PAY FOR PLAY: THE COMPENSATED LEISURE FLAW OF CONTRACT DAMAGES

Mitchell L. Engle∗

INTRODUCTION

Contract damage law strives to provide the injured party the benefit of the bargain.1 This rule caps the damages at the amount needed to place the injured party in as good a position as if the contract had been fulfilled by both parties.2 By limiting damages to the injured party’s net benefit under the contract, contract law allows terminating parties to minimize losses from deals gone awry, but not at the expense of the other side. This protects both parties against a postsigning realization by either one that the contract no longer makes sense.3 For these reasons, the benefit of the bargain norm provides both a fair and efficient result.4

To illustrate, consider a $20,000 sales contract for a boat. Both parties anticipate benefits at the signing, but the buyer loses his job before the delivery date.5 The buyer can cancel without liability for the entire $20,000 price. If the seller resells the boat for $19,000, the buyer generally owes only $1,000.6 The damages rise under the “lost volume” seller doctrine if

∗ Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University. I would like to thank Susan Heyman and Alex Stein for their helpful comments and suggestions, and Greg Brown for his research assistance and comments. Special thanks to Chloe Orlando for her tireless contributions, including insightful feedback on multiple drafts in addition to research assistance.

1 See, e.g., U.C.C. § 1-305(a) (2012) (“The remedies provided by [the Uniform Commercial Code] must be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed . . . .” (first alteration in original)); RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. a (1981) (“Contract 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.”)


3 Such postsigning realization could stem from either a material change in a relevant contract factor or perhaps just a more accurate assessment of the anticipated benefits or costs of the contract. In either event, both sides are protected against being unduly locked into a deal they no longer desire. At the same time, both sides remain protected if the other side reaches such a postsigning realization. See discussion infra Part I.A.1, for more on “efficient breach.”


5 This is calculated as the difference between the $20,000 contract price and the $19,000 resale price. See U.C.C. § 2-706(1) (2012) (“[T]he seller may resell the goods . . . . Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price . . . .”).
the seller could have made both sales at a profit absent the breach. For instance, the buyer would owe $2,000 if the seller could have acquired another similar boat for $18,000. In either case, the damages place the seller only in as good a position as if the buyer had not breached and do not aim to penalize the buyer for breaking the deal.

Turning from goods to services exposes, however, a deeply flawed inconsistency in the law. Assume now that married homeowners enter into separate $20,000 contracts with a mason and carpenter to add a brick façade and deck to their home. The owners choose the contractors due to their reputations for doing all the high quality work themselves. To isolate the services problem, further assume that the owners separately contracted with an outside supplier for the brick and wood materials. After the husband loses his job, the homeowners cancel the contract.

How much would the owners owe the mason and carpenter on the breach? In stark contrast to the boat buyer above, they likely would owe each the full $20,000 as the laborers do not save any tangible costs from the breach. But this provides the laborers much better than the benefit of the bargain as they no longer have to do any of the work. In other words, they receive full compensation and their newly liberated leisure time. Given the value of free leisure time, this result is too generous to the laborers. This

8 Assume, for instance, that the seller purchased the first boat also for $18,000. Absent the breach, the seller would have made one $1,000 profit from the sale to the second buyer ($19,000 - $18,000) and one $2,000 profit from the sale to the first buyer ($20,000 - $18,000). With the breach, the seller made just the $1,000 profit on the actual sale. See U.C.C. § 2-708(2) (2012) (“If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer . . . ”). See Neri, 285 N.E.2d at 313-15, for an application of this doctrine.
10 See id. § 347 cmt. e.
11 More typically, the contracts with the mason and carpenter would involve both the labor and the materials. Since the labor flaw remains the same even in such mixed contract, the textual illustration separates it out for ease of exposition. The discussion of the Restatement’s LVSP illustration provides another example considering a mixed goods and services case. See infra Part I.A.1.
12 The contracts for the brick and wood materials, which also involve goods, are treated similar to the earlier boat scenario. See U.C.C. § 2-105(1) (2012) (“‘Goods’ means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action.”).
13 In contrast, the boat seller retained the resale value of the (tangible) boat. Similar mitigation principles might reduce a laborer’s recovery by newly available wages in certain cases. But mitigation has no impact where new compensation is not available. In addition, as discussed below in the text, mitigation typically does not apply even to newly available wages for these part-time contracting jobs. See infra note 16 and Part I.B.1.
“compensated leisure” result likewise is unduly harsh for the owners, who bear more loss than necessary to make the laborers whole.14

Importantly, the laborers may receive this excess compensation even if they perform new work postbreach. This outcome depends upon the characteristics of the laborer. While income from new work often reduces a full-time employee’s damages,15 this mitigation offset does not impact part-time contractors who can handle multiple projects at the same time.16 Like the lost volume boat seller above, such excess labor capacity supports some extra damages. But the current application of the “lost volume” doctrine in the service context overcompensates laborers by disregarding the saved nontangible costs of work. In sum, a lost volume service provider (“LVSP”) receives full compensation without having to work on the breached contract and regardless of new work availability.

Consider the proper correction for the identified flaw. In theory, the contract price should be reduced by the laborer’s lowest acceptable price for the job: his “reservation price.”17 With such reduction, the laborer would receive his real benefit from the deal, limited to only the extra or “surplus” value above his personalized cost of performance. If the mason would have taken the job for any price above $18,000, he should receive only his $2,000 surplus value.18 This captures his true benefit since a contract at $18,000 (or less) would fail to provide him any benefit at all.19 This surplus value approach would treat service contracts more consistently with goods contracts, thereby improving the law’s coherence, fairness, and efficiency.

Difficulty in calculating actual reservation prices hampers an exact adjustment. This, in turn, might partially explain the current flaw.20 This Arti-

14 With full knowledge of the law, the owners on this “service only” contract have an incentive to either maintain the contracts (since they owe the full price anyway) or negotiate a buyout at a lesser price. As noted above, though, this introductory example isolated the service element for ease of exposition, with the more typical contract involving both services and materials. And in that more typical case, even with full knowledge of the law, the homeowners might be better off cancelling the contract since the damage amount would be less than the contract price due to a reduction for the saved material costs. See infra Part I.A, for such an example and a more detailed discussion of possible resolutions.
15 This mitigation may not fully eliminate the overcompensation effect for full-time employees due to reasons discussed below. See infra Part II, for a fuller discussion of mitigation.
16 See infra Part I.B, for a fuller discussion of the mitigation exclusion and relevant authority.
18 $20,000 less his $18,000 reservation price equals $2,000.
19 A benefit thus occurred only as the negotiated price rose above $18,000, with the benefit then increasing dollar for dollar as the negotiated price moved from $18,000 to $20,000. Another way of saying this is that the mason placed an $18,000 price tag on having to do the work, which is now saved by the breach.
20 Part of the problem is the subtlety of understanding the defect in the first place. See, for example, infra note 50, addressing the intriguing link to the current firestorm over the value of a law degree, where analysts typically make the same error of neglecting the cost of sacrificing leisure for work. Hence one goal of this Article is to make the shortcoming more prominent.
cle presents two feasible ways to approximate reservation prices for LVSPs, either of which would vastly improve the law. Finally, given serious imperfections in application of the possible mitigation offset for full-time employees, the Article suggests comparable improvements for these workers as well.

This Article proceeds as follows. Part I more fully develops the problematic lack of a leisure adjustment for LVSPs. Under the labor/leisure tradeoff principle, workers must sacrifice valuable leisure time to receive payment for services. But legal analysts repeatedly ignore this economic principle by providing LVSPs full contract damages. This Part then shows how diminishing marginal utility principles increase the defect when LVSPs undertake substitute work.21

Part II turns to full-time employees. Damage mitigation applies in this context only for either rejected “comparable” work or substitute work actually performed. Thus, the compensated leisure defect persists for full-time employees who reject “noncomparable” work after discharge. Such employees also end up with fully compensated leisure time.

Part III then demonstrates several achievable ways to reduce the compensated leisure problem. As noted above, estimation of the reservation price provides the key.22 Recognizing the uncertain nature of the contractor’s LVSP claim, the first approach simply would require a more refined likelihood determination of LVSP status. The LVSP’s contract price recovery percentage would increase along with the relative strength of such LVSP likelihood finding.23 A similar sliding scale approach could be implemented for full-time employees, albeit now based on the degree of the substitute work’s comparability.24 Finally, labor elasticity studies provide another way to estimate reservation prices for LVSPs as these studies calibrate how wage changes impact hourly work choices.

I. COMPENSATED LEISURE FLAW FOR LOST VOLUME SERVICE PROVIDERS

This Part more fully explains the “compensated leisure” flaw in contract damage law. Contract damage law often grants a discharged laborer the full contract price despite the worker’s relief from any future performance. Such laborer receives an unjustified windfall: full monetary com-

21 See discussion infra Part I.B.2.
22 Once the reservation price is estimated, the surplus value can be easily determined by subtracting the estimated reservation price from the contract price. Barnes, supra note 17, at 16.
23 This follows from an expected correlation between a lower reservation price and a greater confidence in the LVSP finding. This approach also neatly hedges against erroneous determinations regarding LVSP status. See infra Part III.A.1.
24 The contract recovery percentage proposed would decrease inversely related to the new job’s degree of comparability since higher job comparability indicates a lower surplus value.
pensation plus the newly liberated leisure time. The courts and legal commentary have failed to either recognize or fully appreciate the significance of this compensated leisure problem.25

This Part focuses on LVSPs capable of handling multiple projects.26 After Section A presents general foundation arguments, Section B demonstrates that LVSPs are particularly problematic because LVSP status negates mitigation for subsequent earnings.27 Diminishing marginal utility principles accentuate this windfall when LVSPs obtain new earnings.28 Section C further demonstrates anomalous results when LVSPs subcontract out the work in question. This section also highlights how the LVSP status re-

25 For example, a leading treatise on damages does not directly address the leisure windfall point. See DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 12.25, at 924-25 (1973). As discussed in greater detail below, while a few prior commentators have recognized the liberated leisure problem, even they did not fully express (or perhaps appreciate) the true extent of the problem. See, e.g., Jeffrey L. Harrison, Wrongful Discharge: Toward a More Efficient Remedy, 56 IND. L.J. 207, 207-10 (1981); Michael B. Kelly, Living Without the Avoidable Consequences Doctrine in Contract Remedies, 33 SAN DIEGO L. REV. 175, 206-07 (1996); David S. Evans, An Economic Approach to the Mitigation of Damages in Age Discrimination Cases 2-4 (Nat’l Econ. Research Assocs., Inc., Working Paper No. 17, 1992). Such prior commentary unfortunately focused on full-time employees, who are less prone to compensated leisure than independent contractors since mitigation principles generally apply to employees. But this Article hones in on situations where mitigation is not applicable, thereby forcing a head-on consideration of the problem (without mitigation as a potential saving grace). The problem’s prior consideration in the weaker full-time employee context might explain why the point has not yet taken hold. The initial goal of this Part, then, is to facilitate a more prominent understanding of this subtle issue. Such broader understanding might then open the pathway for a more appropriate response in the law. See infra Part III.

26 Note that this Article adopts a more specific LVSP phrase in place of the often-used, more general “lost volume seller” phrase since “lost volume sellers” can include sellers of goods or services, and only sellers of services implicate the compensated leisure problem. Part II will consider the compensated leisure problem for full-time employees and other laborers lacking a LVSP’s multiple job capacity.

27 Unlike full-time employees, LVSPs are not subject to mitigation offsets for subsequent wages since LVSPs can handle both the breached contract and the subsequent work. More technically, the mitigation offset for non-LVSPs applies to either (1) any work actually taken on; or (2) comparable work declined (or somewhat related, the failure to undertake reasonable efforts to find comparable work). Mitigation principles arguably minimize the leisure windfall for full-time employees since damages are reduced to the extent of the above compensation factors (wages for any work actually performed or any comparable available work not taken by the employee during the contract period). While full-time employees can argue LVSP status for the new work to avoid mitigation, successful LVSP assertions are the exception rather than the general rule for those workers. In contrast, LVSP status is the general rule, not the exception, for the classic part-time independent contractor. See, e.g., Melvin Aron Eisenberg, The Responsive Model of Contract Law, 36 STAN. L. REV. 1107, 1147-50 (1984) (critiquing current law for its general assumption that contractors could handle all the work).

28 Current law’s full compensation without a leisure time reduction provides a particularly poor result for LVSPs since (1) the value of leisure time typically increases as additional work volume is undertaken due to the diminishing marginal utility of leisure; and (2) the value of the monetary compensation typically decreases as more projects are undertaken due to the diminishing marginal utility of money. See infra Part I.B.2.
futes two other possible offsets to the leisure windfall: (1) lost nontangible benefits from working; and (2) time spent looking for new work after the breach.29

A. General Argument for Leisure Time Reduction

Two well-accepted concepts—the contract benefit of the bargain norm and the labor/leisure tradeoff principle30—facilitate exposition and quantification of the compensated leisure flaw.31 To simplify explanation of the compensated leisure flaw, this Section assumes that new replacement work is unavailable after the breach.32

1. Benefit of the Bargain and the Labor/Leisure Tradeoff

Contract damages “are intended to give [the injured party] 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.”33 In other words, contract damages aim to provide “the loss in the value to him of the other party’s performance . . .”34

This benefit of the bargain approach reflects both fairness and efficiency concerns.35 From a fairness perspective, the norm captures the compensatory nature of contract law, devoid of any punitive condemnation of the terminating party.36 This benchmark also furthers efficiency as it permits, and even encourages, a party to breach where its benefit from breach

---

29 The latter point relates to mitigation. See supra note 27. Part II discusses why the possible mitigation and nontangible benefit offsets are debatable even in the full-time employment context. However, the LVSP context better exposes the core problem by avoiding the need to even engage in those debates given their facial irrelevance in the LVSP context.

30 This economic principle instructs that laborers must sacrifice valuable leisure time for compensation.

31 As will be shown, the proper reduction equals the surplus value: the excess of the contract price over the minimum price the contractor would have been willing to accept for the work.

32 Part I.B then demonstrates why these foundational arguments retain force even in the presence of newly available work.


34 Id. § 347(a).

35 The fairness aspect relates to distributional issues (e.g., the sharing of resources between the nonbreaching party and the breaching party), while efficiency focuses on increasing the overall resources or welfare. To use a popular metaphor, efficiency focuses on increasing the size of the pie, whereas fairness focuses on the sharing of the pie between the participants.

36 See, e.g., Oliver Wendell Holmes, The Path of the Law, 10 HARV. L. REV. 457, 462 (1897) (“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.”).
exceeds the other side’s loss from the contract termination. These so-called “efficient breaches” increase the parties’ collective well-being given the excess net benefit from termination.

In total, the benefit of the bargain benchmark best achieves these joint fairness and efficiency goals. Contract damages strive to be just high enough to leave the nonbreaching party indifferent to the breach, while limited enough to incentivize the breach through the breaching party’s retention of the net benefit from termination. Damages in excess of this norm can deter welfare gains from efficient breaches and unduly punish (reward) the breaching (nonbreaching) party. For this reason, contract law generally aims to prevent damages above the nonbreaching party’s real benefit.

With these principles in mind, now consider the LVSP illustration in the Restatement of Contracts. While the real-world universe of LVSPs is quite broad, the Restatement’s basic example neatly illustrates the essential flaw:


The net benefit equals the excess of the breaching party’s gain over the nonbreaching party’s loss from the contract termination. Some argue that the beneficial breach would occur even if the law provided for a (much) higher recovery on breach since the nonbreaching party would then have an incentive to agree to a (somewhat) lower amount on a negotiated breach. Mitchell L. Engler & Susan B. Heyman, *The Missing Elements of Contract Damages*, 84 TEMP. L. REV. 119, 136-38 & n.85, 144 (2011). Under this view, the efficient breach would still occur, but the nonbreaching party would then be able to receive part of the additional value. In addition to raising issues as to whether the nonbreaching party is properly entitled to such a share, this position relies on a successful renegotiation before the occurrence of the breach. Transaction costs and other related factors might hamper such renegotiation however. See id. at 144, for a more detailed discussion.

See Patton v. Mid-Continent Sys., Inc., 841 F.2d 742, 750 (7th Cir. 1988), for a court decision wanting to avoid such deterrent effect. See also J. Yanan & Assocs., Inc. v. Integrity Ins. Co., 771 F.2d 1025, 1034 (7th Cir. 1985).

For these reasons, contract law will not enforce an excessive liquidated damage clause despite the explicit agreement of the parties. See, e.g., *RESTATEMENT (SECOND) OF CONTRACTS* § 356(1) (1981) (“Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.”).

Id. § 347 cmt. f, illus. 16.

In addition to the Restatement’s parking lot paver illustration and the mason from the Introduction’s homeowner scenario, the universe of potential LVSPs includes (1) builders (see Edwin W. Patterson, *Builder’s Measure of Recovery for Breach of Contract*, 31 COLUM. L. REV. 1286, 1306 (1931)); (2) advertising spokesmen (see Lone Star Ford, Inc. v. McCormick, 838 S.W.2d 734, 740 (Tex. App. 1992)); (3) pension consultants (see Donald Rubin, Inc. v. Schwartz, 594 N.Y.S.2d 193, 194-95 (N.Y. App. Div. 1993)); (4) doctors (see Gianetti v. Norwalk Hosp., 43 A.3d 567, 574, 576 (Conn. 2012)); (5) product endorsement contracts by athletes (see, e.g., *In re Worldcom*, Inc., 361 B.R. 675, 686 n.10 (Bankr. S.D.N.Y. 2007) (involving Michael Jordan) (“On one hand, the ‘lost volume seller’ exception does not appear to be available to a product endorser because of the understandable concern over dilu-
A contractor agrees to pave an owner’s parking lot for $10,000. The paver sues for damages after the owner repudiates the contract without justification. To prevent a better result than the bargain itself, the paver’s entitlement to the $10,000 price is reduced by any saved monetary costs such as unused asphalt materials.

Notably absent from the Restatement’s standard formula is any reduction for the paver’s saved work effort. Contrary to fairness and efficiency...
principles, this failure does grant the paver an undesirable “better than the bargain” result. These excessive damages may, in turn, unduly punish the owner’s repudiation and may deter his/her efficient breach.

As noted above, assume initially that new work opportunities are not available to the paver after the owner’s repudiation. The paver now has more leisure time to the extent of her own excused personal performance. This increased leisure time gives the paver the “better than the bargain” result, with the above fairness and efficiency concerns. This follows from the classic labor/leisure tradeoff, nicely captured by the following excerpt from a leading labor economics text:

> Individuals seek to maximize their well-being by consuming goods (such as fancy cars and nice homes) and leisure. Goods have to be purchased in the marketplace. Because most of us are not independently wealthy, we must work in order to earn the cash required to buy the desired goods. The economic trade-off is clear: If we do not work, we can consume a lot of leisure, but we have to do without the goods and services that make life more enjoyable. If we do work, we will be able to afford many of these goods and services, but we must give up some of our valuable leisure time.

In other words, when the paver is presented with a new contract opportunity, the paver faces the unavoidable tradeoff: sacrifice leisure for the cash profit on the contract or forego the cash profit to retain the valuable leisure time. But the paver receives a windfall under current law by retention of both the full cash profit and the liberated leisure time upon breach.

---

47 This initial assumption eases the exposition of the core principles. The actual Restatement illustration considered the situation where the paver did take on new work. Restatement (Second) of Contracts § 347 cmt. f, illus. 16 (1981). This possibility will be discussed shortly. See infra Part I.B.

48 See discussion infra text accompanying notes 55-66, for a more tangible illustration of these fairness and efficiency concerns, which expands upon the core facts of the basic illustration.


50 Underappreciation of the compensated leisure flaw pervades other areas of the law as well. For instance, legal analysts tend to also overvalue law degrees by once again neglecting the nonmonetary cost of the leisure sacrifice. See Michael Simkovic & Frank McIntyre, The Economic Value of a Law Degree 4 (Mar. 21, 2014) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2379146, for the article that sparked the recent debate on the proper value of a law degree. Consider the following from a prior analysis critiquing the standard failure to take into account leisure when valuing a medical degree: “[E]xploiting an investment in human capital requires individuals to sacrifice not only consumption, but also leisure. When estimating the returns to education, existing studies typically weigh the monetary costs of schooling . . . against increased wages, neglecting the associated labor/leisure tradeoff.” M. Keith Chen & Judith A. Chevalier, The Taste for Leisure, Career Choice, and the Returns to Education, 99 Econ. Letters 353, 353 (2008). For further support, consider the following from another attuned medical study: “Investment in medical training appears quite attractive when no attention is paid to hours of work in each occupation. . . . Standardizing for hours worked in each occupation changes the picture markedly . . . .” Cotton M. Lindsay, Real Returns to Medical Education, 8 J. Hum. Resources 331, 338 (1973).
2. Proper Amount of Compensated Leisure Reduction: Surplus Value

What, then, is the appropriate adjustment for the compensated leisure windfall? Importantly, the proper correction does not eliminate any recovery for the paver, as this would go too far in the other direction.\textsuperscript{51} As evidenced by his decision to enter into the contract, the paver preferred the contract price over leisure and would have realized his subjective net benefit from such tradeoff but for the breach. Rather, the recovery should be reduced by the paver’s value for his liberated leisure time, represented by his lowest acceptable price for the job.\textsuperscript{52} At these adjusted damages, the paver would receive his real benefit from the deal, equal to just the contract’s excess value to him after taking into account his subjective cost of performance.

For instance, assume now that the paver would have accepted the job for any price above $9,000, his so-called “reservation price.” The paver should receive only the $1,000 excess or “surplus” value of the contract, calculated as the $10,000 contract price less his $9,000 reservation price.\textsuperscript{53} The $1,000 surplus value captures his true benefit since a contract at $9,000 (or less) would not provide him any benefit at all.\textsuperscript{55} Note that the paver’s $9,000 reservation price includes his price for both his labor and any necessary materials like the asphalt. This $9,000 reduction exceeds the current adjustment, limited to just the necessary materials.

This more limited $1,000 recovery corresponds much better to the fairness and efficiency goals of the benefit of the bargain norm. To make this more concrete, assume now that the parking lot owner receives an attractive price for her property shortly after signing the contract. And while the owner valued the paved lot at an additional $11,000 for use in connection with her business, the new buyer places a much lower value on the

\textsuperscript{51} The occasional court has stated that the recovery should be reduced by the value of the labor saved by the contract party himself. See, e.g., Olds v. Mapes-Reeves Constr. Co., 58 N.E. 478, 479 (Mass. 1900) (“In a contract of the kind before the court . . . [t]he labor or supervision may be personally performed by the contractor, or may be furnished through agents or employees. In either case the value of it is all included, for the benefit of the other party, when the contractor is charged with the whole cost of completing the work, as an amount to be deducted from the contract price in estimating his damages.”). These decisions seem to suggest that the reduction should equal the market price for the labor. This measure, however, goes too far in the opposite direction by taking away the benefit of the bargain as to such labor component.

\textsuperscript{52} Of course, this is in addition to any saved monetary costs.

\textsuperscript{53} See Barnes, supra note 17, at 14, for a more general argument in favor of using surplus value in contract damages. See Harrison, supra note 25, at 232, 234, for a more specific citation in this labor area.

\textsuperscript{54} See Harrison, supra note 25, at 233 n.156.
paving of only $4,000. At the time of the contract signing, the job made sense for both the owner and paver as this would generate a $1,000 benefit for each. But now due to changed circumstances, completion of the job would generate a $6,000 loss to the owner. The $1,000 damage amount based upon the paver’s reservation price leaves the paver equally well off as full performance while allowing the owner to avoid an additional unnecessary loss of $5,000.

In contrast, current law provides less desirable results. Assuming the materials cost $4,000, the owner would owe the paver $6,000 on breach, leaving the owner with a $6,000 loss regardless. But completion of the project would leave the paver with only a $1,000 net benefit, much less than the $6,000 upon the breach. It is difficult, if not impossible, to justify these results as a matter of fairness. Why should the paver receive a $5,000 windfall on breach only by forcing the owner to absorb the avoidable $5,000 loss? One attempted justification might claim that the owner must absorb the full extent of her now-bad deal. To show the inconsistency of such claim, assume now that the materials cost $8,000. A breach now limits the owner’s loss to $2,000 as any avoidable material costs redound to the owner’s benefit.

As a matter of theory, the labor costs should not be treated more harshly from the owner’s perspective than the monetary costs. And while the saved material costs seem more readily determinable than saved

---

55 For some real world cases, see, for example, Rockingham Cnty. v. Luten Bridge Co., 35 F.2d 301, 307 (4th Cir. 1929) (discussing a locality that no longer needed a bridge to nowhere); In re WorldCom, Inc., 361 B.R. 675, 679-80 (Bankr. S.D.N.Y. 2007) (addressing situation where WorldCom no longer needed Jordan’s advertising since WorldCom was bankrupt); see also supra notes 11-19 and accompanying text.

56 The paver would receive the excess of $10,000 over her $9,000 reservation price and the owner would receive $11,000 of value for a $10,000 payment.

57 The owner now would receive just $4,000 of value for her $10,000 payment to the paver.

58 The owner therefore takes only a $1,000 loss by breaching instead of $6,000. The owner has a choice of receiving just $4,000 of value for a $10,000 payment (no breach) versus paying the paver the $1,000 on a breach ($10,000 - $9,000 reservation price).

59 The owner now has a choice of receiving just $4,000 of value for a $10,000 payment (no breach) versus paying the paver the $6,000 on a breach ($10,000 - $4,000 of saved costs).

60 The paver’s benefit would equal $1,000 absent a breach ($10,000 payment less his $9,000 reservation price) versus the $6,000 payment on a breach ($10,000 - $4,000 of saved costs). The majority of the paver’s benefit on breach ($5,000) comes from his newly liberated leisure time, not the $1,000 benefit of the bargain.

61 For another alternative, consider the possibility that the paver subcontracted out some of the labor. The labor would then appear as a monetary cost. See infra Part I.C.1. Consequently, this subcontracted labor too would then redound to the owner’s benefit under current law.

62 Take, for example, the classic Luten Bridge case that required the nonbreaching party to stop work upon breach and not pile on costs. Rockingham Cnty. v. Luten Bridge Co., 35 F.2d 301, 307 (4th Cir. 1929).

63 See Barnes, supra note 17, at 22.
labor costs, this practical point will be addressed below.\textsuperscript{64} The aim here at this stage of the analysis is to show the correct adjustment in theory.

Consider the efficiency justification supporting the more limited $1,000 surplus value recovery. To better frame the issues, assume now the materials cost $3,500 but all other factors remain the same. If so, the owner would realize a $6,500 loss upon breach under current law, but only a $6,000 loss upon completion.\textsuperscript{65} The owner now has an incentive to force this inefficient project to completion to save a $500 loss. But this leads to an inefficient contract performance as it results in a $6,000 loss to the owner and just a $1,000 benefit to the paver. In contrast, the $1,000 surplus value recovery would induce the owner to scrap this inefficient project at no harm to the paver, while simultaneously increasing the fairness and consistency of the law.\textsuperscript{66}

Finally, let’s consider a comparative example to further develop the appeal of the surplus value approach:

Example 1: Igor and Indie each accept an extra $10,000 project for their services. Igor would have accepted the work for any price above $4,000 whereas Indie would not have agreed to

\textsuperscript{64} See \textit{infra} Part I.B.1 (noting the argument that mitigation arguably provides a practical proxy outside the LVSP context, but demonstrating how the law currently lacks any such proxy within the LVSP context); \textit{infra} Part III.A (showing several possible practical ways to approximate the actual reservation price in the LVSP context). Further note how the current LVSP determination also presents an unknowable fact since it requires assessment of a counterfactual situation in which breach has not occurred. As such, the question then becomes whether there exists a practical proxy which improves upon current law’s seriously flawed result. Again, see \textit{infra} Part III.A, for a more detailed discussion of all these points.

\textsuperscript{65} The owner now has a choice of receiving just $4,000 of value for a $10,000 payment (no breach) versus paying the paver the $6,500 on a breach ($10,000 - $3,500 of saved costs).

\textsuperscript{66} It is possible that the parties would negotiate a cancellation of the contract at a price which would leave both parties better off (i.e., a price in between $1,000 and $6,000). As noted above, though, such negotiated cancellation might run into difficulties given transaction and related costs associated with such negotiation. See \textit{supra} note 39. In some sense, renegotiation plays out like a high stakes poker game. Thus, the modified approach, which allows unilateral conduct, more easily leads to the efficient breach result.

Even if the parties did negotiate out a breach, it is not clear from a fairness perspective why the paver should corral some of the efficiency gains by negotiating a settlement price above $1,000. Another attempted justification might argue that contract damages are otherwise undercompensatory due to attorney fees or the inadequate coverage of certain losses. But why then structure the law so that saved labor costs, but not other costs, strengthen the nonbreaching party’s negotiating hand? See \textit{supra} notes 61-62 and accompanying text (regarding how other saved costs redound to the owner’s benefit). And more generally, why not then address problems of undercompensation more directly rather than relying on some haphazard extra amount based on the extent to which the nonbreaching party would perform labor under the contract?
any price below $9,000. Again assume the counterparty repudiates without justification prior to any performance. 67

Igor’s surplus value equals $6,000 given his $4,000 minimum price for his leisure sacrifice. 68 At first, a $6,000 recovery might still seem too generous as Igor would have worked for as little as $4,000. But Igor secured a $10,000 contract providing him $6,000 more than his breakeven point. Igor is properly entitled to this $6,000 gain given contract damage's goal to provide the benefit of the bargain. As such, it is the additional $4,000 equal to Igor’s reservation price that constitutes the real windfall under current law. Current law operates as if Igor’s reservation price is zero: that he (implausibly) would have accepted the job for free. Finally, Indie would receive significantly less than Igor under the surplus value approach: $1,000 rather than $6,000. 69 But this result makes perfect sense given her significantly higher value ($9,000) for her liberated leisure time. 70

B. Case for Leisure Time Reduction Accentuates with New Work

New earnings after the breach increases the need for a leisure time adjustment. Section B.1 first discusses how LVSP status nullifies mitigation for new earnings. Section B.2 then shows how current law conflicts with the well-accepted economic principle of diminishing marginal utility.

1. LVSP Negates Mitigation Response

Returning to the earlier Restatement illustration, let’s assume now that the paver accepts another $10,000 paving contract after the breach. This would eliminate the compensated leisure problem if mitigation wiped out the $10,000 recovery on the breached contract (due to the new $10,000 of earnings). If so, the paver would receive $10,000 total in return for his actu-

---

67 The reservation price would be bifurcated where partial performance had occurred prior to breach to account for work already performed.

68 $10,000 less $6,000 = $4,000.

69 $10,000 less $9,000 = $1,000. Especially with such comparison in mind, one might object on grounds that each individual’s reservation price is not readily determinable. Again, the discussion here focuses on the correct adjustment in theory. Practical considerations are addressed below. Particularly, see infra Part III.A, for several possible practical ways to approximate the actual reservation price (which includes the labor component) in the LVSP context. See also infra Part I.C.1 (highlighting the significant practical problems under current law).

70 Thus, Indie is not being penalized; she just has a lower surplus value. In other words, she is much closer to the margin as to whether she even would take the job.
al work performance. As noted above, LVSP status negates any mitigation offset. In particular, mitigation does not apply if the paver “could and would have entered into the subsequent contract, even if the [underlying] contract had not been broken.” As a consequence, the LVSP paver receives $20,000 despite paving just one of the parking lots in question. The compensated leisure flaw remains intact even with the subsequent earnings as the paver receives compensation for two jobs while sacrificing leisure for just one.

71 This actually would go too far where the paver would have handled both jobs as a LVSP. If so, the paver should also receive the lost surplus value on the breached contract.

72 See supra note 27 and accompanying text, for a discussion on the rule applicable to a LVSP.

73 RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. f (1981). This comment in the Restatement further provides that, in cases in which a contract has been breached, if there is a factual finding that an “injured party could and would have entered into the subsequent contract, even if the [underlying] contract had not been broken, and could have had the benefit of both, he can be said to have ‘lost volume’ and the subsequent transaction is not a substitute for the broken contract.” Id. For one court’s more expansive standard, see Gianetti v. Norwalk Hosp., 43 A.3d 567, 578 (Conn. 2012) (“A ‘substitute’ is a contract which a volume seller who has suffered the loss of one contract through the breach of another party has entered into in place of the broken contract and which the volume seller would not have been able, with his existing personnel and overhead costs, to perform had there been no breach.’ . . . Therefore, ‘a party claiming to be a lost volume seller must establish that it would have had the benefit of both the original contract and the subsequent contracts had there not been a breach. . . . This test has both objective and subjective components.’ . . . Specifically, ‘to recover lost profits under [the lost volume seller] theory, a [nonbreaching] party must prove three things: [1] that the seller of services had the capability to perform both contracts simultaneously; [2] that the second contract would have been profitable; and [3] that the seller of services probably would have entered into the second contract even if the first contract had not terminated.’ The party claiming to be a lost volume seller has the burden of proving lost volume seller status by a preponderance of the evidence.” (alterations in original) (citation omitted) (quoting Gianetti v. Norwalk Hosp., 833 A.2d 891, 898 (Conn. 2003)) (internal quotation marks omitted)).

74 In actuality, the paver likely will be paving many parking lots. This LVSP possibility has not received enough attention in the literature, which might help to explain why this problem has gone largely unrecognized. One commentator mentioned the LVSP possibility, but only in passing. See Harrison, supra note 25, at 208 n.6, 212 n.41, 228. As noted previously, the limited commentary in this area has focused on full-time employment, which might help to explain the lack of focus on LVSPs as LVSP status becomes much more prominent outside the full-time employment scenario. Further note a link to the subcontracting anomaly discussed in Part I.C.1. Establishing LVSP status on the grounds that one could hire others to do the work would eliminate the compensated leisure problem to the extent of such subcontracted labor since saved monetary costs of not having to pay someone would reduce contract damages. The problem would still exist there, though, for any labor retained (e.g., supervisory work, etc.) by the LVSP. A more extensive problem occurs when the LVSP argues that he would be willing to do all the labor himself on the multiple projects. See, for example, supra note 43, for cases where laborers made just such an argument in various settings.
2. Diminishing Marginal Utility on the Second Contract Anomaly

The economic principle of diminishing marginal utility further evidences current law’s flawed approach in the LVSP context. Under the diminishing marginal utility principle, an individual’s value from consumption of a good generally lessens as its consumption amount increases.\(^{75}\) A classic example is how a second ice cream cone provides less pleasure than the first one.\(^{76}\) Following the diminishing marginal utility principle, the LVSP’s surplus value on each additional contract should decline for two reasons.

First, as more projects are undertaken, the lost value of the foregone leisure generally should increase due to the diminishing marginal utility of leisure.\(^{77}\) Compare two parking lot pavers presented with a new paving opportunity: the first one has several other active projects, while the second one has no existing commitments. In taking on the new project, the busy one generally should experience relatively more leisure harm as the idle one sacrifices less valuable leisure time.\(^{78}\) Tracking the classic ice cream example, the busy one sacrifices the first ice cream cone while the idle one foregoes only the less valuable second one.\(^{79}\)

Second, the subjective value of the monetary compensation inversely relates to the number of work projects undertaken due to the diminishing

\(^{75}\) Joshua Greene & Jonathan Baron, Intuitions About Declining Marginal Utility, 14 J. BEHAV. DECISION MAKING 243, 243 (2001) (“To say that a good exhibits declining marginal utility is to say that the more of that good that an individual has, the less valuable having more of it will be to that individual.”).

\(^{76}\) See, e.g., ROBERT E. HALL & MARC LIEBERMAN, MICROECONOMICS: PRINCIPLES AND APPLICATIONS 152-54 (6th ed. 2013). Likewise, the pleasure from the third ice cream cone generally is even less than from the second. Id. at 153 (showing thirty units of utility gain from the first cone, twenty from the second, ten from the third, and so on down to zero from a sixth cone).


\(^{78}\) This might vary in certain cases due to differences in actual taste for leisure time. Nonetheless, it is helpful to conceptualize this principle in generalized terms. As will be discussed more fully, the ultimate goal is to determine only a reasonable approximation of the reservation price. See infra Part III.

\(^{79}\) This point is a little tricky due to the reverse application of diminishing marginal utility principles to a decreasing amount of the leisure good. As evidenced by the ice cream example, the conceptual trick involves seeing the extra work as taking away an earlier-stage consumption amount. The leisure loss harm therefore increases in lockstep with greater work commitments as the work takes away an item from someone who has less of such item.
In taking on the new project, the idle paver’s gain from the new income should exceed the busy one’s increased utility. Again tracking the classic ice cream example, the idle one can now afford the more valuable first cone while the busy one earns money for the less valuable second cone. Linking the two aspects, the busy paver’s surplus value from the new opportunity should be less than the idle one’s due to less benefit from monetary compensation and more leisure harm.

With that in mind, current law perversely insulates the LVSP from any offset from a subsequent project on grounds that the LVSP would have undertaken both projects. Current law thus uses a multiple contract notion to allow the LVSP to keep the entire contract price without any reduction for the saved labor. But due to leisure harm and the diminishing marginal utility of money, the surplus value from each additional contract generally will be less than the immediately prior project, calling the multiple contract assumption into question.

The Article’s prior reservation price terminology further demonstrates current law’s anomalous results. A LVSP’s reservation price on a second contract should be higher than on the first due to the diminishing marginal utility reasons above. As noted previously, though, current law’s approach implicitly assumes a reservation price of zero on the breached contract. Treating the additional work as the first contract and the breached contract as the second, how could the reservation price on a second contract under consideration be zero given that reservation prices typically increase on each additional contract?

Greene & Baron, supra note 75, at 243–44 (“Money, for example, tends to exhibit declining marginal utility, as illustrated by the fact that the utility you would gain from increasing your wealth from $1,000,000 to $1,001,000 would almost certainly be smaller than the utility you would gain from increasing your wealth from $1,000 to $2,000.”).

By definition the issue is whether the LVSP can keep the compensation from the first breached contract added on top of the second (since the LVSP, of course, is entitled to keep the compensation from at least one contract). RESTATEMENT (SECOND) OF CONTRACTS § 350 cmt. d (1981) (“[T]he second transaction is not a ‘substitute’ for the first one.”).

While the breached contract was entered into before the contract for the new work, it is appropriate here to consider the breached contract as additional work effort on top of the work actually performed on the new contract. In other words, the new contract becomes the first contract and the breached contract is the second. This follows given the focus on the worker’s true net loss from the excused contract and the worker’s LVSP claim that he would have performed both contracts absent the breach. As such, the worker’s saved effort on the breached contract relates to avoiding work on the second of the two signed contracts.

Separately, it might be argued that an LVSP’s willingness to work on multiple projects justifies current law by showing a high preference for monetary compensation and/or a low value for leisure. But this argues too much notwithstanding some proven link between a willingness to take on multiple projects and a possible high preference for cash and/or low preference for leisure. It is one thing to say that perhaps the LVSP’s willingness to take on multiple projects indicates a lower reservation price than the average laborer. It is a completely another thing to say that the reservation price for a LVSP is zero, especially as more work is undertaken.
The chart below visually reinforces the anomaly. The horizontal axis, moving from left to right, reflects increasing work hours. The vertical axis, moving from bottom to top, reflects increasing utility (money) or disutility (lost leisure). The downward sloping money utility curve measures the utility from the money obtained from the ever increasing work hours. The upward sloping leisure disutility curve measures the disutility of the leisure lost from the ever increasing work hours. As can be seen visually, the surplus value starts out relatively high for the initial work hours, and then moves relatively lower as the working hours increase.

As a final point from the chart, the worker will decline the work once the leisure disutility matches or exceeds the money utility, starting at the point when the two curves meet.

C. Final Supporting Arguments

This Section presents final supporting arguments for a leisure time reduction. Section C.1 exposes the current law’s anomalous results based on whether the LVSP would subcontract out a portion of the work. Section C.2 then shows why the LVSP setting refutes two possible offsets to the leisure time benefit.

In addition, a practical point further shows the weakness of current law. One cannot know for sure that the LVSP would have taken on all the actual projects absent the breach since this question raises a counterfactual situation. Rather, the courts must make their best determination as to the likelihood of the LVSP’s actions in this counterfactual situation. See infra Part III.A, for more on this uncertainty.

84 See Harrison, supra note 25, at 213 (presenting a similar graph).

85 The “absolute” utility heading for the vertical axis captures the fact that both the money utility and the leisure disutility are mapped together as positive numbers.

86 The two potential claims are that the liberated leisure time makes up for either (1) lost nontangible benefits from working; or (2) time spent looking for new work after the breach.
1. The Subcontracting Anomaly

Consider the possibility that the contractor would hire assistance for the contracted labor. This exposes a disturbing anomaly under current law: the labor effort reduces the recovery but only if performed by someone other than the contractor. In a sense, contract damage law acts as if work effort imposes a cost only when performed by someone else. But if that were true, why would a contractor pay for such assistance rather than working alone? In reality, the contractor balances her own lost leisure cost against the subcontractor’s monetary charge. And regardless of her choice, the contractor experiences a very real cost. Again, an example will illustrate:

Example 2: Igor and Indie each agree to take on an extra $100,000 project. Igor would have accepted the work for any price above $70,000 while Indie would not have agreed for any price below $90,000. A subcontractor now offers to do the work for $80,000 after the contract signings. The counterparty again breaches prior to performance.

What are the correct damages for each? Absent the breach, Indie should farm out the work since she could save leisure time valued at $90,000 for only $80,000. This would increase her benefit on the contract to $20,000. In contrast, Igor should do all the work himself since the sub-

---

87 See, e.g., Wright v. Davis, 193 S.W.2d 294, 296 (Tex. Civ. App. 1945) (“[T]o earn the consideration . . . appellant would have to expend his labor and would be compelled to hire additional labor. It is . . . beyond the power of one man to chop, cultivate and pick fifty acres of land in cotton . . . . The measure [of damages] was the value of . . . what he probably would have raised upon the land, deducting therefrom . . . the expense he would have incurred other than his own labor in cultivating, maturing and harvesting the crops.”) (emphasis added).

88 This is the flip side to the issue of whether a party suing for reliance costs incurred in performing a contract can collect for their nonmonetary labor effort. In theory, the answer should be yes. United States v. Behan, 110 U.S. 338, 345 (1884) (“But when heelects to go for damages for the breach of the contract, the first and most obvious damage to be shown is, the amount which he has been induced to expend on the faith of the contract, including a fair allowance for his own time and services.”). But in actuality, one’s own service time tends to get overlooked in this flip side scenario as well. See, e.g., Patterson, supra note 43, at 1306. Cf. Worcester Heritage Soc’y, Inc. v. Trussell, 577 N.E.2d 1009, 1011 (Mass. App. Ct. 1991) (stating that in determining defendant’s partial performance, trial court properly took into account not just cash expenditures but also the “sweat equity” of the defendant’s own labor).

89 In certain extreme cases, there is no choice but to seek assistance given the physical limitations of one person. See, e.g., Wright, 193 S.W.2d at 295-96 (presenting a scenario where the contractor lacked the physical capacity to perform all the work himself). But the subcontractor possibility arises even where the contractor has the physical capacity to perform the work alone.

90 See supra Part I.A.1 (discussing the labor/leisure tradeoff).

91 Following the earlier analysis, Indie’s surplus value is just $10,000 if she does the work herself, based on her $90,000 reservation price. Farming out the work increases her benefit to the $20,000 net: $100,000 contract price less the $80,000 subcontractor payment. This assumes a negligible oversight responsibility for Indie.
contractor’s $80,000 cost exceeds his $70,000 leisure time value. Following the earlier analysis, Igor’s lost benefit is his $30,000 surplus value, based off his $70,000 reservation price.

Indie receives the correct $20,000 under current law, but only upon a factual finding that Indie would have hired the subcontractor. If so, the “saved” $80,000 subcontractor cost reduces the $100,000 contract price. In contrast, Igor receives the full $100,000 without reduction because he would have performed the work himself. In sum, current law reduces damages for the labor element, but only where the work would have been done by someone other than the contracting party.

The subcontractor possibility uncovers significant practical difficulties under current law in addition to its theoretic shortcomings. Consider Wright v. Davis, where the court allowed some reduction in damages for saved subcontractor labor, stating that: “It is . . . beyond the power of one man to chop, cultivate and pick fifty acres of land in cotton . . . .” But even this threshold inquiry on the propriety of some reduction becomes much more complicated for less labor intensive contracts. And beyond such threshold inquiry, further difficulties arise in determining the extent and pricing of the subcontracted-out work.

2. LVSP Nullifies Two Possible Offsetting Claims

To complete this Part’s presentation of the current flawed approach, this Section considers whether the liberated leisure time properly compensates the laborer for either (1) lost job search time after the breach; or

---

92 See Crews v. Cortez, 113 S.W. 523, 526 (Tex. 1908) (“The rights of the parties are founded on the contract, and the wrong done is compensated for when the injured party is allowed the full value which he would have produced, less the expense of which he has been relieved.”).

93 Focusing on the breaching party provides another way to see the anomalous results. The breaching party must cover either the full price for the labor or nothing at all depending on whether the labor is subcontracted. Under a surplus value proposal, the breaching party could pay a varying amount dependent on the LVSP’s reservation price for the contract. The varying results under such a proposal make sense, though, from the breaching side’s perspective as well since it only incentivizes so-called “efficient breaches.” See supra notes 33-41 and accompanying text (discussing “efficient breach”).


95 Id. at 296.

96 In this regard, recall the broad category of potential LVSPs: plumbers, doctors, lawyers, pavers, masons, architects, etc. See supra note 43.

97 The appellate court in Wright glossed over these complications, apparently leaving those issues to the lower court, as it merely stated that proper deduction should be made for “the expense he would have incurred other than his own labor in cultivating, maturing and harvesting the crops.” Wright, 193 S.W.2d at 296 (emphasis added). The inquiry relates to a counterfactual assessment of what would have happened absent an actual breach. Cf. discussion infra Part IILA (stating difficulties with current law’s absolute LVSP determination of whether the laborer would have taken on both jobs absent the actual breach).
lost nontangible benefits from the job. As will be shown, neither possibility justifies the lack of a leisure adjustment for LVSPs.

a. **Offsetting Job Search Efforts?**

Might job search efforts after the breach satisfactorily offset the leisure time gained from the excused contractual work effort? If a discharged worker fails to seek substitute work, the reasonable diligence component of mitigation reduces the recovery by the compensation possible from reasonably available comparable work.\(^98\) A discharged employee thus might need to spend some of his newly liberated leisure time after the breach seeking such substitute employment.\(^99\)

Similar to the earlier mitigation analysis of compensation earned from subsequent work, though, the reasonable diligence doctrine generally does not impact LVSPs. The classic LVSP laborer—the parking lot paver, mason, architect, etc.—generally handles multiple projects simultaneously and undertakes efforts to generate a regular stream of business.\(^100\) For this reason, the typical LVSP case does not involve the failure to seek new work, but rather the mitigation issue discussed earlier of whether the recovery should be reduced by compensation actually earned after the breach.\(^101\)

Given their ability to handle multiple work projects, some courts have granted LVSPs immunity from mitigation seemingly regardless of their search efforts.\(^102\) Such immunity from any offset despite the lack of replacement efforts further evidences current law’s weakness. Passive postbreach behavior potentially indicates a real taste for leisure and a corre-


\(^{99}\) See, e.g., *Kelly supra* note 25, at 207.

\(^{100}\) This possibility therefore is more apt in the case of a full-time employee who chooses not to work at all after the breach, rather than an LVSP. Even in such case, though, it is unlikely that the required search efforts would meaningfully offset the saved work effort on the contract. See *supra* note 43.

\(^{101}\) See, e.g., Gianetti v. Norwalk Hosp., 43 A.3d 567, 599-600 (Conn. 2012); Lone Star Ford, Inc. v. McCormick, 838 S.W.2d 734, 740 (Tex. App. 1992); *Restatement (Second) of Contracts § 347 cmt. f, illus. 16 (1981).*

\(^{102}\) See *Rochester Capital Leasing Corp. v. McCracken*, 295 N.E.2d 375, 379 (Ind. Ct. App. 1973) (finding business consultant not subject to mitigation as “there was evidence from which the jury might have concluded that [he] could have earned other income and yet have stood ready and able to serve . . . as consultant”); see also *Lone Star*, 838 S.W.2d at 740 (stating, in dicta, that if “the nonbreaching party was legally free to enter into similar contracts with other [sic], the fact that . . . the wronged party could have made similar contracts does not reduce the damages”). See *In re Worldcom*, 361 B.R. at 690, for one interesting case where such an argument failed. *In re Worldcom,* basketball superstar Michael Jordan did not seek any comparable endorsement work, and the court rejected Jordan’s claim that he was immune from mitigation because he legally could have taken on a second endorsement contract simultaneously. *Id.* at 688. This case, though, is not the standard LVSP case.
spondingly lower surplus value. Nonetheless, the LVSP is granted a full recovery.

b. **Offsetting Nontangible Benefits?**

Finally, might a worker receive significant nonmonetary benefits from having a steady work job? If so, the lost nontangible benefits from employment might sufficiently offset the gained leisure time on breach. While such a satisfactory offset is highly debatable even for a full-time employee, this claim disintegrates in the LVSP context for reasons similar to the job search offset. By definition, the classic LVSP handles multiple projects without regard to the work under the breached contract, thereby already avoiding any nonmonetary downside to unemployment.

***

In sum, the LVSP context entails a significant flaw of compensated leisure given the general lack of mitigation or other potential offsets. This leads to a troubling “all-or-nothing” approach under current law. On the one hand, a successful LSVP claim allows full retention of damages without any leisure offset. On the other hand, an unproven LVSP claim can lead to a full denial of any recovery due to mitigation. After Part II shows why the leisure problem persists for full-time employees, Part III then considers feasible leisure offsets.

II. **COMPENSATED LEISURE FLAW FOR FULL-TIME EMPLOYEES**

The compensated leisure flaw analysis shifts for full-time employees since the inability to hold down two full-time jobs precludes LVSP status.

103 See infra Part II, for the comparable discussion for full-time employees.

104 Cf. Eisenberg, supra note 27, at 1153 (“Given normal economic and psychological needs, few persons are likely to turn down a satisfactory job in favor of inactivity and the chance of recovering damages that would put them in no better financial position than would the replacement job.”). See generally Y. Hossein Farzin & Ken-Ichi Akao, Non-pecuniary Work Incentive and Labor Supply 1, 3 (Fondazione Eni Enrico Mattei, Working Paper No. 21.2006, 2006), available at http://www.feem.it/userfiles/attach/Publication/NDL2006/NDL2006-021.pdf (extending the standard labor supply model “[b]y incorporating the positive nonpecuniary effects of employment on individual well-being”).

105 See discussion infra Part II.B.

106 This is not to say that there could never be nonmonetary gains from an additional project, but rather that, as a general rule, any such benefits are unlikely to match the benefits from the liberated leisure time. See Eisenberg, supra note 27, at 1153 (“[F]ew persons are likely to turn down a satisfactory job in favor of inactivity . . . .” (emphasis added)).

107 There is a limited LVSP possibility for part-time only work which could, and would, have been taken on absent the breach. For simplicity, this Part will refer to this group collectively as employees.
Discharged employees who stay idle thus might end up with only uncompensated leisure time for failure to mitigate their damages. Mitigation also blocks a double cash recovery for just a single leisure sacrifice if the employee undertakes new work after the breach. Current law therefore might appear to sufficiently address the compensated leisure problem for full-time employees, particularly given the possible noncash benefits from full-time employment.

But while the compensated leisure problem lessens compared to LVSPs, this Part demonstrates room for substantial improvement for full-time employees as well. Section A highlights another undesirable “all-or-nothing” outcome under mitigation: the comparability or noncomparability of rejected new work. Section B discusses why nontangible benefits typically do not offset the gained leisure value.

A. Serious Defects in Application of the Mitigation Offset

The effectiveness of the mitigation offset for full-time employees depends upon the comparability of available postbreach work to the relieved performance. For very close substitute work, mitigation works relatively well. Palagi v. Nationwide Mutual Insurance Co. nicely illustrates the essence of mitigation’s appeal. Palagi’s employer breached the employment contract by selling the business to a third party without Palagi’s consent. The new owner offered to continue Palagi’s job without any adverse changes, but Palagi eventually resigned and sued the original employer for the contract amount. The court found this to be an easy mitigation case as Palagi turned down an offer to work “in the same place, at the same desk, at the same job, at the same pay. Given these facts, the puzzling question remains: What are Plaintiff's damages?”

even though it can include some nonemployees. Further note that full- versus part-time status is not the ultimate determinant of whether someone is an employee or independent contractor, but nonetheless it remains a useful shorthand distinction for this Article’s purposes.

108 Kelly, supra note 25, at 185-86.
109 The concern here is no longer compensated leisure but a related double cash recovery. Note how this is different than for LVSPs where the issue remains compensated leisure since the LVSP would have worked both projects (or so they argue) but for the breach; not so here as the employee cannot handle both jobs simultaneously.
110 See Kelly, supra note 25, for one commentator who seems to take such a view in the employment context based primarily on the mitigation possibility. For instance, mitigation will step in to block an attempted receipt of compensated leisure by turning down comparable new work after the breach.
112 Id. at 904-05. The contract prohibited assignment of the employer’s obligations without consent. Id. at 904.
113 Id. at 904-05.
114 Id. at 907.
Current law appropriately gave Palagi a choice between uncompensated leisure and the surplus value on the breached contract (by accepting the true “comparable”). In other words, current law nicely blocked Palagi from obtaining a compensated leisure windfall by requiring that he take the truly comparable job to retain the contract surplus value.115

Moving beyond Palagi’s virtually identical job scenario,116 current law maintains its appeal so long as the substitute work is close enough to the original employment that one can still exclaim “What are the damages?” But mitigation falls short where the new work is not such an extremely close substitute. Drawing upon some litigated cases, suppose now the newly available work entails a longer commute,117 lesser compensation,118 or different responsibilities.119 Should the innocent-party employee be forced to account for the failure to take on such different, arguably inferior, work?

---

115 Palagi should have taken the truly comparable job absent an intervening change to his labor/leisure preference. Palagi likewise would have been correctly denied any recovery if he retained the job since he should not receive a double compensation when he could not handle the two positions simultaneously. It might seem obvious here that Palagi could not do both jobs since the “substitute” job was really just a continuation of his original job. While that is true, it might be helpful to think of Palagi as more broadly representing very close substitute jobs with a different employer: in other words, another job with the same general geographic location, compensation, job title, and responsibilities. In this regard, note that the jobs in Palagi were not truly identical due to the change of the boss in connection with the ownership sale. See generally Christa H.S. Bouwman, The Role of Corporate Culture in Mergers and Acquisitions, in MERGERS AND ACQUISITIONS: PRACTICES, PERFORMANCE AND PERSPECTIVES 109, 110-13, 119-20 (Etienne Perrault ed., 2013), available at http://faculty.weatherhead.case.edu/bouwman/downloads/BouwmanCorpCultureM&A%20Dec2012.pdf (examining the literature that looks at different types of corporate culture and the effects it may have on mergers and acquisitions— including on personnel); Marianne Bertrand & Antoinette Schoar, Managing with Style: The Effect of Managers on Firm Policies 2, 4 (Mar. 2003) (unpublished manuscript), available at http://www.mit.edu/~aschoar/costyle.pdf (examining how different management styles can significantly affect corporate behavior and performance).

116 See supra note 115, for an explanation of how the job was not completely identical due to the change in ownership.

117 See, e.g., Donlin v. Philips Lighting N. Am. Corp., 581 F.3d 73, 89-90 (3d Cir. 2009) (holding a discharged warehouse worker sufficiently mitigated her damages where she took a lesser paying job closer to home than a higher paying job with a thirty-two-mile commute); BPS Guard Servs., Inc. v. Int’l Union of United Plant Guard Workers of Am., Local 228, 45 F.3d 205, 211 (7th Cir. 1995) (concluding that a security guard did not fail to mitigate where one substitute job was eighty miles away).

118 Compare Boone v. Atlanta Indep. Sch. Sys., 619 S.E.2d 708, 712 (Ga. Ct. App. 2005) (denying recovery for teacher’s failure to mitigate where declined new job used same skills at lower pay), with BPS Guard Servs., 45 F.3d at 205 (not applying mitigation to a security guard where another substitute job offered lower pay and less benefits).

If the employee declines the new work on grounds of inferiority, current law once again provides problematic “all-or-nothing” results. A noncomparability finding allows full retention of the cash compensation rather than just the lower surplus value. Similar to current law’s flawed treatment of LVSPs, a noncomparability determination implicitly contains an implausible assumption that the employee would have accepted the breached contract for free. On the other hand, a comparability finding results in the polar extreme: elimination of any recovery, including an incorrect deprivation of any surplus value. This bipolarity places tremendous, and arguably excessive, weight on determining what constitutes comparable work.

Beyond providing incorrect results, current law also weakens incentives to work. Because actual earned wages from substitute work reduce the recovery regardless of job comparability, the employee obtains the leisure windfall only by turning down the noncomparable work. This incentivizes the employee to decline new work when confident of a noncomparability finding. Beyond encouraging inefficient idleness, current law essentially forces a difficult choice upon the innocent-party employee. The employee can decline the work, gambling on a noncomparability finding to retain the compensated leisure windfall, but risking full denial of even the surplus value. Or the employee can play it safe by accepting arguably inferior work, thereby sacrificing any extra surplus on the original contract.

120 See, e.g., Parker, 474 P.2d at 691, 693-94 (holding that actress Shirley MacLaine could retain the full contract price without reduction after Fox pulled the plug on the contracted musical and instead offered her an “inferior” role, at the same pay, in a western movie). The court reasoned “the female lead as a dramatic actress in a western style motion picture can by no stretch of imagination be considered the equivalent of or substantially similar to the lead in a song-and-dance production.” Id. at 694.

121 See discussion supra Part I.A.2.

122 See supra Part I.A.2. Again, the employee is properly entitled to just his/her surplus value. Retention of the entire contract price essentially equates the full contract price with surplus value, thereby implying a reservation price of zero.

123 For ease of exposition, assume the comparable work provides a matching amount of compensation. Arguably, the loss should be only the excess of the surplus value on the breached contract over the surplus value on the substitute work as the employee had the option to recapture some surplus value via the alternative. But as the substitute work moves away from a pure match with the breached contract, a counterargument in favor of the full surplus value on the breached contract becomes more compelling. From a fairness perspective, why should the innocent employee be forced to account for the fact that he/she did not take on substitute work that contained some noticeable differences from the original contract? Somewhat related, such rejection serves as a weaker indicator that there was little or no surplus value on the breached contract as the differences become more meaningful.

124 See Kelly, supra note 25, at 219-20.

125 See Evans, supra note 25, at 15 (suggesting that older workers therefore have a greater incentive to turn down new work).
Perhaps mindful of the employee’s dilemma, current law generally imposes a high threshold for comparability. But this exacerbates the compensated leisure problem for breaching employers as employees can more readily turn down new work to retain the compensated leisure. Under current mitigation, there is an unavoidable tension between undue pressure on the innocent employee or an enhanced compensated leisure problem.

B. Noncash Benefits Fail to Offset: Work Hurts!

As noted in Part I, the nonmonetary benefits of work arguably justify current law’s failure to account for liberated leisure time other than through the unreliable mitigation offset. However, the net disutility of work negates such claim. In sum, work hurts.

The attempted justification of nonmonetary offsets essentially claims that employees would generally work for free. But recall the earlier litigated cases, like Palagi, where discharged employees remained idle after the breach by rejecting different work. This rich body of case law rejects the “work for free” proposition. Market forces and common sense intuition further support such rejection. For instance, wouldn’t market wages generally be much lower if most people would work for free?

***

Although less severe than the LVSP context, the compensated leisure flaw persists for full-time employees despite the possible mitigation offset. The “all-or-nothing” approach based on work comparability raises an inherent tradeoff between employee hardship and compensated leisure. As with LVSPs, the compensated leisure problem conflicts with both the fair-

---

126 See, e.g., Kelly, supra note 25, at 246-49; see also Sellers v. Delgado Cmty. Coll., 839 F.2d 1132, 1138 (5th Cir. 1988) (“‘Substantially equivalent employment’ [is] . . . employment which affords virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status as the position from which the . . . claimant has been . . . terminated.”).

127 This has led two commentators to consider a possible relaxation of the comparability standard. See Evans, supra note 25, at 17-21 (proposing an expanded mitigation offset based on evidence of the earnings of similarly situated employees); Harrison supra note 25, at 215-22. Note, though, how this then puts more pressure on the innocent-party employee to take on lesser work.

128 See supra Part I.

129 See supra Section I.C.2.b. This prior discussion evaluated this highly debatable proposition in the LVSP context where it failed to pass even initial muster since the LVSP, by definition, already handles other work projects simultaneously without regard to the breached contract.

130 Or in terms of the earlier framework, that the surplus value equals the full contract price due to a zero reservation price.

131 See supra notes 111-20 and accompanying text.

132 See supra notes 111-20 and accompanying text.
ness and efficiency goals of contract law. The Part that follows outlines practical solutions to the inaccuracy and inflexibility of current law on contract damages, both for LVSPs and full-time employees.

III. CORRECTING THE COMPENSATED LEISURE FLAW

The compensated leisure flaw in contract damages stems in part from the current “all-or-nothing” approaches to LVSP status and work comparability. These rigid determinations fail to approximate the unobserved reservation wages of innocent-party laborers. A more flexible approach to these LVSP and comparability determinations would lessen current law’s compensated leisure problem and move contract damages closer to the fair and efficient “benefit of the bargain” standard.

This Part thus proposes a more adjustable approach to LVSP status and work comparability, thereby providing a better proxy for the reservation prices of laborers. Section A proposes two refined methods for LVSPs: (1) a sliding scale approach whereby the recovery percentage decreases inversely related to the strength of the LVSP finding; and (2) the use of labor elasticity studies, which analyze how wage changes impact work decisions. Turning to full-time employees, Section III.B proposes a similar sliding scale keyed to the substitute job’s degree of comparability.

A. Flexible Determinations of LVSP Status

To recap from Part I, LVSP status nullifies the mitigation offset for new work. This places tremendous pressure on the LVSP determination. A successful LSVP claim grants full compensation from both the breached and substitute jobs without any leisure offset. At the other extreme, a failed LVSP claim denies any recovery under mitigation.\(^{133}\) This presents two main problems. First, the LVSP finding contains a degree of uncertainty given its counterfactual inquiry.\(^{134}\) Second, the resulting consequences go too far even assuming the correctness of the finding.\(^{135}\) For instance, a posi-

\(^{133}\) This assumes the subsequent earnings at least equal the breached contract price. See supra Part II, for a more extensive discussion of mitigation.
\(^{134}\) The inquiry focuses on what the contractor would have done if the (actual) breach had not occurred. So, for instance, an erroneous court finding against LVSP status incorrectly limits the contractor to the surplus value from just one contract, rather than both.
\(^{135}\) This is due to LVSP damages in excess of the laborer’s reservation price for the work (i.e., compensated leisure).
tive LVSP finding implicitly contains an implausible assumption that the contractor would have taken the additional job for free.\footnote{In the other direction, a negative LVSP finding implicitly contains an assumption that the surplus value on the second project at least matches the first. This assumes that the compensation on the new work at least equals the compensation on the breached contract.}

This Section considers more balanced improvements to the current “all-or-nothing” extremes. Section A.1 presents a sliding scale approach whereby the contract recovery percentage decreases inversely related to the strength of the LVSP finding. A higher degree of confidence in the LVSP finding thus would trigger a lesser percentage reduction, although such reduction would stay positive in even a slam dunk LVSP case.\footnote{A positive reservation price remains likely even in such a clear-cut case.} Section A.2 presents an alternate pathway based on labor elasticity studies, which analyze how wage changes impact work decisions.

1. Sliding Scale Likelihood Approach

A contractor must prove LVSP status by a “preponderance of the evidence” under current law.\footnote{Gianetti v. Norwalk Hosp., 43 A.3d 567, 578 (Conn. 2012); Bitterroot Int’l Sys., Ltd. v. W. Star Trucks, Inc., 153 P.3d 627, 639 (Mont. 2007).} This equates to a finding of just “more likely than not,” requiring only slightly higher than a 50 percent possibility.\footnote{Louis Kaplow, Burden of Proof, 121 YALE L.J. 738, 741-44 (2012).} This falls well below the “clear and convincing evidence” and “beyond all reasonable doubt” standards used for fraud and criminal convictions.\footnote{Id. at 779.} A successful LVSP claim nullifies any offset despite potentially meeting only this low 50 percent threshold.\footnote{As shown above, even a “virtually certain” LVSP should receive just the surplus value, not the contract price. See supra p. 24 and notes 22, 136 and accompanying text.} As developed below, more detailed LVSP findings with different likelihood gradations therefore would provide two key improvements: a hedge against a faulty LVSP finding and useful information to help approximate the lost surplus value from the breached contract.

Such an approach would reduce the recovery by a sliding scale percentage inversely related to the LVSP likelihood finding. The reduction would decrease as the LVSP probability strengthens since more confidence in the LVSP finding should indicate a lower reservation price (with a correspondingly higher surplus value).\footnote{Again, a lower reservation price leads to a higher recovery since the surplus value equals the contract price less the reservation price. See supra Part I.A.2.} For example, the recovery could be reduced by 50 percent for a mere “likely” finding; 25 percent for a “highly
likely” finding; and 10 percent for an “extremely likely” finding.\textsuperscript{143} In addition to providing a useful surplus value indicator, this approach hedges against a faulty LVSP finding since a larger reduction tracks greater doubts as to the contractor’s asserted LVSP claim.\textsuperscript{144} 

For an illustrative case, consider \textit{Gianetti v. Norwalk Hospital}.\textsuperscript{145} Dr. Gianetti was an attending physician at several hospitals.\textsuperscript{146} Norwalk improperly terminated his privileges but claimed mitigation for his subsequent higher earnings at the other hospitals.\textsuperscript{147} The appellate court upheld Gianetti’s LVSP claim, albeit in lukewarm fashion.\textsuperscript{148} After recognizing Norwalk’s point that Gianetti did not seek new hospital affiliations post breach, the court noted that “it is within the province of the trial court . . . to . . . determine the credibility” that another hospital was too far away.\textsuperscript{149} The court held that the trial court’s LVSP finding “was not clearly erroneous,” emphasizing how Gianetti needed to prove his LVSP status by only “a [mere] preponderance,” rather than “uncontroverted and overwhelming evidence.”\textsuperscript{150} In sum, the opinion reads like only a “likely” case, thereby justifying a 50 percent haircut in light of the uncertainty surrounding Gianetti’s LVSP claim.

Finally, the sliding scale proposal’s overall appeal remains strong despite some imperfection and complexity. Despite failing to capture the exact surplus value, the proposal’s moderating approach aligns with actual surplus values much better than the current “all-or-nothing” extremes resting on an up-or-down determination of LVSP status.\textsuperscript{151} Furthermore, the proposal minimizes new complexity by modifying an already required fac-

\textsuperscript{143} If helpful, this approach could draw upon the already familiar “clear and convincing evidence” and/or “beyond a reasonable doubt” standards for such higher likelihood categories. The textual presentation avoids such linkage, though, since their use in other particularized settings might implicate other issues not present here.

\textsuperscript{144} This approach also could be used if the contractor loses in a close LVSP case given the possibility of a faulty negative finding. For instance, a higher 70 percent reduction upon a mere “unlikely” finding might appeal since an erroneous anti-LVSP finding incorrectly deprives the contractor of any surplus value if mitigation wipes out the recovery. There are also possible improvements to the non-LVSP world. See infra Part III.B. If implemented, these improvements for non-LVSPs would decrease the significance of this possibility of a faulty negative finding.

\textsuperscript{145} 43 A.3d 567, 574 (Conn. 2012).

\textsuperscript{146} \textit{Gianetti v. Norwalk Hosp.}, 43 A.3d 567, 574 (Conn. 2012).

\textsuperscript{147} \textit{Id.} at 575, 580.

\textsuperscript{148} \textit{Id.} at 575.

\textsuperscript{149} \textit{Id.} at 581-82 (quoting State v. Lawrence, 920 A.2d 236, 247 (Conn. 2007)) (internal quotation marks omitted).

\textsuperscript{150} \textit{Id.} at 578-79, 582.

\textsuperscript{151} The exact surplus value is an unknowable fact. Somewhat related, the current determination likewise turns on an unknowable fact: whether the contractor in fact would have taken on the new work absent the actual breach.
tual determination. Likewise, current law often utilizes sliding scales and likelihood determinations other than the preponderance of the evidence standard. In this regard, this proposal’s significant benefits provide a very favorable tradeoff against its minimal complications.

2. Tax and Labor Supply Elasticity Approach

Labor elasticity studies present an alternate pathway by quantifying the impact of wage changes on work decisions. A higher elasticity re-

152 More generally, improved equitable results often impose some extra complexity. Consider, for instance, the U.S. tax code. A familiar critique concerns its excessive complexity. See, e.g., Sheldon D. Pollack, Tax Complexity, Reform, and the Illusions of Tax Simplification, 2 GEO. MASON INDEP. L. REV. 319, 358 (1994) (“The tax code has become a massive and impenetrable edifice of rules and regulations that describe and govern nearly all spheres of economic life and business activity.”). But one reason for such complexity is the desire to apportion tax burdens in a fair manner. See Jeffrey Partlow, The Necessity of Complexity in the Tax System, 13 WYO. L. REV. 303, 305 (2013) (discussing the fairness basis and other reasons). The tax code could be simplified by having everyone pay the same amount under a “head” tax, but most people would agree that such equal liability would be patently unfair. See, e.g., Lee Anne Fennell & Kirk J. Stark, Taxation Over Time, 59 TAX L. REV. 1, 22 (2005) (“Yet despite these efficiency benefits, head taxes are almost universally rejected on the basis that they inadequately discriminate among taxpayers with varying levels of ability to pay.”); Nancy C. Staudt, The Hidden Costs of the Progressivity Debate, 50 VAND. L. REV. 919, 947 (1997) (“No theorist has ever seriously advocated the head tax, which is perceived to be the most efficient tax.”); Linda Sugin, A Philosophical Objection to the Optimal Tax Model, 64 TAX L. REV. 229, 231-32 (2011) (“Because a head tax is due in a fixed and equal amount no matter a person’s financial circumstance, it strikes most people as fundamentally unfair and arbitrary.”).

153 See, e.g., Developmental Servs. Network v. Douglas, 666 F.3d 540, 544 (9th Cir. 2011) (“Plaintiffs seeking a preliminary injunction . . . must establish that they are likely to succeed on the merits, that they are likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in their favor, and that an injunction is in the public interest. We have glossed that standard by adding that there is a ‘sliding scale’ approach which allows a plaintiff to obtain an injunction where he has only shown ‘serious questions going to the merits’ and a balance of hardships that tips sharply towards the plaintiff . . . so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.”) (emphasis added) (footnote omitted) (citation omitted) (internal quotation marks omitted); Am. Heritage Life Ins. Co. v. Heritage Life Ins. Co., 494 F.2d 3, 12 (5th Cir. 1974) (“The district court found that ‘heritage’ was ‘a word whose primary meaning was so intimately associated with and descriptive of the services intended to be distinguished in commerce’ that ‘strong evidence of secondary meaning’ would be required before AHLIC could be permitted to appropriate it. We agree that the evidentiary burden necessary to establish secondary meaning is substantial where the proposed mark’s original or primary meaning suggests the basic nature of the service to be rendered.”) (emphasis added); EnVerve, Inc. v. Unger Meat Co., 779 F. Supp. 2d 840, 844 (N.D. Ill. 2011) (“Under the ‘sliding scale’ approach for granting injunctive relief, EnVerve will need a very strong showing on the other factors to be entitled to a preliminary injunction.”) (emphasis added)).

flects a greater willingness to substitute leisure for work as wages drop.\textsuperscript{155} As shown below, a higher elasticity correlates with a higher reservation price, thereby justifying a greater recovery reduction.\textsuperscript{156}

Labor elasticity technically equals the employment percentage change divided by the wage percentage change.\textsuperscript{157} For example, a 10 percent wage drop would induce a 10 percent work reduction by a laborer with a labor elasticity of 1.\textsuperscript{158} The diminishing marginal utility discussion above suggests one key factor impacting an individual’s elasticity: individual wealth.\textsuperscript{159} All else equal, the utility from monetary compensation generally decreases as wealth increases.\textsuperscript{160} Unsurprisingly then, elasticity studies consistently associate wealth with a higher labor elasticity.\textsuperscript{161}

To see this promising elasticity use, let’s revisit Example 1\textsuperscript{162} with a new focus on approximating reservation prices and surplus values for Indie and Igor.

Example 3: Igor and Indie each agree to take on an extra project paying $10,000 for their services. Both already have commitments to also work on nine other equal projects. Igor and Indie each would have accepted the new project for less than $10,000, although the actual reservation price for each is now unknown. Indie is wealthier than Igor, which suggests that she has a higher elasticity than Igor, all else equal. As such, let’s assume a higher 0.4 elastic-

---


\textsuperscript{156} As discussed previously, the correct recovery equals the lost surplus value, and the surplus value equals the contract price less the reservation price. See supra Part I.A.2.

\textsuperscript{157} As used herein, the elasticity formula measures the "hours elasticity," calibrating how wage rate changes impact the hours worked by employed categories of people. See Robert McClelland & Shannon Mok, A Review of Recent Research on Labor Supply Elasticities 6 (Cong. Budget Office, Working Paper No. 2012-12, 2012) [hereinafter CBO Report], available at http://www.cbo.gov/sites/default/files/cbofiles/attachments/10-25-2012-Recent_Research_on_Labor_Supply_Elasticities.pdf. In contrast, participation elasticity measures how wage rate changes impact the share of the population that works at all. Id.; see infra note 174.

\textsuperscript{158} Calculated as 0.1/0.1 = 1. In contrast, someone else with a lower elasticity of 0.2 would drop 10 percent of their work only if wages were cut in half, calculated as 0.1/0.5 = 0.2.

\textsuperscript{159} See supra Part I.B.2.

\textsuperscript{160} Greene & Baron, supra note 75, at 243-44.

\textsuperscript{161} See, e.g., CBO Report, supra note 157, at 22. Retirement decision studies, which also analyze the decision whether to forego future work for leisure, further support the wealth factor. See, e.g., Ehrenberg & Smith, supra note 155, at 240 ("Thus, we should expect wealthier people or people with more generous pension benefits as of age 60 to retire earlier, other things equal."); Cori E. Uccello, Urban Inst., Factors Influencing Retirement: Their Implications for Raising Retirement Age, at iv-v (1998), available at http://www.urban.org/UploadedPDF/1000207_retire_factors.pdf (presenting a similar analysis on wealth).

\textsuperscript{162} See supra text accompanying note 6.
ty for Indie and a lower 0.2 elasticity for Igor. Again assume the counterparty breaches before either one begins performance.

The elasticity data neatly converts into reservation prices and surplus values. Under the formula above, a 25 percent wage change would induce Indie to drop 10 percent of her work.\footnote{0.4 = (0.1/X); X = 0.25 (i.e., 0.1/0.25= 0.4).} This converts into a $7,500 reservation price on the tenth job in question,\footnote{If a 25 percent wage drop would induce Indie to decrease her work by 10 percent, this indicates a reservation price on the tenth job (constituting 10 percent of her workload) of $7,500. For instance, she likely would take the job for $8,000 (just a 20 percent drop), but not for $7,000 (a 30 percent drop).} leaving a $2,500 reservation price. In short, her surplus value simply equals the wage change percentage times the contract price. In comparison, Igor has a higher $5,000 surplus value given his 50 percent required wage change.\footnote{0.2 = (0.1/X); X = 0.5 required wage change. The surplus value equals the $10,000 contract price times the 0.5 required wage change.} His higher surplus value makes sense given his relative inelasticity compared to Indie.

The earlier discussion highlighted another key criterion possibly impacting elasticity: the existing workload.\footnote{See supra notes 77-79 and accompanying text.} Busier contractors generally should have higher labor elasticities since each new project requires sacrifice of more limited (and valuable) leisure time.\footnote{The diminishing marginal utility of leisure makes a static amount of lost leisure from each contract increasingly more painful as workload increases since the lost leisure becomes more valuable as it dwindles.} While existing studies have not adequately addressed this issue, the overtime pay literature generally supports a direct correlation between labor elasticity and workload.\footnote{See, e.g., Bils, supra note 77, at 419 (“Even in industries not required to pay an overtime premium, the marginal disutility of work presumably increases with the level of hours. If firms must compete for labor, compensation must reflect this higher disutility at higher hours.”). Thus, firms will have to pay an overtime premium even though not required by law. Dwayne Benjamin et al., Labour Market Economics 60–61 (5th ed. 2002), available at http://highered.mcgraw-hill.com/sites/dl/free/0070891540/43156/benjamin5_sample_chap02.pdf (“Because the worker is overemployed at the going wage rate, the overtime premium is necessary to get her to work more hours.”); Daniel S. Hamermesh, Labor Demand 54 (1993) (“[W]orkers’ supply responses . . . require that a higher wage rate be paid to elicit additional weekly hours . . . .”); see also Robert A. Hart, The Economics of Overtime Working 82 (2004) (“[O]vertime pay may act to ‘find’ those workers willing to supply extra hours at given premium rates.”); Anders Frederiksen et al., Overtime Work, Dual Job Holding and Taxation 1 (Inst. for Study of Labor, Discussion Paper No. 323, 2001), available at http://ftp.iza.org/dp323.pdf (“The wages in overtime job [sic] typically exceed the wages in main occupation although empirical evidence show that this is not always the case, and sometimes there is even no compensation for overtime work . . . .”).} Perhaps this Article will inspire an interested empiricist to model this aspect further with this potentially intriguing use now in mind.\footnote{One current difficulty is that the elasticity studies can show varying results. See Michael P. Keane, Labor Supply and Taxes: A Survey, 49 J. Econ. LITERATURE 961, 962 (2011) (“Indeed, the labor supply literature is characterized by a number of sharp controversies, many of which revolve around the}
identify other elasticity factors although these are generally less applicable
to the LVSP setting. Guided by the empirical literature, courts could look
to relevant variables like wealth, workload, and potentially other indicators
to gauge the likelihood of LVSP status and/or the innocent party’s reservation wage.

***

In sum, either balanced approach would significantly improve upon the
current polar extremes of LVSP determination. The choice between the two is somewhat overstated given their potential overlap in practice. For instance, the elasticity analysis suggests important criteria—income and working hours—for use under the sliding scale likelihood approach. By shifting contract damages closer to actual reservation wages, either or both approaches would more closely approximate a laborer’s “benefit of the bargain,” thereby advancing both fairness and efficiency goals.

magnitudes of labor supply elasticities, and the methods used to estimate them.”). But given the extreme gaps in current law, the use of elasticity studies seems quite promising despite some imprecision. In addition, a technical question arises as to whether the overall elasticity number should be used or the higher substitution-only number. In this setting, the higher substitution-only number likely should be used similar to the following analysis for overtime work (since we are evaluating just the one extra contract in question). Cf. BENJAMIN ET AL., supra note 168, at 60-61 (“The person works longer hours even though he is overemployed at the going wage rate because the overtime premium results in a large substitution effect, by making the price (opportunity cost, income forgone) of leisure higher only for the overtime hours. The overtime premium has a small income effect because the budget constraint rotates upward only for the overtime hours; consequently, it does not have an income effect for the normal straight-time hours.”).

Secondary marital earners with children tend to show a much higher elasticity. See CBO Report, supra note 157, at 12-13 (explaining decrease in married women’s elasticity over time as partially attributable to the decline in fertility rates); see also Klára Kalíšková, Family Taxation and the Female Labor Supply: Evidence from the Czech Republic 19-22 (CERGE-EI Working Paper Series, Paper No. 496, 2013) (showing that joint taxation led to a decline of about 3 percent in the employment rate of married women with children, with declines twice as large among women with high-income husbands). The studies also indicate that women tend to have more elasticity than men, while skilled workers tend to have less elasticity than unskilled workers. For a small sampling of the vast body of literature, see Keane, supra note 169, at 1045-46, 1071 (surveying the literature and noting the sharp contrast between the genders); Nezih Guner et al., Taxing Women: A Macroeconomic Analysis 2 (Inst. for Study of Labor, Discussion Paper No. 5962, 2011) (“[I]t is well known that the labor supply elasticities of women are larger than those of men . . . .”); Mauro Mastrogiacomo et al., A Structural Analysis of Labour Supply Elasticities in the Netherlands 3 (CPB Neth. Bureau for Econ. Policy Analysis, Discussion Paper No. 235, 2013) (“Low skilled singles and single parents have much higher labour supply elasticities than their high skilled counterparts . . . .”).

Note how the elasticity approach also utilizes a sliding scale adjustment, but now based on the elasticity number rather than an LVSP likelihood determination.
B. Extension of Corrective Regime to Full-Time Employees

As demonstrated in Part II, significant compensated leisure gaps remain in the full-time employee context even with mitigation from substitute work.\(^{172}\) The prior LVSP demonstration suggests one possible improvement through a similar sliding scale approximation of surplus value.\(^{173}\) While the elasticity approach also intrigues, the sliding scale approach converts more readily to this full-time setting.\(^{174}\) This Section presents a modified sliding scale approach through an initial sketch of the idea, a follow-up illustrative example, and an explanatory discussion for further support.

Recall that the compensated leisure flaw persists in the full-time employee context due to the employee’s ability to reject noncomparable work

---

\(^{172}\) See supra Part II.

\(^{173}\) Note that one commentator considered a somewhat similar approach, albeit seemingly only for noncomparable work, thereby maintaining a firm dividing line between comparable and noncomparable work. See Harrison supra note 25, at 232-35. Professor Jeffery Harrison’s proposal also differs from the proposal presented in this Article in that the percentage offset would (1) be based on the “effort” component; and (2) remain the same regardless of whether the employee accepted the work. Id. at 234-35. Note though that extension of the proposal to employees is not necessary to support the changes to LVSPs, where the case is more compelling due to the lack of any mitigation offset. See infra Conclusion. Implementation in both areas would require some coordination, especially if a pure “unlikely” finding of non-LVSP status triggered a 70 percent reduction under the suggested rules. See supra Part III.A. This percentage reduction would make sense if the treatment of full-time employment was left unchanged since the laborer otherwise would experience a 100 percent reduction under current law. As such, the laborer would receive some appropriate relief for having a borderline LVSP case. But if the Part III.B proposal is implemented as well, leaving the laborer with a 70 percent reduction would be too harsh if the laborer’s new work was “highly noncomparable.” In this case, as discussed in greater detail below, the laborer would experience only a slight 10 percent reduction apart from any LVSP claim. As such, the percentage reduction should drop to at least 10 percent since a borderline LVSP claim should only help, not hurt, the laborer. Another option would be to further credit the laborer for their LVSP argument by multiplying the Part III.A and III.B percentages to arrive at the ultimate reduction (e.g., only a 7 percent reduction on the assumed facts above: 70% x 10% = 7%).

\(^{174}\) The full-time employment context complicates an elasticity application as follows. Recall how Part III.A converted the “hours elasticity” into a surplus value multiplier by focusing on the percentage work reduction for a laborer. See supra note 157 and accompanying text. This “hours elasticity” notion does not really apply when considering the reservation price for a contract constituting all of the laborer’s work time. Such full-time contracts then seem to implicate instead the laborer’s “participation elasticity,” which measures how wage rate changes impact the share of the population that works at all. See CBO Report, supra note 157, at 6. But this “participation elasticity” does not then translate so easily into a multiplier adjustment. The elasticity studies also might be less helpful here since the “income” effects seem more dominant, which lessens the substitution effect. This results since the price change impacts the laborer’s entire work effort. See supra note 168 and accompanying text, for a discussion of income versus substitution effects. Finally, note how one of the two key elasticity factors—number of hours otherwise worked—now falls out of the calculus for these full-time contracts. With that in mind, perhaps wealth is one elasticity factor that might be taken into account in adjusting the percentage recovery for comparability (e.g., perhaps a greater willingness to apply a highly comparable multiplier to a wealthier laborer).
without triggering a mitigation offset.175 Rejection of noncomparable work thus gives the employee both his/her surplus value and liberated leisure time. On the other hand, rejected comparable work can wipe out any recovery under the mitigation offset. This inflexible “all-or-nothing” dichotomy conflicts with the uncertainty and gradation surrounding such a finding.

As with LVSP status, a sliding scale approach—that now based on work comparability—can mitigate the current rigid determination and better align recoveries with actual surplus values. To demonstrate, first assume that the employee declines the new work. Under a sliding scale approach, the recovery would drop by a percentage of the newly available wages. The percentage reduction would increase on a sliding scale as the new work becomes more comparable.176 The offset could be 90 to 95 percent of the wages for a “highly comparable” job in the Palagi ballpark,177 declining down to 10 percent at the other extreme for a “highly noncomparable” job like a waiter position for a discharged secretary.178 Intermediary percentages would apply to loosely comparable or noncomparable jobs.179 If the discharged employee accepted the new job, the percentage reduction would then slightly increase without eliminating the recovery.180

To illustrate the benefits of such a flexible regime, take the following example:

Example 4: Eddie, Ellen, Esther, and Evan all have full-time employment contracts which pay $100,000 for the upcoming year. All four employers breach on the contracts. Eddie and Ellen each have only a highly noncomparable option available to them, which pays $100,000

---

175 See supra Part II.A.
176 Thus, somewhat similar to current practice, the fact finder would make the categorical finding of (non)comparable or highly (non)comparable. This approach could also include in an extremely (non)comparable category if desired. An alternative ranking approach would simply require a determination of comparability on a scale of say one to ten.
177 Palagi v. Nationwide Mut. Ins. Co., 69 F. Supp. 2d 903, 904-05, 907 (S.D. Tex. 1999). Again, while Palagi dealt with the identical job (other than the change in boss), it more broadly represents cases where the new work provides a very close match on geographical location, pay, title, and responsibilities. Note that it might then seem like a 100 percent reduction is appropriate here regardless of whether the employee takes on the work, but some recovery could be justified in the sense that nothing is truly exactly the same, and that the employee deserves a little something for the trouble.
178 Cf. RESTATEMENT (SECOND) OF AGENCY § 455 cmt. d, illus. 2 (1958) (noting that a discharged secretary would face mitigation after some time for an available typist job, but not a waiter job).
179 See id. § 455 cmt. d, illus. 1, for a potential loosely comparable scenario, with the focus now on the secretarial and typist jobs. While perhaps somewhat outdated, this example still nicely captures the essence. A more modern example might contrast the position of an executive assistant to that of an office manager, receptionist, etc. See, e.g., What Is an Executive Assistant?, DEGREEDIRECTORY.ORG, http://degreedirectory.org/articles/What_is_an_Executive_Assistant.html (last visited Oct. 7, 2014) ("Executive assistants hold more responsibilities and typically rank higher than the following other clerical professionals: Receptionists; Clerks; Secretaries; Administrative assistants; Administrative associates; and Office managers.").
180 For instance, the reduction could increase to 25 percent for a highly noncomparable job. The percentages provide flexibility and could be adjusted as deemed appropriate.
for the year. Esther has a loosely comparable option available to her while Evan has a highly comparable option available to him, both of which also pay $100,000 for the year. Eddie, Esther, and Evan all decline the work, while Ellen accepts the work.

Let’s first examine the results based on current law. Under current law, Eddie receives the full $100,000 since he declines “noncomparable” work. Esther likely also receives the full $100,000 since she declines only loosely comparable work. In contrast, Ellen and Evan both likely receive nothing by either taking on new work (Ellen) or turning down highly comparable work (Evan). These results are charted below:

<table>
<thead>
<tr>
<th>New Work</th>
<th>Accept or Decline?</th>
<th>Current Recovery</th>
<th>Proposed Recovery</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eddie</td>
<td>Highly Noncomparable</td>
<td>Decline</td>
<td>$100,000</td>
</tr>
<tr>
<td>Ellen</td>
<td>Highly Noncomparable</td>
<td>Accept</td>
<td>Nothing</td>
</tr>
<tr>
<td>Esther</td>
<td>Loosely Comparable</td>
<td>Decline</td>
<td>$100,000</td>
</tr>
<tr>
<td>Evan</td>
<td>Highly Comparable</td>
<td>Decline</td>
<td>Nothing</td>
</tr>
</tbody>
</table>

This comparison highlights the sliding scale proposal’s moderation between current law’s disturbing “all-or-nothing” extremes. As noted above, Eddie and Esther receive the full contract price under current law, while Ellen and Evan receive nothing. Current law thus makes an absolute “all-or-nothing” determination despite the reality of varying degrees on a spectrum of comparability. In favorable contrast, the proposed regime would provide a more nuanced partial recovery for all, ranging from $10,000 to $90,000. As detailed below, the proposal’s moderating approach advances the fairness and efficiency goals of contract law.

181 See, e.g., Parker v. Twentieth Century-Fox Film Corp., 474 P.2d 689, 694 (Cal. 1970) (“[A] dramatic actress in a western style motion picture can by no stretch of imagination be considered the equivalent of or substantially similar to the lead in a song-and-dance production.” (emphasis added)). Comparable employment under Title VII must have “virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status . . . .” Sellers v. Delgado Cmty. Coll., 839 F.2d 1132, 1138 (5th Cir. 1988). Private contracts often predefine “comparable employment” but the results still vary from exclusively focusing on compensation to exclusively focusing on field of expertise, even within the same field of employment. See, e.g., Martin J. Greenberg & Djenane Paul, Coaches’ Contracts: Terminating a Coach Without Cause and the Obligation to Mitigate Damages, 23 MARQ. SPORTS L. REV. 339, 373-76 (2013).
1. Rejection of New Work Comparison

First compare the three employees who declined work after the breach. Eddie and Esther each receive the full contract price under current law, consistent with a zero reservation price and a full $100,000 surplus value. Evan receives nothing, consistent with a full $100,000 reservation price and no surplus value. But are these situations really so extreme?

Focus first on Evan’s more readily justified outcome. Evan’s rejection demonstrates zero surplus value for the new work. Arguably, this also shows little or no surplus value on the breached contract due to the jobs’ comparability. But this only follows where the two jobs are extremely close substitutes, as in Palagi. As the job differences expand, the rejection’s indication of a de minimis surplus value on the breached contract lessens. With that in mind, why not substitute a more flexible percentage adjustment in lieu of the current 0 or 100 percent extremes? After all, Evan did decide to accept the first contract but reject the second, perhaps evidencing different surplus values for the two jobs.

More compellingly, Esther’s rejection of even loosely comparable work indicates a surplus value on the breached contract meaningfully below $100,000. A moderate 50 percent reduction is justified in lieu of current law’s full recovery which implicitly assumes a zero reservation price.

Eddie’s highly noncomparable opportunity is more ambiguous since the low surplus value indication wanes as the differences between jobs mount. Nonetheless, some smaller reduction is appropriate as his decision to stay idle evidences a taste for leisure over work and a surplus value below the contract price. Current law fails to capture any of these aspects.

---

182 Note the importance of the point that for comparable work, Evan keeps everything he earns due to mitigation on the contract regardless. Compare this to the incentives problem for noncomparables. See infra notes 187-189 and accompanying text. In this regard, the rejection does not provide absolute proof of zero surplus value since Evan might falsely believe that he will lose his wages on the breached contract only if he accepts the new opportunity, or perhaps it is not so clear after all that the two jobs are truly comparable.


184 Note that such rejection under current law does not provide a useful indicator of surplus value on the breached contract because mitigation operates like a 100 percent tax on the proceeds for noncomparable work. See infra Part III.B.2. But this proposal would allow retention of some recovery from accepting even noncomparable work, thereby providing a useful indicator of surplus value. Furthermore, the rejection under current law does not then support the full recovery on the breached contract as this essentially equates to a finding that the surplus value equals the contract price. Rather, the rejection just continues to leave courts in the dark as to true reservation prices.

185 This equates to an implausible assumption that Esther would have accepted the first job for free. See supra Part II.B. But that seems even more implausible given Esther’s decision to stay idle in the face of other work opportunities.

186 Further recall how the lack of any offset under current law essentially places a zero value on Eddie’s liberated leisure time. See supra Part II.A. In this regard, some even-smaller reduction could be justified even absent any available work. Any such adjustment should be relatively slight, though, since
With its more flexible outcomes, the sliding scale approach minimizes the pressure on reaching the “correct” comparability finding. Also, the sliding scale approach intuitively appeals apart from the technical surplus value analysis above. Increasing the recovery as the alternative work becomes less comparable makes sense since the rejection becomes more understandable. In the words of the *Palagi* court, one can start to see “the damages” as the new work deviations expand.

2. Highly Noncomparable Comparison

As discussed in Part II, current law disincentives productive activity by providing compensated leisure to employees only if they remain idle. To illustrate this incentives problem, focus on the two employees with highly noncomparable opportunities, Eddie and Ellen. Under current law, Eddie, who rejects the new work, receives the full $100,000, while Ellen receives nothing on the breached contract due to her new earnings. As each receives the same $100,000 total, Ellen’s breaching employer captures all the cash benefits from Ellen’s work sacrifice. This incentivizes Ellen to reject the work like Eddie.

Focusing solely on the incentives perspective, Ellen should receive the same contract recovery as Eddie so that she receives the full monetary benefit from her work sacrifice. However, the benefit of the bargain norm supports a lower recovery. Ellen’s lost benefit equals just any excess surplus value on the breached contract over the new work. In sum, the incentives

---

187 See supra Part II.
188 The $100,000 of new earnings maintains Ellen’s $100,000 income, eliminating her employer’s $100,000 liability.
189 There might be some long-term benefits which could induce her to take the job in certain circumstances. See Evans, *supra* note 25, at 11-14.
190 Ellen is not properly entitled to the surplus value on both contracts since she cannot handle both full-time jobs simultaneously. If the surplus value on the new “inferior” work is lower than on the original work, she is entitled to such difference. In one sense, Ellen’s acceptance of the new “inferior” job arguably supports a higher recovery on the breached contract since such acceptance might indicate a particular preference for work over leisure and therefore a lower reservation price. But again, Ellen is entitled to only one full surplus value due to her inability to handle both jobs. In the other direction, her acceptance of the noncomparable work arguably suggests that the difference in her surplus values between the two jobs is not so great, thereby supporting a greater reduction to her recovery. It is possible, though, that the new work’s surplus value is much lower, albeit still positive enough to induce her acceptance. In any event, the “correct” reduction from a benefits perspective needs to be balanced against the incentives concern.
and fairness goals diverge when contemplating the ideal recovery for new work.\textsuperscript{191}

The proposed regime strikes an appropriate balance between these competing goals.\textsuperscript{192} Under the proposal, Ellen retains some, but not all, of the new earnings. Under the suggested percentages above, Ellen would net an additional $85,000 by accepting the new work, equal to 85 percent of the new earnings.\textsuperscript{193} This moderating compromise would significantly decrease current law’s extreme incentives distortion while also maintaining contact with contract law’s fairness criteria.\textsuperscript{194}

CONCLUSION

The benefit of the bargain benchmark encourages efficient breaches while providing fair results to both sides on such breach. Damages above this norm unduly punish the breaching party and can deter efficient breaches. Unfortunately, current law inadvertently provides such undesirable excess compensation by ignoring the saved work effort on breached service contracts.

Both theoretic and practical reasons explain why current law contains this significant flaw. Legal theory’s neglect of the labor/leisure tradeoff explains the general lack of commentary on this contract damage law problem. The lack of an obvious remedy provides a further practical impediment.

Mindful of these impediments, this Article focused initially on the more pristine LVSP setting. Without the possibility of mitigation or other offsets, the LVSP setting more readily exposes the current law’s anomalies and potential practical solutions. As shown, courts can mitigate the com-

\textsuperscript{191} Note that these concepts also apply to new work other than highly noncomparable opportunities. This Section focused on the highly noncomparable scenario since that was the one category in Example 4 that had one employee accept and another reject the new work.

\textsuperscript{192} More generally this reflects the typical tension between providing both a fair and efficient result. This neatly links to the tax elasticity studies, which highlight the tradeoff between potentially desirable fairness gains from higher rates versus the resulting efficiency loss to the extent such higher rates distort decision making. \textit{See generally} ARTHUR M. OKUN, \textit{EQUALITY AND EFFICIENCY: THE BIG TRADEOFF} 88-92, 101-08 (1975) (discussing the classic fairness/efficiency balance in the tax law).

\textsuperscript{193} As shown in the chart above, Ellen would receive $75,000 on the breached contract if she accepts. This would give her $175,000 total ($75,000 on the breached contract, and $100,000 paid on the new contract). In contrast, if Ellen declines, she gets $90,000 total (all from the breached contract). $175,000 total less $90,000 equals an additional $85,000 by accepting the new work. An alternative pathway to the $85,000 figure is the following: By taking the new work, she loses $15,000 from the breached contract ($90,000 - $75,000). And since she gets paid $100,000 from the new work, that results in an $85,000 benefit.

\textsuperscript{194} \textit{Contra} Harrison, \textit{supra} note 25, at 232-35 (stating the common law’s “all-or-nothing” rule and proposing a regime whereby the discharged employee could keep 100 percent of the new earnings).
Compensated leisure flaw through use of existing elasticity data,\textsuperscript{195} and/or more detailed findings of LVSP status.

Although the compensated leisure flaw lessens for full-time employees, current law’s mitigation approach in this area also could be significantly improved.\textsuperscript{196} Having already blazed the sliding scale trail to reform for LVSPs, the ready reform for full-time employees easily follows: vary the employee’s percentage recovery reduction based on the new job’s degree of comparability.\textsuperscript{197} This sliding scale would provide a more balanced result than the current law’s problematic “all-or-nothing” approach.\textsuperscript{198}

In sum, contracting parties, like the homeowners in the Introduction, deserve comparable treatment regardless of whether they enter into contracts for services or goods. Breaching parties on goods contracts can cut their losses without additional penalty by paying only the innocent party’s benefit of the bargain. By ignoring the laborer’s performance efforts, however, current law inconsistently provides a windfall to laborers on service contracts at the service recipients’ extra expense. Fortunately, the feasible reforms demonstrated above can rectify this unfortunate disconnect.\textsuperscript{199} In

\textsuperscript{195} This results since the LVSP context focuses on the relinquishment of just one project out of many, rather than relinquishment of the laborer’s entire work effort. See supra Part III.A. Somewhat related, now that this Article has uncovered this exciting potential elasticity use, perhaps an interested empiricist will be inspired to model elasticity with this particular use in mind. More detailed modeling would make elasticity figures even more useful over time.

\textsuperscript{196} Despite this strong case for employees too, the proposed reform could be implemented solely in the more defective LVSP area. Especially given the status quo bias favoring incremental reform, the initial reform could cover just LVSPs, with a possible later extension to full-time employees. The status quo bias cautions against making substantial changes all at once, favoring instead a more incremental approach. See, e.g., William Samuelson & Richard Zeckhauser, Status Quo Bias in Decision Making, 1 J. Risk & Uncertainty 7, 33-35, 37-39 (1988). On the other hand, changing both areas together would improve the coordination between the two, thereby further reducing the pressure on the LVSP determination. Even without the employee change, though, the proposal would improve the coordination given the current complete insulation from any mitigation offset under an LVSP finding.

\textsuperscript{197} With the shifted focus to comparability degree, the more balanced result would again correspond to an appropriate surplus value indicator.

\textsuperscript{198} For an article critiquing another aspect of contract law—the damage calculation for uncertain profits—due to its troubling all-or-nothing results, see Elmer J. Schaefer, Uncertainty and the Law of Damages, 19 WM. & MARY L. REV. 719, 740 (1978) (“This all-or-nothing characteristic has led a number of commentators to criticize the rule. The approach proposed in this Article provides an appealing alternative which avoids this all-or-nothing characteristic, permitting a compromise between these extremes, and limits damages in a precise and appropriate way.” (footnote omitted)).

\textsuperscript{199} Note that current law has its own practical difficulties in determining the amount of saved cash costs. See, e.g., supra Part I.C.1 (discussing whether the contractor would have saved cash by subcontracting out the work). Beyond the subcontracting issue, much litigation concerns the extent of saved monetary expenditures from contract breaches. Consider, for instance, the troubling area of proper adjustment for an allocable portion of “overhead” expenses. See, e.g., 3 E. ALLAN FARNsworth, Farnsworth on Contracts § 12.10, at 219-20 & nn.23-24 (3d ed. 2010); see also Patterson, supra note 43, at 1293-96.
the immortal words of contracts luminary Karl Llewellyn200 regarding the attractive flexibility of the common law, “the rule follows where its reason leads; where the reason stops, there stops the rule.”201

200 Llewellyn was the driving force behind the Uniform Commercial Code (“U.C.C.”). Gregory E. Maggs, Karl Llewellyn’s Fading Imprint on the Jurisprudence of the Uniform Commercial Code, 71 U. COLO. L. REV. 541, 541-44 (2000). Article 2 of the U.C.C. governs the sale of goods. While the U.C.C. does not govern service contracts, courts often look to the U.C.C. for guidance on service contracts given its reputation for a well-reasoned approach. See, e.g., Vitex Mfg. Corp. v. Caribtex Corp., 377 F.2d 795, 799 (3d Cir. 1967) (“While this contract is not controlled by the Code, the Code is persuasive here because it embodies the foremost modern legal thought concerning commercial transactions.”).

201 K.N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 189 (1981); see also Scott R. Grubman, Bark with No Bite: How the Inevitable Discovery Rule is Undermining the Supreme Court’s Decision in Arizona v. Gant, 101 J. CRIM. L. & CRIMINOLOGY 119, 119 (2011) (“Apart from the poetic and literary value of this quotation, Professor Llewellyn’s point is quite simple and abundantly relevant in all areas of the law: when a rule is created for certain reasons, and those reasons cease to exist, the rule should no longer be applied. Courts have utilized Professor Llewellyn’s axiom in various areas of the law, refusing to apply rules to situations in which the reasons justifying the rules are no longer present.”).