical service; and social-legislation benefits, such as Social Security benefits and welfare payments. *Id.* § 920A cmt. c.

150. *See, e.g.*, Nat'l Labor Relations Bd. v. Gullett Gin Co., 340 U.S. 361, 364 (1951) (affirming the National Labor Relations Board's refusal to deduct state unemployment compensation payments from backpay awards to discriminatorily discharged employees because "no consideration need be given to collateral benefits which employees may have received"). *See generally* Dailey v. Societe Generale, 108 F.3d 451, 460 (2d Cir. 1997) (observing that, in light of *Gullet Gin*, a majority of courts "have held that unemployment benefits should never be deducted from back pay awards" in Title VII cases).

151. "As part of a tort reform program, around half the states have abolished or limited the collateral source rule for specified claims, frequently medical malpractice claims and those against public entities. Some statutes cover all tort actions or even all actions for damages." *See* DOBBS, *supra* note 56, § 380, at 1059; *accord* SCHWARTZ, *supra* note 35, at 543. For a discussion about two such reform statutes, see *infra* Part IV.B.3.

of these points tracks conventional theory[152] and thus will be addressed first.

a. Policy Considerations Underlying the Collateral-Source Rule

Just as a plethora of policy considerations have been invoked to avoid damage enhancement for harms that the defendant's tort actually caused and foreseeably risked,[153] so too have a plethora of policy considerations been invoked to prevent liability offsets for collateral-source benefits caused by, and foreseeably incident to, a defendant's tort.[154] The latter policy considerations invariably are advanced in response to the defense argument that a tort victim will receive a windfall if she is compensated by both the defendant and a collateral source for the same injury.[155] Of course, there is no windfall to the tort victim in "the many situations where the plaintiff . . . must reimburse the collateral source out of the damages he recovers from the tortfeasor."[156] The discussion here assumes no such reimbursement; it thus squarely examines the policy bases supporting duplicative payments for the same harms.

Perhaps the strongest policy justifications for the alleged windfall arise when collateral-source payments are made by a source that was created by the plaintiff's own resources or efforts, such as payments by an insurer under an insurance policy previously purchased with the plaintiff's own money or labor.[157] Allowing the alleged windfall here

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152. *See* DOBBS, *supra* note 56, § 380, at 1060.

153. *See supra* Part III.A.3.

154. *See generally* John G. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CAL. L. REV. 1478, 1544-48 (1966) (discussing "[a] number of reasons" for the collateral-source rule).

155. To be sure, application of the collateral-source rule can result in "double compensation for a part of the plaintiff's injury." RESTATEMENT (SECOND) OF TORTS § 920A cmt. b (1979).

156. *See* Fleming, *supra* note 69, at 57; *see also* DOBBS, *supra* note 56, § 380, at 1058 ("In many instances, the collateral source rule only operates to preserve the subrogation rights of an insurer.").

157. *See* Helfend v. S. Cal. Rapid Transit Dist., 465 P.2d 61, 64 n.5, 69 (Cal. 1970) (distinguishing gratuitous collateral sources from those "the plaintiff had actually or constructively paid for," and reaffirming "adherence to the collateral source rule in tort cases in which the plaintiff has been compensated by an independent collateral source—such as insurance, pension, continued wages, or disability payments—for which he had actually or constructively . . . paid"). Indeed, a minority of courts have confined the collateral-source rule to such sources when rejecting its application to gratuitous benefits. RESTATEMENT (SECOND) OF TORTS §920A cmt. b and c (1979). *See also* DOBBS, *supra* note 56, § 380, at 1059. *See generally* SCHWARTZ, *supra* note 35, at 542.

serves the "venerable concept that a person who has invested years of insurance premiums to assure his medical care should receive the benefits of his thrift."[158] Indeed, to deny the tort victim the windfall would unavoidably mean giving it to the tortfeasor instead—one who clearly "should not garner the benefits of his victim's providence."[159] Allocating the unavoidable windfall to tort victims also tends to encourage others in the community (with the means to do so) to exercise the same foresight and thrift as the tort victim did.[160]

The same policy justifications arguably apply to many collateral-source benefits of an apparently gratuitous nature. The personal-injury plaintiff who is "given" discounted medical services, for example, may have negotiated the discount himself or with the help of a hired attorney.[161] And the friend or family member who helps out the plaintiff in a time of need might be someone who is returning to the plaintiff a valuable favor previously bestowed by the plaintiff.[162] Alternatively, the generous friend or family member might have become someone to whom the plaintiff now feels a valuable favor is owed.[163] To be sure, few things in life are truly free. Indeed, the policies animating legal doctrine sometimes derive from commonly understood obligations of a social or moral nature.[164]

The policy aims served when a defendant is made to internalize the full cost of tortious activity also support the collateral-source rule, whether or not the plaintiff created the collateral source.[165] For example, the rule makes the employer who tortiously discharges an employee internalize all of the employee's lost wages without offset for unemployment compensation already received from a state fund created

158. *Helfend*, 465 P.2d at 66.

159. *Id.*

160. *Id.*

161. *See, e.g.*, Montgomery Ward & Co. v. Anderson, 976 S.W.2d 382, 383 (Ark. 1998) (treating a fifty percent discount on the plaintiff's medical bill, which had been procured by her attorney, as subject to the collateral-source rule).

162. RESTATEMENT (SECOND) OF TORTS § 920A cmt. b (1979).

163. *Id.*

164. *See, e.g.*, Webb v. McGowin, 168 So. 196, 198 (Ala. Ct. App. 1935) (enforcing a promise to compensate a rescuer injured while saving the promisor from death or serious injury because "a moral obligation is a sufficient consideration to support a subsequent promise to pay where the promisor has received a material benefit"). *But see* Coyne v. Campbell, 183 N.E.2d 891, 892 (N.Y. 1962) (stating that "[a] moral obligation, without more, will not support a claim for legal damages" for the reasonable value of necessary medical services provided to the plaintiff gratuitously).

165. *See* RESTATEMENT (SECOND) OF TORTS § 920A cmt. b (1979) (stating that "it is the tortfeasor's responsibility to compensate for all the harm that he causes, not confined to the net loss that the injured party receives").

to replace those very same wages.[166] In such cases, there may be a tendency in judicial opinions to broadly state that the collateral-source rule serves the deterrence purpose of tort law.[167] But the rule really does not *add* any deterrence; it merely *preserves* the usual level of breach disincentive accomplished by the ordinary measure of compensatory damages.[168] In other words, the application of the rule here prevents the defendant from "taking advantage of an externality," that is, a source of payment collateral to the defendant.[169]

Along these lines, application of the collateral-source rule never results in the defendant paying for anything more than the compensable harms actually and proximately caused by the tort, and thus the rule does not assess against the defendant truly "punitive damages."[170] On the other hand, the rule can allow a plaintiff to recover more than a full measure of compensatory damages, and thus in that sense, might be thought to punish those who put the plaintiff in better than her rightful position.[171] In light of these competing views, the Restatement of Torts ambiguously states: "Perhaps there is an element of punishment of the wrongdoer involved. . . . Perhaps also this is regarded as a means of helping to make the compensation more nearly compensatory to the injured party."[172] The latter point is an acknowledgement that traditional compensatory-damage calculation overlooks various litigation costs and is thus often under-compensatory.[173]

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166. *See, e.g.*, *Gullet Gin Co.*, 340 U.S. 361; Dailey v. Societe Generale, 108 F.3d 451 (2d Cir. 1997).

167. *See* Fleming, *supra* note 69, at 58 ("Traditionally, the principal general defense of the collateral source rule has been that for the sake of both deterrence and equity vis-à-vis his victim, a wrongdoer should not escape the full cost of the injury he has caused.").

168. *See id.* (noting that the deterrence rationale has been "widely discredited").

169. *Id.* at 62.

170. *See* SCHWARTZ, *supra* note 35, at 550 ("Punitive damages . . . consist of an *additional sum, over and above compensation* of the plaintiff for the harm suffered, awarded for the purpose of punishing the defendant . . . .") (emphasis added); *see also, e.g.*, *Helfend*, 465 P.2d at 69 ("[The] collateral source rule is not simply punitive in nature.").

171. Those who so discern a punitive purpose to the rule invariably think that the rule punishes the breaching defendant. *See* Flemming, *supra* note 69. Yet an equally, if not more plausible, theory is that the party actually punished is the innocent collateral source. *See* DOBBS, *supra* note 56, § 380, at 1058 ("In many instances the collateral source rule only operates to preserve the subrogation rights of an insurer."); Fleming, *supra* note 69, at 62 ("[There is] a widely favored ideal of assuring that the tortfeasor does not gain any advantage from the collateral benefit without at the same time overcompensating the plaintiff.").

172. RESTATEMENT (SECOND) OF TORTS § 920A cmt. b (1979).

173. *See Helfend*, 465 P.2d at 68 ("The collateral source rule partially serves to compensate for the attorney's share and does not actually render 'double recovery' for

The ambiguity in the Restatement of Torts about this matter perhaps explains why the Restatement of Contracts states that an offset for benefits from "collateral sources is less compelling in the case of breach of contract than in the case of a tort."[174] Punishment, after all, is usually an improper remedy for a breach of contract.[175]

Except for the punishment rationale (which has been "widely discredited"[176]), the remaining policy bases for the collateral-source rule in cases of torts would seem to apply with as much force to claims of breach of contract.[177] In other words, an employee discharged wrongfully in breach of contract can argue, just as forcefully as one tortiously discharged, that the employer should not be able to take advantage of the employee's thrift for arrangements the employee previously made to replace lost earnings; that optimum breach disincentive is preserved if the breaching party internalizes all losses caused by the breach, notwithstanding any collateral-source payments; and that application of the collateral-source rule tends to offset undercompensatory features of damages calculation, such as the American rule regarding attorney fees, which adversely affect not only tort claimants but also contract claimants.[178]

b. Nexus Considerations Underlying the Collateral-Source Rule

As just explained, various policy aims eschew damages offsets for collateral-source benefits triggered by a breach, much the same way that various policy aims eschew damages enhancement for some losses

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the plaintiff."); *see also* Fleming, *supra* note 69, at 59 ("Abolition of the collateral source rule without a concomitant reform of the contingent fee system would . . . heavily prejudice . . . successful plaintiffs by denying them, in effect, adequate compensation for their real loss.").

174. RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. e (1981).

175. *See* RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981) ("Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort . . . .").

176. Fleming, *supra* note 69, at 58.

177. *See* Fleming, *supra* note 69, at 58-59; *see also Helfend*, 465 P.2d 61.

178. *See* Fleming, *supra* note 69, at 80-81. As Professor John G. Fleming concluded after a thorough review of the tort-contract distinction:

> [T]he policies underlying the law of contract do not dictate an application of the collateral source rule different from that in tort. For one thing, attorney's fees come out of both contract and tort awards; for another, even the controversial theory of efficient breach of contract would not justify minimizing the defendant's damages because to do so would give him the advantage of an externality and thus distort allocative efficiency.

Id. at 62.

caused by a breach. This symmetry, as will be explained here, also extends to nexus considerations. In other words, sometimes a plaintiff is entitled to enjoy collateral-source compensation—and recover compensation for the same loss from the defendant—because the collateral-source benefit is in some sense especially "collateral," that is, unrelated, to the defendant's wrong.

Gratuitous collateral sources perhaps best illustrate the points to be made here. While much concern has been expressed about the prospect of double recovery allowed by the collateral-source rule generally,[179] perhaps the rule's most controversial application occurs when the duplicative, collateral benefit seems entirely gratuitous. Consider, for example, a secretarial employee who is tortiously driven out of her workplace by a sexually harassing employer. As a result of the harassment, the former secretary obtains necessary psychiatric treatment, which, for some reason, the doctor provides for free. Although the treatment was given freely, the collateral-source rule, according to the torts Restatement, allows this victim to recover from the defendant the "reasonable value" of the treatment.[180] The Restatement explains:

> If the benefit was a gift to the plaintiff from a third party or established for him by law, he should not be deprived of the advantage that it confers. The law does not differentiate between the nature of the benefits, so long as they did not come from the defendant or a person acting for him.[181]

Apparently accepting the idea (as the Restatement of Torts does) that some benefits in life actually are free,[182] a minority of courts have rejected application of the collateral-source rule to such benefits.[183] These courts, in other words, allow the sexual harassment victim to keep only those collateral windfalls whose source she created herself, with her money or efforts. Conversely, she is denied the advantage of those

179. *See generally* ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY: APPROACHES TO LEGAL AND INSTITUTIONAL CHANCE 2 pt. c § IV(D) 179 (ALI Reporter's Study 1991) (recommending "reversal of the collateral source rule" in tandem with "imposing liability on defendants for successful plaintiffs' attorneys' fees"); *see also* DOBBS, *supra* note 56, § 380, at 1059 (describing measures aimed at reforming the collateral-source rule in about half the states).

180. *See* RESTATEMENT (SECOND) OF TORTS § 920A cmt. c (1979).

181. *Id.* § 920A cmt. b.

182. In fact, most things in life probably are not. For example, the personal-injury plaintiff who is "given" discounted medical services may have had to negotiate the discount himself or with the help of a hired attorney. *See Montgomery Ward & Co.*, 976 S.W.2d 382.

183. *See* SCHWARTZ, *supra* note 35, at 542.

collateral windfalls that are indeed windfalls in the truest sense of the word—e.g., an outright gift or governmental aid, the source of which neither party created. Presumably, the benefit could fortuitously drop upon the plaintiff from nowhere, like manna from heaven, and these courts would redirect its advantage to the sexual predator.[184] Yet, if the defendant's wrong happened to put the plaintiff in the path of a bolt of lightning, damages most certainly would not be enhanced for the fortuitous harm.[185]

The same proximate cause limitation on the lightning strike ought to apply to truly gratuitous, "collateral" benefits.[186] As the Restatement of Torts explains, an outright "gift to the plaintiff from a third party" ought not to be treated as having "come from the defendant."[187] In other words, something like the gratuitous psychiatric treatment—which undoubtedly would not have been conferred *but for the sexual harassment*—is not *proximately conferred by the harassment.*[188] It was simply a third-party gift that the defendant did not confer in anything but the philosophical sense of but-for causation.[189]

Consider the simpler example offered at the beginning of this Article, which involved the wrongfully discharged whistleblower who just happened to have a rich and generous aunt. The aunt heard about her nephew's job loss and decided to give him exactly the amount of his lost wages until he found substitute employment.[190] Assume that this gift never would have been conferred *but for* the wrongful discharge, and that it did not merely substitute for some comparable future gift that would have been conferred in any event (perhaps because the aunt died immediately after the last payment to the nephew and her will devised all her assets to a charity). In this case, did the "defendant's tortious conduct,"—the sexual harassment—really "confer[]" the gift, as required

184. *See, e.g.*, *Coyne*, 183 N.E.2d at 892 (allowing defendant to avoid liability for the reasonable value of necessary medical services provided to the plaintiff gratuitously).

185. For a discussion of the proximate cause limitation to damages for truly fortuitous intervening events, see *supra* Part III.A.

186. For a discussion of applying symmetrically the proximate cause limitation to fortuitous benefits, see *supra* Part III.B.1.

187. RESTATEMENT (SECOND) OF TORTS § 920A cmt. b (1979).

188. The general rule in the Restatement of Torts about offsetting benefits also implies a proximate-cause limitation. *See* RESTATEMENT (SECOND) OF TORTS § 920 (1979) (allowing an offset only if "the defendant's tortious conduct . . . has *conferred* a *special* benefit") (emphasis added). For a complete quotation of the rule, see *supra* note 120.

189. *Cf.* DOBBS, *supra* note 56, § 380, at 1060-61 (explaining a "direct benefits" limitation to liability offsets).

190. *See supra* Part I.

by the Restatement of Torts?[191] Did it cause the gift proximately? Or is the gift more like a fortuitous lightning strike?

Indeed, even benefits more closely related to the sexual harassment can fall short of being a proximate result of it. Suppose, for example, that the sexual harassment victim writes an enormously profitable, best-selling book about her harrowing job experience. Make sure to assume that she would not have been able to write the book but for the harassment and constructive discharge—i.e., she could not have written the book but for having suffered the harassment and but for the time after the constructive discharge, during which she chose to remain unemployed to write the book rather than resume secretarial duties in another workplace. Do you think her harassment and constructive-discharge damages should be reduced by anything more than the secretarial pay she passed up by not taking a substitute secretarial position? I think not. The extraordinary effort it took to write the smash-hit book, in relation to the defendant's sexual harassment, seems to be an independent, intervening event—i.e., a "superseding" cause which defeats any connection between the harassment and the book's profits.[192] In other words, juxtapose the plaintiff's remarkable, intervening book-writing effort with the wholly anti-social nature of what the sexual predator initially did, and what you have are two entirely *unrelated* things.

The law of remedies does not enhance damages for unrelated harms.[193] Conversely, it does not reduce damages for unrelated benefits.[194] As previously explained, this symmetry is reflected even in the Restatement of Contracts, which acknowledges the potential for "unrelated" benefits that do not offset liability for mere breaches of contract.[195]

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191. For a complete quotation of the torts Restatement's rule about offsetting benefits, see *supra* note 120.

192. *See generally* DOBBS, *supra* note 56, § 193, at 482-83 (discussing intervening, superseding causes that cannot be attributed to the defendant for purposes of enhancing damages).

193. *See, e.g., The Wagon Mound*, [1961] A.C. at 422-23.

194. *See* Goldberg, *supra* note 24.

195. *See* RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. e, illus. 15 (1981).

IV. APPLICATION OF THE SYMMETRY THEORY TO THE QUESTION OF WHETHER THE COLLATERAL-SOURCE RULE SHOULD BE CATEGORICALLY REJECTED IN CASES OF WRONGFUL DISCHARGE BASED ON BREACH OF CONTRACT

As previously observed, the Restatement of Contracts equivocates on the question whether an employer who wrongfully discharges an employee should have liability reduced for a collateral-source benefit given freely by a third party.[196] There is good reason for this equivocation. Indeed, "[n]o consistent answer has been given" to the question whether the collateral-source rule applies in this particular context.[197] The question often arises, for example, when a wrongfully discharged employee seeks recovery for lost wages without reduction for unemployment benefits received before the employee actually obtained substitute employment.[198] If the unemployment benefits do not offset lost wages, there might be concern about the plaintiff receiving double recovery.[199]

Of course, recovery beyond the plaintiff's actual loss is precisely what the collateral-source rule contemplates.[200] So why is there concern about the possibility of excess recovery in cases of wrongful discharge?[201] Courts that raise this concern invariably do so as to employment discharges incident to "innocent breaches of contract,"[202] as opposed to "wrongful dismissals"[203] in violation of duties imposed by

196. *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981).

197. PERILLO, *supra* note 9, § 14.18, at 512 & n.14.

198. *See id.* § 14.18 at 511-13 & nn. 12-13.

199. The Fifth Edition of Professor Perillo's hornbook expressed this concern. *See* JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 14.18, at 590-91 (5th ed. 2003) (stating that, absent a damages offset, there would be "recovery of more money than required to compensate the employee for the injury done"). The more recent edition of the hornbook offers a different perspective. *See* PERILLO, *supra* note 9, § 14.18, at 512 (deleting the sentence quoted in the parenthetical explanation to the prior citation and stating, instead, that "[t]here seems to be no justification . . . for the cases allowing a windfall to the breaching party").

200. *See* RESTATEMENT (SECOND) OF TORTS § 920A cmt. b (1979) (stating that even if the plaintiff's net loss is reduced by the collateral benefit, "it is the position of the law that [the] benefit . . . should not be shifted so as to become a windfall for the tortfeasor"). *See generally* RESTATEMENT (SECOND) OF TORTS § 920A (1979).

201. To be sure, no excess recovery occurs in the many cases when a collateral source has a right to be reimbursed from the plaintiff's recovery. Fleming, *supra* note 69.

202. *Id.* at 80.

203. *Id. See, e.g.*, United Protective Workers of Am., Local No. 2 v. Ford Motor Co., 223 F.2d 49 (7th Cir. 1955) (holding that the collateral-source rule did not apply and the plaintiff's recovery was correctly reduced because the plaintiff's claim sounded in contract); Dehnart v. Wavkesha Brewing Co., 124 N.W.2d 664 (Wis. 1963) (same).

statute or by the law of torts.[204] These courts also invariably regard purportedly excess recovery as punitive in nature and, therefore, appropriate only to tortious discharges.[205]

An illustration of this controversial[206] tort-versus-contract line of reasoning is summarized next, in subsection A. This line of reasoning is then critiqued in subsection B, which applies the symmetry theory explained above to demonstrate a more principled approach to the issue.

A. An Illustration of the Categorical Tort-Contract Distinction

In *Corl v. Huron Castings, Inc.*,[207] the Michigan Supreme Court addressed the question of whether an employer who wrongfully fired an employee, in breach of contract, was entitled to have damages offset by

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204. Professor John Fleming, writing in 1983, noted that "all but two of the numerous cases" to address this question did indeed "give the plaintiff the benefit of the collateral-source rule." *Id.* at 80. He also observed that "[t]he two deviant decisions, both based on a refusal to apply tort rules *to innocent breaches of contract*, are invariably explained by the difference between 'good faith' breaches resulting from misinterpretation of collective bargaining agreements and *'wrongful' dismissals* in violation of fair labor standards and the like . . . ." *Id.* (emphasis added). The two deviant cases referred to by Fleming are *United Protective Workers of Am., Local No. 2* and *Dehnart*, *supra* note 203. Since 1983 several more courts have taken the "deviant" path. *See, e.g.*, the post-1983 cases cited *infra* note 205.

205. This rationale is central to both *United Protective Workers, Local No. 2* and *Dehnart*. *See supra* note 204; s*ee also United Protective Workers, Local No. 2*, 223 F.2d at 54 (stating that the collateral-source rule is a "rule of tort law [which] has a flavor of punitive damages," and rejecting application of the rule to a wrongful discharge because the employer was "not a wrongdoer in the tort sense"); *Dehnart*, 124 N.W.2d at 670 (describing the collateral-source rule as a means of enhancing "damages in tort" for purposes of "punishing the tortfeasor," and thus refusing to apply the rule to a claim of wrongful discharge grounded on breach of contract). This rationale is also central to several more recent cases cases. *See, e.g.*, Stacy v. Batavia Local Sch. Dist. Bd. of Educ., 829 N.E.2d 298, 307 (Ohio 2005) (confining the collateral-source rule to "tort actions," where the rule "is intended to have both a punitive and deterrent effect on the tortfeasor," and thus concluding that the rule is "not applicable to cases involving the breach of an employment contract"); Corl v. Huron Castings, Inc., 544 N.W.2d 278, 280, 282 (Mich. 1996) (describing the collateral-source rule as "a concept of tort law" inapplicable to an employer who fires an employee in breach of contract because, unlike the case of tortious discharge or discharge in violation of a statute, "guilt" cannot be attributed to a contract breaker); *see also, e.g.*, *In re* Murray Indus., Inc., 130 B.R. 113, 116 (M.D. Fla. 1991) (affirming bankruptcy court's decision against applying the collateral-source rule to unemployment compensation an employee received after his wrongful discharge in breach of contract and reducing his recovery accordingly).

206. Many courts reject the tort-contract distinction and uniformly apply the collateral-source rule to all claims of wrongful discharge. *See, e.g.*, *infra* note 243.

207. 544 N.W.2d 278 (Mich. 1996).

unemployment benefits that the state gave to the fired employee.[208] The court's decision to allow the offset overruled a prior decision by the same court, which had applied the collateral-source rule to disallow such an offset.[209] In light of this abrogation of precedent, the *Corl* opinion purports to "cautiously review" the issue.[210]

The job termination in *Corl* was "wrongful" because it contravened the employee's "legitimate expectation" of continued employment—an expectation that had been created by the employer's assurance that job termination could result only for "good cause."[211] The wrongful discharge caused the employee losses of $22,700; his ensuing unemployment further entitled the employee to $6,200 of benefits under a state fund created for people who lose their jobs.[212] Apparently, the legislation that created the state fund did not require reimbursement of the fund when a recipient, such as the employee in *Corl*, subsequently recovered lost wages from a breaching employer.[213]

Although the Michigan Legislature did not find it necessary to give the State of Michigan any such reimbursement right, the *Corl* court questioned whether it should allow the non-breaching employee to retain the $6,200 government benefit while also recovering the $22,700 in damages caused by the wrongful discharge—or whether, instead, the $6,200 should be credited to the breaching employer, who would then pay only $16,500.[214] Following precedent, the lower courts in *Corl* chose the first alternative, deciding that if either party was to enjoy a $6,200 windfall, it should not be the employer who fired the employee without

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208. *Id.* at 279.

209. *Id.* (discussing how the lower courts in *Corl*, which disallowed the offset, were bound to do so by *Pennington v. Whiting Tubular Products, Inc.*, 122 N.W.2d 692 (Mich. 1963)).

210. *Coryl*, 544 N.W.2d at 283.

211. *Id.* at 279 & n.1 (discussing the employee's reliance on the "legitimate expectations" theory developed in *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880 (Mich. 1980)); *see also Corl*, 544 N.W.2d at 280 & n.6 (describing the *Toussaint* theory).

212. *Id.* at 279 & n.2.

213. *See id.* at 292 (Boyle, J., dissenting) (noting that the Legislature had not provided for recoupment by the state).

214. *Id.* at 279. *See* Fleming, *supra* note 69, at 79 ("[I]f reimbursement of the collateral source is excluded from consideration, the only remaining alternatives are either double recovery for the plaintiff or reduced liability for the defendant."). Divergent opinions in *Corl* reflect this windfall dilemma: the majority opinion emphasized concern about the prospect of "duplication of [the] employee's wage loss," *see Corl*, 544 N.W. 2d at 279, whereas a dissenting opinion emphasized concern about the prospect of "allow[ing] the party in the wrong a credit." *See id.* at 293 (Boyle, J., dissenting).

cause, but instead it should be the innocent employee who unjustifiably lost his job.[215]

The *Corl* court reversed, and thus allowed the breaching employer the $6,200 windfall.[216] To arrive at this result, the court first determined whether the plaintiff's "legitimate expectations" theory sounded in *tort* or *contract*.[217] This was a challenging question in Michigan at the time because the same court had, in prior cases, ambiguously characterized the legitimate-expectations theory, on the one hand, as involving a right "'enforceable in contract'"[218] and, on the other hand, as involving a right "'not based on traditional contract analysis.'"[219]

By a 4-3 vote, the *Corl* court decided that the plaintiff's legitimate-expectations claim of wrongful discharge was grounded not on a tort basis of liability but instead on a contract basis.[220] In light of this contract basis, the court observed that the remedial goal "is not to punish the breaching party, but to make the non-breaching party whole."[221] According to the court, allocation of the $6,200 windfall to the innocent employee would offend the general contract rule of remediation because that would make him more than whole.[222]

Although a windfall of this sort is just what the collateral-source rule contemplates, the court was not dissuaded; according to the court, the collateral-source rule "is a concept of tort law"[223] that "does not apply in cases of common-law contract."[224] The court explained that a breach of contract does not involve the same "guilt" as a tort or violation of statute,[225] thus implying that the collateral-source rule serves punitive

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215. *Id.* at 279.

216. *Id.* ("[P]laintiff's unemployment compensation benefits must be deducted from his subsequent damage award.").

217. *Id.* at 279-81.

218. *Toussaint*, 292 N.W.2d at 890 ("[A]n employer's express agreement to terminate only for cause, or statements of company policy and procedure to that effect, can give rise to rights enforceable in contract.").

219. *See Corl*, 544 N.W.2d at 291 (Boyle, J., dissenting) (quoting *Rood v. Gen. Dynamics Corp.*, 507 N.W.2d 591, 606 (Mich. 1993)).

220. *Corl*, 544 N.W.2d at 280 & n.6.

221. *Id.* at 280.

222. *Id.* at 281 (stating that application of the collateral-source rule would be "in direct conflict with the fundamental precept that the remedy for breach of contract focuses on making the nonbreaching party whole").

223. *Id.* at 280.

224. *Id.* at 286.

225. *See id.* at 282 (distinguishing *Gullet Gin Co.*, 340 U.S. 361, which permitted application of the collateral-source rule to deny any offset to the recovery of employees for unemployment benefits they received following discharges in violation of federal labor legislation).

purposes inappropriate in contract cases.[226] In other words, the court thought that the windfall had to be allocated to the employer rather than the employee to avoid punishing the employer, even though allocation to the employee would simply leave the employer paying precisely the amount of damages in fact caused by its breach.[227]

Notably, the *Corl* court's analysis had to overcome obstacles presented by the very legislative act that created the $6,200 benefit at issue. Indeed, the court in a prior case had determined that "nothing in the act [suggests] that payment of unemployment compensation is to be construed as in lieu of wages," and that, instead, "the object sought to be attained was the promotion of the public good and general welfare of the people of the State."[228] To be sure, a characterization of the $6,200 benefit as merely a welfare benefit—not wage replacement—would tend to undermine the *Corl* court's concern about duplicative recovery—of lost wages—if the employee also recovered wrongful-discharge damages.[229] The court, however, overturned its prior interpretation of the act[230] and found the benefit to be in lieu of wages—without the support of any intervening legislative amendment to the act in question.[231]

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226. This suggestion is made clearer by the court's overarching view of *"[o]ur system of contract remedies,"* which the court said *"is not directed at compulsion of promisors to prevent breach; it is aimed, instead, at relief to promisees to redress breach."* *Corl*, 544 N.W.2d at 280 n.8 (emphasis in original); *see also id.* at 281 n.14 ("Unlike contract law, '[o]ne factor affecting the development of tort law is the moral aspect of the defendant's conduct—the moral guilt or blame to be attached . . . to the defendant's acts.'") (citation omitted).

227. The notion that either party would be punished by allocation of the $6,200 to the other party is truly baffling. The $6,200 was a government *benefit*, and the court was simply asked to decide which of the parties should *enjoy* it. *Id.* at 279.

228. *Id.* at 284 (quoting *Pennington*, 122 N.W.2d at 697).

229. According to the high court of Maine:

> The overwhelming majority of courts that have considered the issue have held that the damages awarded in an action for the breach of an employment contract are not to be reduced by the amount of unemployment compensation benefits received by the plaintiff. . . . *The dominant rationale for this rule is that unemployment compensation is intended to alleviate the distress of unemployment*, not to diminish the amount an employer must pay as damages for the wrongful discharge of an employee.

Potvin v. Seven Elms, Inc., 628 A.2d 115, 116 (Me. 1993) (emphasis added); *see also* DOBBS, *supra* note 28, § 12.6(1)(7), at 793 (observing that, in contracts cases, courts usually apply the collateral-source rule to unemployment benefits "to deny the defendant any credit for the *public benefit*") (emphasis added).

230. *See, e.g.*, *Pennington*, 122 N.W.2d 692.

231. The court relied instead on an intervening amendment to Michigan's Worker's Compensation Act. *See* MICH. COMP. LAWS ANN. § 418.358 (West 2009). The amendment to Section 418.358 reduces unemployment benefits when an unemployed individual also collects worker's compensation benefits. The *Corl* court inferred "a clear legislative

While it was thus unclear that allocation of the $6,200 to the employee truly would have duplicated wage replacement if full damages had been paid, it was quite clear, according to a dissenting opinion in *Corl*, that "allowing [the employer] a setoff of the entire amount . . . [was] an overcredit" in light of the legislation that created the state's unemployment fund.[232] The legislation did indeed require the employer in *Corl* to contribute to the state's unemployment fund; however, as the dissent highlighted, the *Corl* employer's contribution rate under the legislation was "not . . . dollar for dollar what the employee [took] out."[233] In fact, no evidence had been offered upon which any true credit of $6,200 could be based.[234]

The *Corl* majority contested the charge that the $6,200 credit it awarded to the employer was a windfall, although it did not contest the charge that there was no evidentiary basis for it.[235] The Legislature had, according to the court, developed a "complex formula for the funding" of unemployment benefits[236] and the court, it seems, was satisfied to summarily conclude that the *Corl* employer was "ultimately responsible" for its wrongfully discharged employee's $6,200 unemployment compensation claim.[237]

Accepting this reasoning (albeit suspect)[238] at face value—i.e., that the *Corl* employer was "ultimately responsible" for the $6,200 paid out of the state fund—one must wonder why the court even bothered elaborating an artful distinction between contractually wrongful

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intent to . . . characterize unemployment compensation as a wage-loss benefit." *Corl*, 544 N.W.2d at 284-285. *But see id.* at 289 (Cavanagh, J., dissenting) (arguing that the Legislature's failure to overturn settled precedent which disallowed a setoff in wrongful discharge cases, while creating such a setoff in workers' compensation cases, "gives rise to a paradigmatic situation for application of the legislative acquiescence doctrine").

232. *Id.* at 292 (Boyle, J., dissenting).

233. *Id.*

234. *Id.* ("[The court has] not been provided any information that would permit a satisfactory formulation of the true amount paid by the employer . . . [the] amount deducted would be essentially arbitrary.").

235. *See id.* at 285-86.

236. *Corl*, 544 N.W.2d at 286.

237. *Id.* at 286 (finding the unemployment compensation claim to amount to $6,200.00).

238. When only a portion of an employee's unemployment benefits are funded by the contributions of her former employer, there is, according to Maine's high court, "an insufficient nexus between [the former employer's] direct expense and the actual benefits [its employee] received to conclude that the payments she received came from [the employer]." *Potvin*, 628 A.2d at 116; *see also* Washington Welfare Ass'n, Inc. v. Poindexter, 479 A.2d 313, 318 n.13 (D.C. 1984) (finding that unemployment benefits "are not wages, nor can they be deemed the equivalent of wages, *even though they are paid out of funds provided by employers*") (emphasis added).

discharges and tortiously or statutorily wrongful discharges.[239] If the *Corl* employer really was ultimately responsible for the $6,200 payment, then the payment wasn't even "collateral" to begin with; so the collateral-source rule could not apply; and a credit to the employer would thus have been proper no matter the basis of Mr. Corl's claim.[240] For example, if Mr. Corl had been tortiously driven out of the workplace or fired in egregious violation of a statute protecting him against race discrimination, the $6,200 unemployment benefit, if ultimately attributable to the employer, would offset Mr. Corl's *compensatory* damages because it would be *compensation* already paid *by the employer* and thus not a collateral payment subject to the collateral-source rule.[241] The availability of truly *punitive* damages, of course, would be an entirely separate matter.[242]

B. A Challenge to the Tort-Contract Distinction Based on Symmetrical Application of Scope-of-Liability Principles

To be sure, many courts have decided to give the collateral-source rule uniform application to cases of wrongful discharge, whether the discharge was tortious or in breach of contract.[243] Uniformity of result,

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239. *Corl*, 544 N.W.2d 278.

240. Only sources of compensation independent of the defendant are "collateral sources" subject to the rule. RESTATEMENT (SECOND) OF TORTS § 920A cmt. c (1979)

241. *See* RESTATEMENT (SECOND) OF TORTS § 920A cmt. a (1979) (explaining that the collateral-source rule "of course" does not apply to payments made by the defendant "toward his tort liability" or "under an insurance policy that is maintained by the defendant").

242. "Punitive damages . . . consist of an *additional sum, over and above compensation* of the plaintiff for the harm suffered, awarded for the purpose of punishing the defendant . . . ." SCHWARTZ, *supra* note 35, at 550 (emphasis added).

243. This view is grounded on the character of the benefit rather than the substantive basis of the plaintiff's claim. *See, e.g.*, *Potvin*, 628 A.2d at 116 (following an "overwhelming majority of courts" that have applied the collateral-source rule to unemployment benefits in cases of breach of contract because these benefits are "intended to alleviate the distress of unemployment, not to diminish the amount an employer must pay as damages for the wrongful discharge"); *Washington Welfare Ass'n, Inc.*, 479 A.2d at 318 n.13 (same); Century Papers, Inc. v. Perrino, 551 S.W.2d 507, 511 (Tex. Civ. App. 1977) (same). *See also, e.g.*, Lee-Wright, Inc. v. Hall, 840 S.W.2d 572, 582 (Tex. App. 1992) (stating that "application of the collateral-source rule depends . . . upon the character of the benefits received," and applying the rule to worker's compensation benefits received by an employee who had been fired in breach of contract); Hayes v. Trulock, 755 P.2d 830, 834 (Wash. Ct. App. 1988) (acknowledging uniform application of the collateral-source rule to a "tortfeasor or contract breacher"); Rutzen v. Monroe County Long Term Care Progam, Inc., 429 N.Y.S.2d 863, 865 (N.Y. Sup. Ct. 1980) (stating that "unemployment insurance benefits are in the nature of

however, is not the aim of the present challenge to the tort-contract distinction. The position taken here indeed acknowledges that the collateral-source rule almost certainly is of more limited scope in cases that, in form, are denominated "breach of contract," but not simply because they are so denominated. The concession here is simply that diminished culpability certainly is a tendency in the contracts cases, and degree of culpability certainly is one of the principles applicable to the distinction that really matters—i.e., *the distinction between breach-induced benefits that offset liability and those that do not.* But innocence is only a tendency in contracts cases, subject to case-specific refutation of the sort explained in subsection one. Moreover, as explained in the second and third subsections below, the relevant distinction—again, between benefits that offset liability and those that do not—is influenced by other considerations that entirely transcend the substantive basis of a plaintiff's claim.

1. Culpability Nexus

Just as some breaches of contract are particularly wrongful and thus deserving of enhanced remedies,[244] so too are particularly wrongful breaches of contract likewise deserving of a narrower scope of damages offsets for resulting benefits. In other words, even if a court generally allows the breaching party a damages offset for collateral-source payments to the plaintiff, that same court is apt to recognize an exception (i.e., is apt to disallow an offset) when the breach of contract has, as one court once put it, "a tortious or wilful flavor." [245]

The so-called "contract" theory relied on in *Corl* actually provides a very good example of a breach of contract that has a tortious or willful flavor.[246] Recall that the job termination in *Corl* was "wrongful" because

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collateral 'fringe' benefits," and rejecting a credit of such benefits for an employer who fired the plaintiff in breach of contract).

244. *See supra* note 66.

245. *See* City of Salinas v. Souza & McCue Constr. Co., 424 P.2d 921, 926 (Cal. 1967). Notably, the *Souza* court justified the general tort-contract distinction on the "the deterrent effect of an [unreduced] award against a tortfeasor." This rationale was later repudiated by the same court. *See Helfund*, 465 P.2d at 69 (concluding that "the collateral-source rule is not simply punitive in nature," and "dissaprov[ing] of any indications to the contrary in *City of Salinas v. Souza & McCue Constr. Co.*"). This turnabout suggests that the collateral source rule should, as a general rule, be applied to all types of contract claims. *See* Fleming, *supra* note 69, at 64 ("[T]he *Helfend* court assume[d] the collateral-source rule to be prima facie applicable to contract claims without apparent reference to the nature of the breach involved").

246. *See* Fleming, *supra* note 69, at 64 (noting that some contract breaches are so egregious as to warrant the same treatment as a case arising in tort).

it contravened the employee's "legitimate expectation" of continued employment—an expectation created by express representations that were later reneged when the employer fired the employee without cause.[247] This theory, according to pre-*Corl* Michigan case law, is grounded on non-contractual, employer-published personnel policies that are "enforceable not as express promises, in quasi contract, or because of promissory estoppel, but because the [Michigan Supreme] Court under its common-law authority recognized the enforceability of a situation instinct with an obligation . . . an obligation distinct from and independent of contract analysis."[248]

Wrongful discharge theories of this sort can be traced back to Professor McCormick's scholarship predicting a hybrid tort-contract basis of liability for "willful and unjustifiable discharge of an employee, even though employed for an indefinite term, upon false charges or from inadequate reason."[249] Before courts began imposing liability for arbitrary discharge, Professor McCormick suggested that such a discharge might be regarded "as a *tort*, for which emotional and punitive damages might be given."[250] Alternatively, he suggested that courts at least

> expand their measure of compensation for breach of the employment *contract* by recognizing that deprivation of a job, if more than a casual one, not only affects usually a man's reputation and prestige, but ordinarily may so shake his sense of security as to inspire, even in men of firmness, deep fear and distress.[251]

To be sure, there are other hybrid tort-contract claims for which courts have opted to compensate the aggrieved party with tort-type damages, including damages enhanced by application of the collateral-source rule.[252] For example, breach of warranty has provided a basis of liability in personal-injury cases brought against commercial sellers of

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247. *See Corl*, 544 N.W.2d at 279 & n.1 (discussing employees' reliance on the "legitimate expectations" theory developed in *Toussaint*, 292 N.W.2d 880).

248. Bullock v. Auto. Club of Mich., 444 N.W.2d 114, 118 (Mich. 1989) (internal quotations omitted) (citations omitted). *See also* Rood v. Gen. Dynamics Corp., 507 N.W.2d 591, 606 (Mich. 1993) (also observing that the theory "is not based on traditional contract analysis").

249. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES, *supra* note 69, § 163 at 638.

250. *Id.* § 163 at 638.

251. *Id.* § 163 at 639.

252. *See generally* DOBBS, *supra* note 28, § 12.6(1)(7), at 793 (explaining that rejection of the collateral-source rule is less likely for contract claims with "tort-like elements").

defective products that harm purchasers.[253] Indeed, this hybrid theory, "born of the illicit intercourse of tort and contract,"[254] is usually subject to a tort measure of damages "[e]ven when the action is in form one for breach of contract."[255] More specifically, the enhanced damages measure called for by the collateral-source rule in torts cases has been extended to this hybrid claim "as a matter of course."[256]

Some might distinguish the products-liability cases because the breach of warranty in those cases causes physical harm, whereas the harm caused in cases of wrongful discharge might be thought of as economic.[257] But this distinction is no more categorically determinative than is the tort-contract distinction. When assessing the *factor* at issue—i.e., culpability—one should bear in mind that the type of harm caused by the breach says nothing about the defendant's attitude towards causing it.[258] In the breach of warranty cases, for example, the personal injury caused by a defective product may well result from the breach of a downstream retailer who neither knew nor had reason to know of the defect, and was thus entirely innocent as to the victim's injuries.[259] On the other hand, in the case of a wrongful discharge of the sort that occurred in *Corl*, the defendant-employer is likely to have willfully created a legitimate expectation of continued employment by express representation, and then, after lulling the workforce into that expectation of job security, turned around and reneged on that representation by firing the plaintiff-employee without cause.[260] Surely, the absence of

253. Notably, warranty theory is still used in Michigan for claims against manufacturers and sellers of defective goods. *See generally* Siedlik v. Stanley Works, Inc., 205 F. Supp. 2d 762, 764-65 (E.D. Mich. 2002) (discussing the continuing viability, in Michigan, of strict liability for breach of implied warranty of merchantability).

254. *See* SCHWARTZ, *supra* note 35, at 721.

255. *Id.*

256. *See* Fleming, *supra* note 69, at 73.

257. *See id.* ("[T]he tendency toward greater restraint in assessing damages for breach of contract than for tort may in fact reflect a difference in attitude toward economic losses . . . compared with personal injury.").

258. *See* Fleming, *supra* note 69.

259. *See, e.g.*, Siedlik v. Stanley Works, Inc., 205 F. Supp. 2d 762, 764 (E.D. Mich. 2002) (explaining that, under Michigan law, a product-liability claim against a retailer based on implied-warranty theory does not require a showing of fault).

260. *See Corl*, 544 N.W.2d 278. Although not required to state a claim, the employee's detrimental reliance on the employer's express assurance of job security seems to have been one of the concerns that motivated the Michigan Supreme Court's adoption of the legitimate-expectation theory in the first place. *See Toussaint*, 292 N.W.2d at 895 (justifying adoption of the legitimate expectation theory on the grounds that, having made the express assurance, "presumably with the view to obtaining the benefit of improved employee attitudes and behavior and improved quality of the work force, the employer may not treat its promise as illusory").

bodily harm in the latter situation does not somehow categorically absolve of moral blameworthiness every "wrongful" discharge on every conceivable set of facts.[261]

In any event, the injuries sustained by the wrongfully fired employee are not entirely economic. As Professor Fleming as explained:

> Wrongful dismissal is simply not a breach of contract which courts will view with the detachment advocated by apologists of the "efficient" breach; its potentially devastating effect on the employee is attested by the pejorative use of the term "wrongful" from the tort vocabulary; and the collateral source rule is justified both by the need for deterrence and by the feeling that mere indemnity for his net economic loss does not compensate the employee for all is injury, emotional as well as pecuniary.[262]

At bottom, when assessing culpability for purposes of considering whether a defendant is morally deserving of a credit for a collateral-source payment to the plaintiff, the focus should not be on the abstract theory of recovery (tort versus contract), but instead on what the defendant actually did, the actual harms that the defendant risked, and the defendant's actual attitude toward those risks.

2. Risk Nexus

The strength of the risk nexus between a wrongful discharge and a collateral-source payment to the plaintiff is another factor relevant to the question whether the breaching party deserves a damages offset for the collateral-source payment. In other words, just as losses caused by a breach might nevertheless be "unrelated" to it and thus disregarded for purposes of damages enhancement,[263] some benefits caused by the breach are more "collateral" to the breach than others and are thus more justifiably retained by the non-breaching party, without damages offset, under the collateral-source rule.[264]

Consider the admittedly less common collateral source described at the beginning of this article—i.e., the case of the wrongfully discharged employee who receives financial assistance from a rich aunt while he is

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261. The circumstances approximate outright fraud if, for example, the employer treats as illusory an express assurance of job security to a wrongfully discharged employee who did indeed rely on the assurance. As explained *supra* at note 260, deception of this sort would seem to be one of the evils addressed by the legitimate-expectations theory.

262. Fleming, *supra* note 69, at 81.

263. *See supra* Part III.A.2.

264. *See supra* Parts III.B.1 and III.B.3.

unemployed.[265] Should the employer who wrongfully fired the unemployed individual receive a damages offset for such gratuitous assistance? That result would seem to be compelled by the rule of cases such as *Corl*—that is, if the wrongful discharge is denominated a breach of contract as opposed to a tort or violation of statute.[266] In other words, categorical abrogation of the collateral-source rule for "contract" cases seems to disregard our intuitive "need" to deny offsets for breach-induced benefits that are largely fortuitous.[267]

This may seem like an unusual hypothetical, but such gratuitous assistance from family and friends of unemployed persons is probably not uncommon. Indeed, it is easy to imagine an occasionally sympathetic creditor who might provide collateral relief in light of a debtor's unemployment.[268] And, of course, there are various forms of debt insurance with attenuated connections to the breach itself because the insurance is the product of advanced precautions taken by the wrongfully discharged individual.[269] Consider, for example, the prospect of a damages credit for the employer when the wrongfully discharged employee had previously exercised the foresight and thrift to purchase insurance coverage of mortgage or credit-card debt in the event of unemployment. Under the rule of cases such as *Corl*, the employer who *merely* breached a contract apparently can argue for an offset on the theory that the insurance payments substitute for lost earnings that would have paid these debts.[270] The problem with the rule of *Corl*, again, is that no matter how "collateral" the collateral source is, the breaching party is categorically entitled to the damages offset. That result defies our intuitive desire for a stronger relationship between the defendant's wrong and the resulting benefit.

A similar point has been made about state-provided unemployment insurance. As Professor Fleming argues, "regardless of who formally pays the premiums, they are in reality attributable to the employee's

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265. *See supra* Part I.

266. *See Corl*, 544 N.W.2d 270. *See generally supra* Part IV.A.

267. *See* Goldberg, *supra* note 24 (suggesting that intuition best explains limitations on damages offsets for fortuitous benefits).

268. *See, e.g.*, *Montgomery Ward & Co.*, 976 S.W.2d at 383 (treating a fifty percent discount given by a healthcare provider on the plaintiff's medical bill as a collateral source subject to the collateral-source rule).

269. *See* RESTATEMENT (SECOND) TORTS § 920A cmt. c (1979) (identifying "[i]nsurance policies, whether maintained by the plaintiff or a third party" as collateral sources).

270. *See Corl*, 544 N.W.2d at 284-85 (finding unemployment compensation benefits as substitutes for wages and therefore concluding that these benefits are properly deduced from the amount the discharged employee can recover from his former employer).

earnings and should thus be credited to him rather than to the employer."[271] Remarkably, even if one accepts the premise of this argument—that the premiums are attributable to employee earnings—an employer credit still inescapably occurs in all "contracts" cases under the rule of cases such as *Corl*. Again, this form-driven rule utterly disregards how the connection between the wrong and the resulting benefit can be attenuated when the benefit is the product of third-party generosity or the wronged person's own resources.

3. Policy Considerations

Just as policy considerations can limit the scope of liability for harms caused by a defendant's breach,[272] so too can policy considerations limit the scope of breach-induced collateral benefits that will offset the defendant's liability.[273] Indeed, most of the policy justifications traditionally offered in support of the collateral-source rule—such as assuring that all breach-induced costs are internalized by the breaching party—apply with equal force whether the plaintiff's claim is grounded on tort or contract.[274]

In *Corl* itself, there were additional policy considerations arising out of the need to interpret ambiguous legislation that provided the unemployment benefit at issue.[275] Recall that the collateral benefit at issue in *Corl* was unemployment insurance provided by the State of Michigan, and that the underlying legislation did not give the State a right of reimbursement from any wrongful-discharge recovery that the employee might later obtain from the employer.[276] In this context, the *Corl* court confronted a straightforward interpretive choice: either (1) allow the employee a windfall recovery, or (2) allow the employer a windfall credit.[277]

Confronted with these choices, the best course would seem to be "to postulate that the collateral benefit was not intended to inure to the

271. *See* Fleming, *supra* note 69, at 82.

272. *See* Part III.A.3.

273. *See* Part III.B.3.a.

274. *See* Fleming, *supra* note 69, at 62.

275. According to the Restatement of Contracts, whether unemployment benefits should offset recovery for breach of contract "depends on the state legislation under which it was paid and the policy behind it." RESTATEMENT OF CONTRACTS § 347 cmt. e, illus. 14 (1981).

276. *See Corl*, 544 N.W.2d at 279.

277. *See id.*; Fleming, *supra* note 69, at 79 ("[I]f reimbursement of the collateral source is excluded from consideration, the only remaining alternatives are either double recovery for the plaintiff or reduced liability for the defendant.").

advantage of a contract breaker."[278] This course would allow the benefit to inure to the advantage of the non-breaching employee, while leaving open to the Legislature the option of (1) amending the statute to allow recoupment by the State in future cases if doing so is in the State's interest,[279] or (2) leaving the statute unaltered in order to give additional assistance to the wrongfully unemployed. In other words, the ambiguity about the statute's underlying policy aim—to simply replace wages or to instead provide public assistance[280]—could have been left to the Legislature.[281]

The *Corl* court overlooked another legislative policy choice that might have counseled in favor of allocating the collateral benefit to the wrongfully discharged employee. In 1986, ten years before *Corl* was decided, a statute was enacted in Michigan that abrogated the collateral-source rule for "personal injury" actions.[282] This tort-reform statute plainly applies to personal-injury actions only; conversely, it plainly leaves in place Michigan's common-law treatment of the collateral-source rule as applied to all other types of claims, whether they sound in tort or some other source of law.[283] Among those other types of claims still subject to the collateral-source rule as of 1986—indeed, since 1963—were claims based on breach of contract.[284]

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278. Fleming, *supra* note 69, at 79.

279. *See id.* at 56-57 ("[M]ost often the choice before the court is not between conferring a windfall on either plaintiff or defendant but of determining which of two obligors (the defendant or the collateral source) should assume primary responsibility for compensating the loss. With few exceptions, repayment to the collateral source . . . has been the preferred solution."). Indeed, this solution was suggested by Justice Boyle, dissenting in *Corl*. *Corl*, 544 N.W.2d at 292.

280. *See, e.g., Potvin*, 628 A.2d at 116 (discussing the rationale behind unemployment compensation when considering which party should receive the benefit).

281. In fact, the relevant legislation already gives the State of Michigan a right of restitution when a person receives unemployment benefits "to which that person is not entitled." MICH. COMP. LAWS ANN. § 421.62 (West 2001). The Michigan Court of Appeals has previously suggested that this statute might create a right to seek restitution from back pay awards in cases of wrongful discharge. *See* Adama v. Doehler-Jarvis, Div. of NL Indus., Inc., 376 N.W.2d 406, 410 (Mich. Ct. App. 1985), *remanded*, 384 N.W.2d 34 (Mich. 1986). If the *Adama* court is correct, then the Michigan Supreme Court in *Corl* effectively nullified a remedy that the state created for itself.

282. *See* MICH. COMP. LAWS ANN. § 600.6303(1) (West 2000).

283. *See* Heinz v. Chi. Rd. Inv. Co., 549 N.W.2d 47, 53 (Mich. Ct. App. 1996) (observing that the statute's "personal injury" classification "does not include all tort victims," and upholding this limited classification as consistent with equal protection principles), *appeal denied*, 567 N.W.2d 250 (Mich. 1997).

284. *See supra* Part IV.A. As previously explained, the *Corl* court's decision abrogated the same court's prior decision, in 1963, to apply the collateral-source rule in contract cases. *See Pennington*, 122 N.W.2d 692.

The same court, in *Corl*, reversed that precedent in 1996 without so much as mentioning the distinct possibility that Michigan's Legislature had acquiesced to the non-personal-injury precedents left untouched by its tort reform statute. To be sure, it is not at all clear why Michigan's Legislature singled out tortfeasors who cause bodily harm and gave them the benefit of damages offsets for collateral benefits paid to their victims.[285] Nevertheless, this is clearly the policy choice that the Legislature had made.

A similar, perhaps even more flagrant, disregard of legislative policy-making occurred recently in neighboring Ohio. In April 2005, Ohio's Legislature adopted a tort-reform statute expressly exempting "breach of contract" claims from a repeal of the collateral-source rule; the repeal instead applied to "any tort action" for "damages that result from an injury, death or loss to person or property."[286] Two months after this statute's effective date, the Ohio Supreme Court announced that the collateral-source rule is "inapplicable in breach-of-contract actions."[287] Like its neighbor in Michigan, the high court of Ohio never mentioned the statute and thus never explained why the legislature's policy choice—to permit common-law application of the collateral-source rule in contracts cases—is misguided.

V. CONCLUSION

The position that a prevailing plaintiff would have been in "but for" the breach—that is, the "rightful position"—is not an absolute. On the damage-enhancement side of the calculation, its application is narrowed to fit the degree of the wrong and the range of harms appreciably risked by it, and sometimes even further to accommodate substantive policies.

The same thing is true on the damage-reduction side of the calculation for breach-induced benefits. That is, credit to the defendant must also fit with the degree of the wrong and the range of benefits appreciably related to it, and sometimes even then a credit may be improper in light of policy constraints.

To be sure, the universality and symmetry of these basic remedies principles derive in part from strong intuition. But they are not based solely, or even primarily, on the psychological appeal of simply having principles of universal and symmetrical application. Indeed, conventional sources reveal them, and they have for a long time animated a tradition

285. *See Heinz*, 549 N.W.2d at 53 ("[N]o statutory history detailing the exact intent of the Legislature . . . exists.").

286. OHIO REV. CODE ANN. § 2315.20(A), (D)(1) (West 2009).

287. Stacy v. Batavia Local Sch. Dist. Bd. of Educ., 829 N.E.2d 298, 307 (Ohio 2005).

of rejecting offsets for benefits "collateral" to the breach. Thus, direct account of them is prerequisite to a truly principled application of the collateral-source doctrine.