WILLFULNESS: A CRUCIAL FACTOR IN CHOOSING REMEDIES FOR BREACH OF CONTRACT

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> What is it, then, about promises, that endows them with such power? In the first place, in making a promise, I set up expectations, an equilibrium; should I break my promise, I upset that equilibrium and fail to live up to those expectations; I am unfair, given what I had promised and what I now owe to another. Second, in breaking faith, I am failing to make my promise come true.
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> —Sisella Bok, *Lying*

Courts have failed to develop a clear definition for the term "willful breach of contract" or for its various synonyms.[1] This Article proposes that "willful breach of contract" be defined as "*a knowing breach by a party not legally excused from performing, which is made for any primary purpose other than to confer a benefit on the aggrieved party.*" Admittedly, this broad definition of willful breach would cover most contract breaches. The remedial principles suggested in this Article would therefore be applicable to most defendants.

However, within the universe of contract breachers at least three categories would be excluded from this definition of willful breach: first, those breachers who are excused from performing under the doctrines of impos-

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1. Synonyms used by courts have included "knowing," "voluntary," "deliberate," "intentional," "unwarranted," "unjustified," or "bad faith." WEBSTER'S DICTIONARY (2d ed. 1977) defines "willful" in two current ways. The first meaning is saying or doing something deliberately or intentionally, which connotes a sense of voluntariness without regard to motive. *Id.* The second definition is "following one's own will unreasonably; obstinate; stubborn." *Id.* This definition seems to include, in addition to voluntariness, an unreasonable lack of regard for another person.

The definition of willfulness suggested in this Article includes Webster's first meaning, that is, an intentional act, plus an absence of legal excuse for the failure to perform, and the absence of sole intent to benefit the non-breaching party. Section V of this Article discusses the need to enlarge the instances in which punitive damages can be granted for breach of contract and suggests that Webster's second meaning of willfulness be used to create a subcategory of willful breachers who should be liable for punitive damages, that is, those who intentionally breach with an unreasonable disregard for the other party.

sibility, frustration, mistake or unconscionability; second, those breachers who unknowingly breach; and, third, those who deviate from contract terms in an effort to benefit the other party.

The remedies section of the Restatement (Second) of Contracts describes "traditional contract goals" as "including compensation but not coercion," and states that " 'willful' breaches have not been distinguished from other breaches."[2] This Article will show that despite the Restatement's characterization, the presence of "willfulness" frequently has been an important element in courts' choices of remedies for breach of contract. It will also show that many sections of the Restatement indicate a concern with willfulness strikingly inconsistent with the restaters' position in their introduction to the remedies section.

This Article will argue that not only is the courts' traditional concern with willfulness commendable, but that courts and legislatures should put more emphasis on willfulness as a factor in selecting remedies for breach of contract. Such increased emphasis would serve at least two basic purposes of contract law: (1) deter breaches, which protects expectancies created by contracts; and (2) promote a remedial scheme which offers the flexibility of several possible formulas for computing damages, thus increasing the likelihood that damages in a particular case will be fair because they are more precisely tailored to specific facts. This Article considers the notion of "efficient breach," concluding that it is faulty and that such breaches should not be encouraged by the courts' use of remedial principles that allow the willful breacher to profit from his breach. Even if the theory of efficient breach were realistic, the values that support it are of less importance to society than the principle of good faith and fair dealing in the performance and enforcement of contracts.

To demonstrate that many courts have traditionally distinguished willful from nonwillful breaches, this Article considers cases involving breaches by construction contractors and by grading and mining contractors. These cases also will be used to show that the definition of willful breach suggested in this Article can be used to develop new remedial principles which will serve legitimate goals of contract law. It is assumed throughout this Article that the aggrieved plaintiff has performed faithfully his own obligations under the contract and that the contract is not unconscionable.[3]

Before considering the construction contract cases, it is helpful to summarize briefly the ambivalence toward "willfulness" found in the Restatement (Second) of Contracts.

I. "WILLFULNESS" IN THE RESTATEMENT (SECOND) OF CONTRACTS

The introductory note to the remedies section of the Restatement (Second) of Contracts states in part:

2. RESTATEMENT (SECOND) OF CONTRACTS ch. 16, intro. note at 100 (1979).

3. See Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 743-48 (1982), for an excellent discussion of how the bargain principle breaks down in four categories of contracts involving elements of unconscionability.

> The traditional goal of the law of contract remedies has not been compulsion of the promisor to perform his promise but compensation of the promisee for the loss resulting from breach. *"Willful" breaches have not been distinguished from other breaches*, punitive damages have not been awarded for breach of contract, and specific performance has not been granted where compensation in damages is an adequate substitute for the injured party. In general, therefore, a party may find it advantageous to refuse to perform a contract if he will still have a net gain after he has fully compensated the injured party for the resulting loss.[4]

This assertion that courts have not distinguished willful breaches from other breaches is erroneous. Some courts have not made the distinction, but many have, and the restaters clearly knew this. The reporter's note on section 348, comment c, cites the controversial case of *Groves v. John Wunder Co*.[5] where willfulness was the crucial factor in the court's choosing of the higher "cost of repair" measure of damages instead of the lower "diminished value" measure. The willfulness factor stressed in *Groves* and in many less well-known cases,[6] was ignored by the restaters. One is therefore tempted to conclude that the restaters were determined not to restate the law,[7] but to advance a different theory of their own. However, there is evidence in the Restatement that the drafters were not following consistent views of their own, but rather were both confused about how courts view the willfulness factor and ambivalent as to its proper role in selecting remedial principles for breach of contract.

This ambivalence about willfulness is demonstrated by several sections of the Restatement in which the willful nature of the breach is acknowledged as an important or even crucial factor in granting or denying relief in a particular category of cases. For example, section 261 refuses to excuse a nonperforming party on the ground of supervening impracticability if the impracticability is the fault of the party claiming the excuse,[8] and comment d states that fault includes "willful" wrongs.[9] Comment a to section 352 indicates willfulness is one relevant circumstance which may justify a lesser degree of certainty in proof of the amount of damages.[10] An intentional breach, which is a synonym for "knowing breach," is considered by comment b to section 374 to be a sufficient basis for denying restitutionary recovery to a breaching building contractor whose performance materially varies from contract specifications.[11]

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4. RESTATEMENT (SECOND) OF CONTRACTS ch. 16, intro. note at 100 (1979) (emphasis added).

5. 205 Minn. 163, 167, 286 N.W. 235, 236 (1939). According to the RESTATEMENT (SECOND) OF CONTRACTS § 348 reporter's note at 123, *Groves* is to be compared with illustration 3 to § 348.

6. *E.g.*, McKee v. Wheelus, 85 Ga. App. 525, 528, 69 S.E.2d 788, 791 (1952).

7. The introduction to RESTATEMENT OF CONTRACTS (1932) explains: "The function of the courts is to decide the controversies brought before them. The function of the Institute is to state clearly and precisely in the light of the decisions the principles and rules of the common law."

8. RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981).

9. *Id.* comment d.

10. *Id.* § 352 comment a.

11. *Id.* § 374 comment b. The corresponding section of RESTATEMENT OF CONTRACTS included a specific reference to "willful" breach. RESTATEMENT OF CONTRACTS § 357(1) (1932).

Not only does the Restatement consider willfulness relevant in the remedies sections just mentioned, but it also emphasizes in section 205 the general duty of good faith and fair dealing in the performance and the enforcement of every contract.[12] Comment d to section 205 disclaims the possibility of completely cataloguing types of bad faith, but gives as one example "willful rendering of imperfect performance."[13] Section 241(e) lists as one circumstance relevant in determining whether a particular failure to perform is material "the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing."[14] Comment f to section 205 states:

> A party's adherence to standards of good faith and fair dealing (§ 205) will not prevent his failure to perform a duty from amounting to a breach (§ 236(2)). Nor will his adherence to such standards necessarily prevent his failure from having the effect of the non-occurrence of a condition (§ 237; cf. § 238). The extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing is, however, a significant circumstance in determining whether the failure is material (subsection (e)). In giving weight to this factor courts have often used such less precise terms as "wilful."[15]

In substituting the term "good faith and fair dealing" for the traditional term "willful," the restaters are turning to Uniform Commercial Code terminology,[16] as they have done in several other sections. It is submitted that the new language is no more precise, nor easier to define, than the traditional terms, and that a willful breach, as defined in this Article, would be a bad faith breach.

Thus, consideration of the willfulness factor pervades the Restatement, despite some ambivalence in American Law Institute (ALI) circles apparently created by the writings of economic theorists embracing the notion of the "efficient breach."[17] According to these economists a breach is economically efficient if one party to a contract can breach, pay the other full expectancy damages, and still come out ahead.[18] These economists suggest that such a person should breach, and argue against remedial prin-

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Section 357(1) denied restitution to any plaintiff who had rendered part performance prior to a willful or deliberate breach or non-performance of a condition. *Id.*

12. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979).

13. *Id.* comment d.

14. *Id.* § 241(e).

15. *Id.* § 205 comment f.

16. The obligation of good faith in performing and enforcing contracts which is imposed by U.C.C. § 1-203 is defined in U.C.C. § 1-201(19) as "honesty in fact in the conduct or transaction concerned." In the case of a merchant, U.C.C. § 2-103(1)(b) requires honesty in fact and the observance of reasonble commercial standards of fair dealing in the trade.

17. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW § 4.9, at 89-90 (2d ed. 1977); Birmingham, *Breach of Contract, Damages, Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273 (1970). The theory has been criticized by a number of writers, most recently and effectively by Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947 (1982). The impact of the efficient breach concept on the restaters is evident in their introductory note to the remedies section and the reporter's note following the introduction. *See* RESTATEMENT (SECOND) OF CONTRACTS ch. 16, intro. note at 99-102 (1979).

18. R. POSNER, *supra* note 17, § 4.9, at 89-90; Birmingham, *supra* note 17, at 284.

ciples which deter him.[19]

The concept of efficient breach is a myth which has muddied the waters of contract remedies. As the drafters of the Restatement (Second) of Contracts admit in their introductory note to the remedies section:

> The analysis of breach of contract in purely economic terms assumes an ability to measure value with a certainty that is not often possible in the judicial process. The analysis also ignores the "transaction costs" inherent in the bargaining process and in the resolution of disputes, a defect that is especially significant where the amount in controversy is small.[20]

Professor Farber demonstrates that since transaction costs are never zero, the economic efficiency arguments for limited compensatory damages for breach of contract result in undercompensation and lead to inefficient behavior.[21] He shows how the transaction costs of litigation and settlement depress both supply and demand curves, thus resulting in a decrease below the optimum level in the commitment of resources to production.[22] Professor Farber suggests that economic efficiency is increased by "supercompensatory damages" when X, an outsider, values goods more highly than Buyer (B) who has a fixed price contract with Seller (S).[23] High damages will deter S from breaching. B is then likely to either assign his contract rights to X or resell to X, resulting in low transaction costs that may be limited to the price of a phone call as compared to the high transaction costs of litigation that result when S breaches.

Professor Ian Macneil also has labeled the "simple-efficient-breach analysis" as fallacious.[24] Professor Macneil demonstrates that transaction costs must be considered in order to determine whether granting specific performance or damages will generate more efficiency, and urges that relative efficiency is, in fact, measured exactly by the transaction costs of particular rules, not by the substance of the rules.[25] He suggests renaming the principle of efficient breach "the principle of efficient termination-and-remedy" and formulates the correct statement of the principle as follows:

> Whether an expectation damages rule or a specific performance rule is more efficient depends entirely upon the relative transaction costs of operating under the rules. Where, as will most generally be the case, transaction costs under either rule will exceed gross efficiency gains made possible by scrapping one contract in favor of another, each rule is equally [in]efficient. Where both rules will permit substituting a more productive contract for a less productive contract, the difference in efficiency of the rules will be measured exactly by the difference in their respective transaction costs. Where one rule will permit substitution and the other will not, the difference in efficiency

19. R. POSNER, *supra* note 17, § 4.9, at 88-93; Birmingham, *supra* note 17, at 284-86.
20. RESTATEMENT (SECOND) OF CONTRACTS ch. 16, intro. note at 100 (1979).
21. Farber, *Reassessing the Economic Efficiency of Compensatory Damages for Breach of Contract*, 66 VA. L. REV. 1443, 1448-64 (1980).
22. *Id.* at 1451.
23. *Id.* at 1453.
24. Macneil, *supra* note 17, at 949.
25. *Id.* at 954-60.

> will be measured by the difference in respective transaction costs, but subject to an upper limit consisting of the hypothetical net efficiency gain under the rule with the lower transaction costs. None of the transaction costs can be deduced by use of the microeconomic model, but can only be determined inductively from empirical evidence.[26]

Although Professor Macneil has utilized the choice between specific performance and the expectation measure of damages to demonstrate his theory, a variation of his principle can be constructed to apply to the choice between cost of repair and diminished value damages. I suggest this corollary principle:

> Whether a cost of repair or diminished value measure of damages is more efficient depends entirely upon the relative transaction costs of operating under the rules. Since the cost of repair rule tends to deter breaches, it tends to minimize transaction costs involved in post-breach negotiations and litigation, and therefore will tend to promote efficiency. Using the term "ER" to stand for "excess recovery," i.e. the dollar amount by which cost of repair damages would exceed diminished value damages, it becomes apparent that the cost of repair measure will permit the owner to either repair or to substitute a more productive use of ER, and the diminished value measure will permit the breaching contractor to divert ER, the money he saved by breaching, into a more productive use. A court could ask each party what he intends to do with ER if he gets it, or is allowed to keep it. However, courts are ill-suited to second guess the efficiency of the parties' proposed investments. Furthermore, allowing courts to decide each case by comparing the predicted efficiency of each party's use of the money would inject so much uncertainty into the decision making process that large claims inevitably would end up in litigation, thus tending to increase transaction costs. Therefore, the cost of repair measure should be presumed to be the more economically efficient measure.

One problem with my corollary principle is its focus on only the transaction costs involved in post-breach negotiations and litigation, despite Macneil's insistence that all transaction costs, including relational costs such as damage to reputation and any need for future cooperation between the parties, be included.[27] However, emphasis on settlement and/or litigation costs seems reasonable because they tend to be large items that are easy to predict and estimate, while relational costs are difficult to predict and measure. Also, my corollary principle seems warranted in light of Macneil's argument that "to the extent that whoever decides not to perform . . . can avoid paying all the costs of that decision, the likelihood of his making inefficient decisions is increased."[28]

In conclusion, the traditional efficient breach notion which promotes breach over specific performance, and which promotes low measures of damages so that the breacher can pay and still profit from his breach, ap-

26. *Id.* at 957.
27. *Id.* at 957-59.
28. *Id.* at 960.

pears fallacious. It seems that Macneil has made a good start toward developing correct principles of efficient termination and remedy. However, even a set of correct economic principles cannot serve as a practical aid to courts in selecting appropriate remedies for breach of a particular contract. Macneil suggests that all the intellectual outpouring on efficient breach probably applies to only a handful of situations and asks:

> If so, should the legal system burden itself with the kinds of high-cost analysis, producing very high transaction costs, both to parties and society generally, required by microeconomic analysis of this kind? Or would it not be far better to ignore all the sophistication in favor of historical or more intuitive solutions?[29]

The answer to Macneil's second question is "yes." Therefore, we need not join the restaters on their fence, unwilling either to cast their lot with the economists or to climb back down into older, yet still fertile, vineyards in a land where economic efficiency is not king. Instead we can forget the myth and concentrate on tending vineyards in the real world.

II. CHOOSING BASIC VALUES

Every first year student of contracts history learns that one clearly recognized purpose of contract remedies is protection of the expectation interest,[30] traditionally stated as a measure of damages intended to put the aggrieved party in as good a position as he would have been in had the contract been fully performed. The Restatement (Second) of Contracts,[31] the Uniform Commercial Code,[32] some law and economics writers,[33] and this Article all agree that protecting the expectation interest is still a legitimate purpose of contract remedies. Other interests protected are the aggrieved party's restitutionary and reliance interests.[34] Despite virtual unanimity on these perceived purposes of remedial rules, courts and writers have struggled to apply the principles fairly. A detailed discussion of the difficulty of the application is beyond the scope of this Article, but it can be noted briefly that these remedial principles often overlap[35] and sometimes conflict.[36]

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29. *Id.* at 954 n.28.

30. Who can forget Hawkins v. McGee, 84 N.H. 114, 146 A. 641 (1929), introducing generations of contracts students to the difficulties of measuring the difference in value of the "one hundred per-cent perfect" hand promised by the surgeon and expected by the plaintiff, and the hairy hand which the plaintiff actually received.

31. RESTATEMENT (SECOND) OF CONTRACTS § 344(a) (1979).

32. U.C.C. § 1-106(1) (1978).

33. *See, e.g.*, Farber, *supra* note 21, at 1443 (stating in his introduction that contract damages are designed to put the plaintiff in precisely the same position as performance, but unfortunately accepting the view that deterrence of nonperformance is not a function of damages); Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271 (1979).

34. *See* RESTATEMENT (SECOND) OF CONTRACTS § 344(b), (c) (1981). *See also* Fuller & Purdue, *The Reliance Interest in Contract Damages: 1 and 2*, 46 YALE L.J. 52, 373 (1937).

35. Fuller & Purdue, *supra* note 34, at 71-75.

36. *See* Gardner, *Observations on the Course of Contracts* (1934), *reprinted in* L. FULLER & M. EISENBERG, BASIC CONTRACT LAW 167 (4th ed. 1981) (Gardner describes the elementary ideas in contracts law as (1) the tort idea, (2) the bargain idea, (3) the promissory idea, and (4) the quasi-contractual idea, and notes that conflict emerges because (2) and (3) proceed from the notion that justice is to be known before the [contracting] event, while (1) and (4) proceed from the premise that justice is to be known after the [contracting] event).

Every jurisprudential argument has to be ultimately bottomed not only on what the writer perceives courts to be doing, but on what the writer thinks the courts ought to be doing. Courts ought to be putting more emphasis on the notion of the sanctity of contract and the resulting moral obligation to honor one's promises. This moral obligation to honor promises has been justified on philosophical grounds. For example, Hobbes stressed that before the making of the fundamental covenant establishing civil society, every man had the right to everything and no action could be unjust.[37] He concluded that injustice can be defined as the breaking of a covenant, whether by breaking a law which you have agreed the sovereign has a right to make, or by breaking a covenant you have bound yourself to perform.[38]

Kant's *Categorical Imperative*, "[a]ct only on that maxim whereby thou canst at the same time will that it should become a universal law,"[39] leads us to think about the results if every contracting party breached when, ignoring transaction costs, he calculated that he could pay the aggrieved party some limited measure of damages and still profit. The loss of individual autonomy and trust resulting from the breaking of a million one dollar contracts in one day undoubtedly would be greater than the dollar loss of one broken contract multiplied by one million.[40] Furthermore, considering only goals of economic efficiency, if breach of contract became the norm instead of the exception, the needs of businesses and consumers for orderly planning would be frustrated, and the desire for voluntary risk taking in the hope of economic reward would be diminished.

Professor Charles Fried, in discussing the moral obligation of promise, states:

> An individual is morally bound to keep his promises because he has intentionally invoked a convention whose function it is to give grounds—moral grounds—for another to expect the promised performance. *To renege is to abuse a confidence he was free to invite or not, and which he intentionally did invite*. To abuse that confidence now is like (but only like) lying: the abuse of a shared social institution that is intended to invoke the bonds of trust. *A liar and a promise-breacher each use another person* . . . . To avoid lying you need only believe in the truth of what you say when you say it, but a promise binds into the future, well past the moment when the promise is made. There will, of course, be great social utility to a general regime of trust and confidence in promises and truthfulness. But this just shows that a regime of mutual respect allows men and women to accomplish what in a jungle of unrestrained self-interest could not be accomplished.[41]

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37. O. BIRD, THE IDEA OF JUSTICE 60 (1967) (discussing Hobbes' writings on justice).
38. *Id.* at 61-62.
39. S. BOK, LYING 56 (1979) (discussing Kant's writings on moral philosophy).
40. This analysis was suggested by an excerpt from R. HARROD, UTILITARIANISM REVISED *reprinted in*, S. BOK, *supra* note 39, at 294.
41. C. FRIED, CONTRACT AS PROMISE 16 (1981).
The value of trust and confidence in contractual promises underlies my approach to contract

Adopting the sanctity of contract as a basic value leads to the question: "Are all contracts equally sacred and, if so, should they be equally enforced despite the variations in circumstances which surround the entering, the performing and the breaching of contracts?" If the answer were "yes," our enforcement scheme would be simple: increasing the availability of specific performance and, where that remedy is not feasible, granting fully compensatory damages, plus attorneys' fees and court costs, to all prevailing plaintiffs. There would be no reason to distinguish between the willful and the nonwillful breach. But the better answer is that even if all contracts are equally sacred, we have not, and should not, ignore relevant surrounding circumstances in deciding enforcement questions.

An established body of contract law clearly distinguishes the "best breachers" from the rest of the pack. The best breachers are those who apparently breach, but later are relieved by the court from some duty of performance through the doctrines of mistake, frustration or unconscionability. This Article asserts that there is a less well developed body of contract law that properly distinguishes between two other categories of breachers: (1) the "good breachers," who are not excused from performance, but who can establish that they did not willfully breach (that is, either the breach was unknowing or done with intent to benefit the other party); and (2) the "not-so-good breachers,"[42] who cannot establish a legal excuse and who knowingly breached, usually to benefit themselves. Cases involving breach of contract by building contractors and by grading and mining contractors will be examined to see whether courts do and should distinguish between willful and nonwillful breaches in selecting remedies.

III. WILLFUL BREACH OF CONTRACT BY BUILDING, GRADING AND MINING CONTRACTORS

A. *Introduction*

The courts have not been doctrinally consistent in their treatment of the willfully breaching building, grading, or mining contractor. Some courts have distinguished willful breaches from nonwillful breaches in fashioning remedies and others have not. Most courts favor granting the aggrieved owner damages measured by the cost of completing performance if the contractor has stopped in midstream, or by the cost of repair if the contractor completed the job but deviated from the contract specifications.[43] Under some circumstances, however, most courts have been will-

remedies in this Article. If you believe that other values are more important, I cannot prove that I am "right" and you are "wrong." I agree with Professor Leff that in searching for the "right" law, we cannot locate anything "more attractive, or more final, than ourselves." Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229. We must continually negotiate with each other to develop shared values and shared notions about the effectiveness of laws devised to implement those values.

42. The term "not-so-good breachers" has been used to get away from the term "bad man." Not all those who breach contracts should be labeled bad, but this particular group of not-so-good breachers are getting close to deserving the "bad" label. The "worst breachers," discussed in Section V of this Article on punitive damages, are those who willfully breach with an unreasonable lack of regard for the other party. Surely even Holmes would admit they are "bad."

43. D. DOBBS, REMEDIES § 12.21, at 897 (1973).

ing to limit the owner's damages to the difference between what the property would be worth had the contractor completed his performance according to the contract terms and the value of the property in its actual condition.[44] Frequently, this diminished value measure produces substantially lower damages than does the cost of repair measure.[45]

These two possible measures of damages make it possible to argue that the willful breacher always should be required to pay the higher measure. However, several factors besides willfulness have been considered by the courts in selecting the measure of damages. The most important of these are (1) whether repair would result in economic waste by destroying sound construction, (2) whether repair or completion would result in costs grossly disproportionate to the good to be attained, and (3) whether the owner's aesthetic preference is involved. The following discussion shows the tensions between the willfulness factor and the other factors, and describes the emphasis placed on these factors in the case law. An alternative analytical framework for selecting an appropriate measure of damages is then suggested.

B. *Willfulness of the Breach and Economic Waste*

The most troublesome cases involve willfully breaching building contractors who have completed all or a portion of the building, but not in accordance with contract specifications. Repair would involve the destruction of some completed, but faulty, work. In some instances, the destruction would damage even parts of a building constructed according to specifications. In such a case, the willfulness factor indicates cost of repair damages would be appropriate, while the economic waste factor suggests the lower diminished value measure. Even where the breach was willful, the vast majority of courts have refused to award cost of repair damages where repair would entail extensive destruction of completed work.[46] Most of the awards measured by the cost of destruction and rebuilding have involved contractors who not only willfully breached but whose work was so faulty that it was worthless to the owner.[47] However, in *McKee v. Wheelus*,[48] which involved both a willful breach and worthless work, the court awarded the cost of replacing kitchen cabinets without emphasizing

44. *Id.*

45. In a rare case where the evidence tended to show that the cost of repair was less than the diminished value of the house, the court held that the trial court correctly charged the jury to ascertain and award the diminished value. Marshall v. Marvin H. Anderson Constr. Co., 283 Minn. 320, 328-29, 167 N.W.2d 724, 729 (1969). In such a situation the owner often has a duty to repair in order to minimize his damages.

46. *E.g.*, Kirk Reid Co. v. Fine, 205 Va. 778, 787, 790, 139 S.E.2d 829, 835-36, 837 (1965) (relying principally on the economic waste argument to support diminished value damages but apparently also deeming relevant that the contractor's knowing departure from the contract specifications was not done to save money on the contract).

47. *E.g.*, Henderson v. Oakes-Waterman Builders, 44 Cal. App. 2d 615, 112 P.2d 662 (1941) (affirming a $3,702.49 damages award, which included the reasonable cost of removing debris and rebuilding plus lost rental value, where the contractor was found by the trial court to have willfully breached a $2,500 building contract, leaving the plaintiff with a useless building).

48. 85 Ga. App. 525, 69 S.E.2d 788 (1952).

the fact that the cabinets were found to be worthless to the owner. Instead, the court stressed the willfulness factor, stating:

> The plaintiff was entitled to have what he contracted for or its equivalent, and what that equivalent is depends upon the circumstances of the case. Where a substantial part of the work would have to be changed and rebuilt in order for the work to be done according to the contract, the owner would be entitled to recover the difference between the value of the work as done and the value of the work as it should have been done provided that the builder acted in good faith. On the other hand, if the builder's breach of the contract is intentional and in bad faith, *or* if the defects may be remedied without what would amount to destroying the work already done, the owner is entitled to recover the cost of making the work conform to that contracted for.[49]

The use of the word "or" indicates that the presence of willfulness alone was considered sufficient to trigger the cost of repair measure even where repair entailed destruction of completed work. In the same vein, dictum in *Jacob & Youngs, Inc. v. Kent*[50] indicates that had the contractor willfully substituted the wrong brand of pipe, the court would have awarded cost of repair damages even though substantial destruction of the house would have been required in order to replace the pipe.

C. *Willfulness of the Breach and the Disproportionality Principle*

Courts are hesitant to award cost of completion or cost of repair damages which are deemed excessively high when compared with either (1) the increase in the value of the property attributable to the repairs, (2) the fair market value of the property, or (3) the increased usefulness of the land to a particular owner. This balancing of repair or completion cost against the "good to be attained"[51] or against the pre-contract value of the property is referred to in this Article as "the disproportionality principle" to distinguish it from the courts' attempts to avoid the "economic waste" involved in the rebuilding of all or part of a building.[52]

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49. *Id.* at 528, 69 S.E.2d at 791 (emphasis added) (citations omitted).

50. 230 N.Y. 239, 244, 129 N.E. 889, 891 (1921).

51. This is Professor McCormick's terminology taken from Judge Cardozo's opinion in Jacob & Youngs, Inc. v. Kent, 230 N.Y. 239, 129 N.E. 889 (1921). C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 168, at 649 (1935).

52. There is no consensus among writers or courts as to the meaning of "economic waste." Farnsworth believes that it means "a use of assets in a way considered 'wasteful' according to standards shared by society in general." Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1173-74 (1970). He apparently applies it to situations where work must be undone and redone at a cost greatly in excess of the increased value. Farnsworth further points out that the award of damages itself is not economically wasteful—rather the plaintiff is given a chance to "waste" the award on repairs which cost substantially more than they will produce in value. *Id.* This definition of economic waste, which incorporates both destroying completed work and the disproportionality principle but recognizes the plaintiff as the possible "waster," also is reflected in RESTATEMENT (SECOND) OF CONTRACTS § 348 comment c (1979).

One trouble with Farnsworth's "shared standards of society" definition of waste is that it is doubtful that society has reached a consensus on this concept. For example, some probably decry destruction of any completed work that is usable, even if the owner intensely dislikes some nonapproved substitution by the contractor. At the other end of the spectrum are those who believe that since building materials are never really destroyed—rather they just change form—scrapping

The willfulness factor, which indicates that cost of completion damages would be appropriate, frequently conflicts with the disproportionality principle, which provides an argument for choosing the lower diminished value measure. The cases reflecting this conflict are not in apparent harmony. Some courts have awarded cost of repair damages against a willfully breaching contractor even when this recovery is substantially more than the diminished value of the property, and others have not. In *Pence v. Dennie*,[53] a building contractor used brick instead of the specified artificial stone for the front of a building because he had trouble locating satisfactory artificial stone. Although the court found that the value of the building was not greatly diminished by the substitution, the owner was allowed cost of repair damages of over $1,000.[54]

In *Groves v. John Wunder Co.*,[55] the Minnesota Supreme Court decided that the trial court improperly refused to award cost of completion damages of over $60,000 to a landowner against a sand and gravel company that willfully breached its contractual duty to leave the property at a uniform grade. The evidence showed that the reasonable value of the property, had it been properly graded, would have been only $12,160, and the trial court's judgment was for this figure plus interest.[56] The majority opinion of the supreme court stressed that the plaintiff was entitled to receive its contractual expectancy irrespective of the value of the land and distinguished those cases involving the economic waste inherent in wrecking completed structures.[57] The dissent argued that had the defendant performed, the plaintiff would not have received the cost of the work but the work itself; therefore, the plaintiff's damage was only the lost increase in the market value of the land.[58] This argument is incorrect. The plaintiff did lose the work not done, but, at the time the contract was entered, that work had a personal value to the plaintiff that included elements in addition to the expected increase in market value. The bargained for price of the remedial work was $60,000.

Professor Posner has argued that the measure of damages in *Groves* was improper.[59] His argument is based on a series of inferences from surrounding circumstances and from the plaintiff's post-trial conduct. For example, Posner assumes that the *Groves* court ignored the effect of the 1930s' depression, which hit shortly after the contract was signed in 1927.[60] Posner speculates that the parties must have intended to allocate the risk of

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completed work is always reasonable. Most persons probably lie between the extremes and give lip service to conservation of material goods but nevertheless scrap old cars, furniture, clothes, etc. quite readily. And we seldom cry "waste" while watching manufactured fires, floods and bombings destroy the "completed work" which comprises sets for movies and television.

53. 41 Cal. App. 428, 433, 182 P. 980, 982 (1919).

54. *Id.* at 434, 182 P. at 982. The importance of the owner's aesthetic preference in the appearance of the building is another factor on which the court could have relied. *See infra* notes 110-15 and accompanying text.

55. 205 Minn. 163, 171, 286 N.W. 235, 238 (1939).

56. *Id.* at 165, 286 N.W. at 236.

57. *Id.* at 167, 171, 286 N.W. at 237, 238.

58. *Id.* at 176, 286 N.W. at 241.

59. R. POSNER, *supra* note 17, § 4.9, at 90-91.

60. *Id.* at 91.

a fall in the market for real estate to the plaintiff owner, thus limiting him to the diminished value measure of damages.[61] This argument is unrealistic because the contract was not one to improve commercial land for the purposes of sale. Rather it was a lease for the removal of sand and gravel plus the use of a screening plant.[62] The grading provision was included to ensure that the land would not be harmed by the defendant's operations. Although the opinion does not reflect the value of the land at the time of the lease, it is possible that it remained relatively stable throughout the contract period. However, the construction industry, to which the defendant probably sold most or all of its sand and gravel, must have been dramatically affected by the depression. By no stretch of the imagination can it be argued that the plaintiff assumed the risk of a decline in the profitability of the defendant's sand and gravel business.[63]

Posner also asserts that plaintiff's failure to ask for specific performance, and plaintiff's subsequent use of little of his recovery to level the land, indicate he did not care whether the land was leveled. This assertion is mere inference on Posner's part. The plaintiff's failure to ask for specific performance could have been caused instead by the impossibility of establishing that his legal damages were inadequate. Furthermore, although when he entered the contract the plaintiff clearly wanted the land left level, by the time of trial the intervention of the 1930s' depression probably had created more urgent needs for the plaintiff's money. It is not argued that this supposition about the plaintiff's state of mind is right and Posner's is wrong. But it is worth noting that inferences show only what might have been—not what was—in the plaintiff's mind at the time of contracting and at the time of trial.

Furthermore, the law should not inquire into a particular plaintiff's motives at trial for seeking cost of repair damages rather than specific performance. A plaintiff's desires at the time the bargain is made are important in determining appropriate remedies, because it is those desires, which become expectancies when incorporated directly or indirectly into contract terms, which the court later seeks to uphold in its order of specific performance or award of damages. Therefore, without drawing inferences about plaintiff's desire to have level land at the time of trial, Posner should have addressed the question whether cost of repair damages are an appropriate remedy when a plaintiff has performed his part of the bargain and the defendant has willfully breached, even where the cost of repair greatly exceeds the increase in market value which the repair will produce. Unfortunately courts, as well as writers like Posner, frequently have labeled this excess a "windfall," an incorrect term which has created a bias in favor of the lower diminished value measure of damages.

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61. *Id.*

62. *Groves*, 205 Minn. at 163, 286 N.W. at 235.

63. Under circumstances where the value of the lease was totally or almost totally destroyed by the depression, a company in the defendant's position could ask to be excused from performance under the frustration doctrine. *See* J. CALAMARI & J. PERILLO, CONTRACTS 495-96 (2d ed. 1977). No such facts were indicated in the *Groves* opinion, and even if they had been, excuse probably would have been inappropriate because the depression was foreseeable when the contract was made. *Id.* at 498-502.

Willfully breaching contractors should not be able to escape cost of repair damages because the court suspects the plaintiff owner may pocket the damages instead of repairing the house or grading the land. Even in these so-called "windfall" cases it is unwise to adopt a measure of damages that affirmatively encourages the contractor to breach. Professor Vernon poses a hypothetical based on *Groves* in which Alice, the defaulting contractor seeks to limit her damages to the $10,000 diminution in the value of land owned by Bob. Bob, on the other hand, wants cost of completion damages of the $175,000 necessary to level the land after Alice has removed sand.[64] Professor Vernon notes that if Bob gets the $175,000 there may or may not be a windfall to Bob depending on how he spends the money and concludes:

> The question is simply which of two parties should decide how the $175,000 would be spent. If Bob's recovery were limited to $10,000, Alice would profit substantially from her breach. But an award of more than $10,000 would constitute a windfall to Bob; his dollar position would be better than if Alice had performed. As between the two, who should get the windfall—Alice, who would profit from her breach, or Bob, who performed as promised?
>
> While one might argue for a damage system that neither encourages nor discourages performance, it is difficult to advance a reasoned argument in favor of a damage system that affirmatively encourages nonperformance. If the choice is between a $10,000, or a $175,000 award, the better choice would seem to be the larger amount.[65]

Cost of repair damages that are substantially higher than diminished value damages should not be labeled a "windfall" to the plaintiff, because the excess recovery is nothing more than plaintiff's profits on the bargain. If such profits are a windfall, all bargains which ultimately create more benefits for one party than for the other party produce a windfall for the more advantaged party. In our economy, maximizing profits has long been deemed a legitimate goal of bargainers. Why many legal economists have become antagonistic toward the more successful bargainer in a

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64. Vernon, *Expectancy Damages for Breach of Contract: A Primer and Critique*, 1976 WASH. U.L.Q. 179, 228.

65. *Id.* at 230. Is the choice to give all the windfall to either the plaintiff or the defendant? Professor Vernon suggests a statute under which the plaintiff would receive diminished value damages and a state fund that would receive the amount by which cost of completion damages exceed the diminution in value.

The trial court in Peevyhouse v. Garland Coal & Mining Co., 382 P.2d 109, 111 (Okla. 1962), *cert. denied*, 375 U.S. 906 (1963), allowed the jury to consider evidence of both cost of repair and diminution in value, and the jury arrived at an amount between the two figures, a result approved by Farnsworth, *supra* note 52, at 1175.

D. DOBBS, *supra* note 43, § 12.21, at 902, suggests a fifty-fifty split of the windfall. Dobbs also suggests an order of specific performance which would encourage the parties to strike a new bargain, thus avoiding the extremes of Groves v. John Wunder Co., 205 Minn. 163, 286 N.W. 235 (1939) and Peevyhouse v. Garland Coal & Mining Co., 382 P.2d 109 (Okla. 1962), *cert. denied*, 375 U.S. 906 (1963), and insuring full compensation of the plaintiff. See also Linzer, *On the Amorality of Contract Remedies—Efficiency, Equity, and the Restatement (Second)*, 81 COLUM. L. REV. 111, 136-37 (1981), emphasizing that a decree of specific performance allows the promisee to prove the value to him of that performance by determining whether he will accept some dollar amount in place of the performance.

Groves-type situation is mysterious. Instead, the landowner should be congratulated for his good bargain—or his good luck in having subsequent events go his way—and should be awarded his cost of repair damages without requiring a promise that he will use it to undertake the repairs. By the time of trial the owner may have a "higher and better use" for his damage award than to repair. In fact, if he decides to use it for a less than high purpose—say for gambling at the race track—that is his perogative. It is his money because it came to him through his legally binding bargain.[66]

Although courts in several cases such as *Groves*[67] and *Pence v. Dennie*[68] have granted an aggrieved owner cost of repair damages against a willfully breaching contractor even though this measure was arguably disproportionate to the economic benefit of full performance, at least as many courts have in such circumstances limited the plaintiff to the lower diminished value measure. For example, in *Jansen v. Rilling*,[69] the Wisconsin Supreme Court determined that the diminished value rule probably should have been applied when the contractor failed to provide the specified anchors for a brick veneer exterior, provided the contractor could have shown that the walls were otherwise sufficiently anchored to make them good substantial walls. According to the supreme court, the trial court erroneously excluded evidence of customary practices of experienced builders which would tend to show that the walls as constructed were good and substantial despite the clear departure from contract specifications.[70] Although the trial court found that this particular breach was material and intentional, the supreme court did not focus on the willfulness factor in selecting the appropriate measure of damages. Instead, the court emphasized the amount of destruction involved and a cost of repair of $1,955 on a house having a total contract price of $12,250 and held that if, on remand, the walls as actually constructed were found to be good substantial walls, repair would be "impracticable" under the circumstances.[71] The Wisconsin "impracticability" standard as applied in *Jansen* seems to encompass both the economic waste and the disproportionality principles.

Jansen, however, may not be in clear conflict with *Groves*. The breach in *Jansen* arguably can be distinguished as *de minimis* because the plaintiff got substantially what he bargained for performance wise—solidly anchored walls with a brick veneer exterior. Had the land owner in *Groves*

66. One recent decision recognized that in some circumstances no unjust enrichment occurs when the plaintiff "pockets" his expectation recovery. In Emery v. Caledonia Sand & Gravel Co., 117 N.H. 441, 447-48, 374 A.2d 929, 933 (1977), the court, without disclosing any loss in value figure on the market value of the land, found no disproportionality in the trial court's award of $17,520 as the cost of the defendant's breached obligation to restore plaintiffs' hayfield after removing landfill, stating that "[a] valuable income-producing asset [the hayfield] has been rendered unproductive; the damages awarded constitute a reasonable means of bringing that asset back to life. If the plaintiffs choose to 'pocket' their recovery, they will have forgone the restoration of their land; they will not have been unjustly enriched."

67. 205 Minn. 163, 171, 286 N.W. 235, 238 (1939).

68. 41 Cal. App. 428, 434, 182 P. 980, 982 (1919). *See supra* notes 53-54 and accompanying text.

69. 203 Wis. 193, 201-02, 232 N.W. 887, 890 (1930).

70. *Id.* at 202, 232 N.W. at 890.

71. *Id.* at 201-02, 232 N.W. at 890.

been limited to diminished value damages, he would not have received an important part of what he bargained for: restoration of his property to grade.

There are several obstacles to a neat comparison of the cases which stress the disproportionality factor. One obstacle is that the courts are not uniform in their choice of what figure should be compared to the cost of repair to determine the presence or absence of disproportionality. Some courts compare cost of repair with the loss in market value, if any, to the building or land by virtue of the defendant's breach.[72] Other courts compare cost of repair damages to the market value of the land (in the land restoration cases),[73] or to the total contract price (in building construction cases).[74]

Another obstacle to a clear understanding of the cases stressing disproportionality is the tendency of some courts to use this principle as a springboard into an open-ended balancing of all factors they deem relevant, such as willfulness, aesthetic preference of the owner, and the loss of habitability suffered by the plaintiff. Without admitting that they have shifted into a balancing test, and without any articulated assignment of weights to each factor, these courts usually conclude their analysis by simply announcing that because of certain enumerated factors there is, or is not, a disproportionality between cost of repair and loss in market value or some other chosen figure. *Beik v. American Plaza Co.*[75] is an interesting example of this type of case. In *Beik* the defendant contractor installed in several condominium units sliding glass doors and air conditioners cheaper than those specified in the contract.[76] Plaintiff owners sought an order of specific performance requiring installation of the specified doors and air conditioners, or in the alternative, cost of repair damages.[77] The trial court ordered the defendant to either install the specified items within sixty days or pay a judgment that would be entered for cost of repair damages.[78] The defendant contractor appealed, arguing among other things, that any damages assessed should have been measured by the difference between the value of the condominium units with the existing doors and air conditioners and the value of the units had the specified items been installed.[79] In *Beik* the Oregon Supreme Court articulated a rule which combined a preference for cost of repair as the measure of damages, with an exception that encompassed both economic waste and disproportionality principles.[80] The court then ostensibly compared the $8,700 per unit

72. *E.g.*, H.P. Droher & Sons v. Toushin, 250 Minn. 490, 85 N.W.2d 273 (1957).

73. *E.g.*, Sandy Valley & Elkhorn Ry. Co. v. Hughes, 175 Ky. 320, 321, 194 S.W. 344 (1917) (comparing cost of completing the grading to the market value of the plaintiff's entire farm without indicating whether value was measured before or after the promised repairs).

74. *E.g.*, Jansen v. Rilling, 203 Wis. 193, 232 N.W. 887 (1930) (comparing cost of rebuilding brick walls to the total contract price of the house).

75. 280 Or. 547, 572 P.2d 305 (1977).

76. *Id.* at 550, 572 P.2d at 307.

77. *Id.* at 549, 572 P.2d at 306.

78. *Id.*

79. *Id.* at 555, 572 P.2d at 310.

80. *Id.* at 555-56, 572 P.2d at 310.

cost of repair figure with the $40,000 price of each condominium unit.[81] The court's analysis evolved, however, into an open-ended balancing of all factors deemed relevant:

> The relationship of cost of repair to purchase price is not disproportionate here, especially considering the lack of a need for a structural change, the loss of habitability suffered by the plaintiffs, and the almost $65,000 that the defendants testified they saved by installing the inferior doors and air conditioners. Further, an award of . . . the diminution of value . . . would leave the plaintiffs with an obviously inferior condominium and a sum of money that would be inadequate to bring it up to specifications. It is clear that the only way that plaintiffs can be made whole is to award them the cost of repair.[82]

Since the defendants saved almost $65,000 by their apparently willful breach, the decision reached a fair result. However, it would have been doctrinally clearer had the court first decided whether there was a disproportion between the cost of repair figure and the cost of the condominiums, or better yet, between the cost of repair and the increase in market value which such repairs would bring to the property. Even if the court had found a disproportionality, it could have been considered as only one of the many factors to be balanced in order to select the more appropriate measure of damages.

A few courts have seen the light and more clearly articulated their balancing approach. The Wisconsin Supreme Court in the early case of *Burmeister v. Wolfgam*[83] first stated the rule governing the choice between diminished value damages and cost of repair damages in these words:

> That rule is that, where defects complained of could not be presently remedied at a reasonable expense without any great sacrifice of work or material already wrought into the building, then as in the present situation, the proper measure of damages is the diminished value of the building as turned over by the builder to the owner from its value if completed according to the contract and without the complained of defects.[84]

Building upon *Burmeister*, the Wisconsin Supreme Court in *Jansen v. Rilling*[85] admitted that "[n]o hard-and-fast rules can be laid down as to whether in a given case the first branch of the rule or the second branch of the rule shall be applied," and clearly articulated a balancing technique involving all relevant factors:

> Whether the facts in a particular controversy justify the application of the rule of damages permitting recovery for the amount of the reasonable expense of remedying the defects, or whether the facts are such as to require the application of the "diminished value" rule, or whether the facts in a given case require the application of both branches of the rule of damages, to different items of dispute, is

81. *Id.* at 556, 572 P.2d at 310.
82. *Id.*
83. 175 Wis. 506, 185 N.W. 517 (1921).
84. *Id.* at 512, 185 N.W. at 520.
85. 203 Wis. 193, 201, 232 N.W. 887, 889 (1930).

> ordinarily *a question to be determined by the trial court from all of the facts and circumstances in the particular case*, subject always, however, to a review by this court.[86]

The Wisconsin court, by adopting an open-ended balancing test, freed itself from the confusing "rule, exceptions to the rule, exceptions to the exceptions" approach taken by many courts. It also was the first court to apply the diminished value rule to difficult-to-repair items, such as misplaced walls, and the cost of repair measure to other easy-to-repair items in the same case.[87] Unfortunately, as mentioned earlier, the willfulness factor has been accorded little or no weight by Wisconsin decisions.[88]

The so-called "main purpose rule" is another obstacle to a neat comparison of cases stressing the disproportionality factor. A few courts in determining the appropriate measure of damages against a breaching contractor ask whether the breach is of a duty deemed to be a main purpose of the contract. If the court finds that the breached duty was a main purpose, it allows cost of repair damages despite any disproportion between that recovery and the diminished value of the property.[89] When the duty which was willfully breached is considered not to be a main purpose of the contract, the court will limit the plaintiff to diminished value damages provided the defendant also successfully invokes the disproportionality principle. In *Peevyhouse v. Garland Coal & Mining Co.*[90] the Oklahoma Supreme Court stated:

> We therefore hold that where, in a coal mining lease, lessee agrees to perform certain remedial work on the premises concerned at the end of the lease period and thereafter the contract is fully performed by both parties except that the remedial work is not done, the measure of damages for breach of contract is ordinarily the reasonable cost of performance of the work; however, where the contract provision breached was merely incidental to the main purpose in view, and where the economic benefit which would result to lessor by full performance of the work is grossly disproportionate to the cost of performance, the damages which lessor may recover are limited to the diminution in value resulting to the premises because of the nonperformance.[91]

The facts in *Peevyhouse* illustrate the difficulty in determining which contract provisions are merely incidental to the main purpose. The defendant could argue that the main purpose of the contract was the coal strip mining operation while the plaintiff owner could assert that the main purpose was to profit from defendant's mining without permanently injuring his property.[92] The Oklahoma Supreme Court, however, expressed no hesitancy in finding the restoration to be incidental, and since the $29,000

86. 203 Wis. at 200-01, 232 N.W. at 889 (emphasis added).
87. *E.g.*, Buchholz v. Rosenberg, 163 Wis. 312, 156 N.W. 946 (1916).
88. *See supra* text accompanying note 69.
89. *E.g.*, Fite v. Miller, 196 La. 876, 200 So. 285 (1940).
90. 382 P.2d 109 (Okla. 1962), *cert. denied*, 375 U.S. 906 (1963).
91. *Id.* at 114.
92. *See* Comment, *Measure of Damages—Cost of Performance Versus Diminution in Value for Breach of a Strip-Mining Lease*, 49 IOWA L. REV. 597, 601 (1964).

cost of restoration was disproportionate to the $300 increase in the value of the property which the repair work would bring, the court concluded the owner was entitled to only $300 in damages.[93]

Depriving the plaintiffs of the benefit of their bargain in *Peevyhouse* was justifiable only if the coal company deserved relief under either mistake or existing impracticability principles. Unpublished materials by Professor Danzig indicate that Garland Coal & Mining Co. introduced evidence on which these theories could have been advanced.[94] In fact, the coal company's brief seems to make an economic impracticability argument when it states that the coal company did not perform the remedial work because the amount of coal on the leased premises turned out to be limited, and, as a result, the defendant's mining operations were curtailed, which in turn made compliance with the term requiring remedial work uneconomic. The defendant therefore argued that it did not willfully or in bad faith enter into a contract that it did not intend to perform. This, of course, negates fraud or bad faith at the time of contracting but does not negate willfulness in breaching. Furthermore, a decision in favor of the coal company overtly based on mistake or existing impracticability would have been unwarranted because the coal company, an expert as to coal deposits, should bear the risk as to the amount of coal. Also, its partial performance of the strip mining operation undoubtedly damaged the plaintiffs' land, making it impossible to restore them to their status quo without completing some or all of the specified remedial work. It was inappropriate to deprive the plaintiffs of all but token damages by invoking the disproportionality principle and the main purpose rule as a covert method of applying the economic impracticability doctrine in circumstances where the propriety of its application was doubtful, at best. Even if the main purpose rule has validity, it was misapplied in *Peevyhouse* because, according to the dissent, "[d]efendant admitted in the trial of the action, that plaintiffs insisted that the above provisions [requiring remedial work] be included in the contract and that they would not agree to the coal mining lease unless the above provisions were included.[95] Therefore, it is clear that the remedial work was a very important purpose of the contract.

The disproportionality principle is an idea whose time has come

93. 382 P.2d at 113-14

In P. G. Lake, Inc. v. Sheffield, 438 S.W. 2d 952, 956 (Tex. Civ. App. 1969), which involved an oil and gas lessee's breach of its covenant to restore the land at the end of the lease, the court after stating that it was "inclined" to follow the *Peevyhouse* rule, said the determinative issue facing it was whether the defendant had the burden of showing that the "cost" rule was inapplicable. Because minimization of damages is a defensive matter, the court held that "where the contract breaker seeks to avoid the reasonable cost of performance, he must plead and prove facts showing that if the cost of performance rule is applied, such cost would grossly exceed the diminution in value of the plaintiffs' land and would result in awarding plaintiffs a sum in excess of their actual damages, thus allowing plaintiffs to profit from their breach." *Id.* Lawyers in jurisdictions following *Peevyhouse* should be sure that the defendant is at least made to bear the burden of proof on both the disproportionality and the main purpose prongs of the exception to the cost rule.

94. See discussion of Danzig's research in L. FULLER & M. EISENBERG, *supra* note 36, at 196-97.

95. 382 P.2d at 115. For a good discussion of the importance of the excess subjective utility of a good or service over its market price in assessing the promisee's expectation interest, see Harris, Ogus & Phillips, *Contract Remedies and the Consumer Surplus*, 95 L.Q. REV. 581 (1979).

and—if not gone—should at least be deemphasized. It arose in the early part of this century[96] due to the courts' concern with protecting the still youthful building industry.[97] That industry has come of age and no longer deserves the protection of remedial principles that subsidize contractors who willfully cut corners.[98] In order to fully compensate plaintiffs and to deter breaches, the disproportionality principle should not be considered as even one factor in deciding what measure of damages should be awarded against a willfully breaching contractor. However, retaining the economic waste and disproportionality principles for the benefit of contractors who unknowingly breach probably is warranted because unknowing breaches cannot be deterred.

Although disproportionality is a factor in choosing appropriate damages for breach of contract which should now be kept within reasonable bounds, the rubric of the Restatement (Second) of Contracts increases the emphasis on this principle and does so in a confusing way. Section 347(a) first adopts as part of the expectancy measure of damages the injured party's "loss in value."[99] Comment b states that the amount of this loss depends on the plaintiff's particular circumstances instead of "values to some hypothetical reasonable person or on some market."[100] Since this amount often cannot be established with reasonable certainty as required in section 352,[101] alternatives to the personal loss in value measure are suggested in section 348.[102] Section 348(2), which applies to breaches resulting in defective or unfinished construction, suggests these alternatives:

96. The principle was first clearly articulated in Jacob & Youngs, Inc. v. Kent, 230 N.Y. 239, 244, 129 N.E. 889, 891 (1921), when Judge Cardozo stated "[t]he owner is entitled to the money which will permit him to complete, unless the cost of completion is grossly and unfairly out of proportion to the good to be attained." He made this statement in the context of a case involving a non-willful breach and in which replacing the non-conforming pipes would require a substantial destruction of a sound house. Nevertheless, the disproportionality principle was later applied in cases such as Peevyhouse v. Garland Coal & Mining Co., 382 P.2d 109 (Okla. 1962), *cert. denied*, 375 U.S. 906 (1963), which involved neither the economic waste of sound construction nor a non-willful breacher.

97. *See* M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1790-1860 188 (1977), pointing out that the principle that innocently breaching builders could recover off the contract in *quantum meruit* was developed because of "that special solicitude which American courts have reserved for infant industry." In fact, many early cases limited the owner's damages against a contractor who had not substantially performed to the diminished value for the express purpose of insuring that the contractor would be compensated adequately for his labor and material. *E.g.*, White v. Mitchell, 123 Wash. 630, 638, 213 P. 10, 13 (1923).

98. Some jurisdictions subsidize this type of contractor by allowing a contractor who has willfully and substantially breached to obtain a restitutionary recovery against the owner. Professor Dobbs notes the existence of three views regarding restitutionary recovery by the contractor who is in substantial breach: first, denying restitution even where the breach was not willful; second, permitting restitutionary recovery only if the contractor's breach was not willful; and third, permitting restitution even where the breach was willful. D. DOBBS, *supra* note 43, § 12.24, at 920-22.

It would be appropriate to give even the willfully defaulting contractor *quantum meruit* recovery limited to the value conferred on the owner by that portion of the contractor's work which (1) meets contract specification and (2) will not have to be destroyed and rebuilt in order to correct deviations in other parts of the construction.

99. RESTATEMENT (SECOND) OF CONTRACTS § 347(a) (1979).

100. *Id.* comment b.

101. *Id.* § 352.

102. *Id.* § 348.

(a) the diminution in the market price of the property caused by the breach, or

(b) the reasonable cost of completing performance or of remedying the defects if that cost is not clearly disproportionate to the *probable* loss in value to him.[103]

This language seems to encourage courts to adopt a new disproportionality principle in which cost of completion is compared not to some figure which might be ascertained with reasonable certainty but to a "probable" personal loss figure which cannot be so ascertained, and therefore cannot itself be the appropriate measure of damages.

To restate the disproportionality factor in the new language of sections 347 and 348 would have added only incremental confusion to existing case law had the restaters stopped there. However, they also added section 351(3) which states:

> A court may limit damages for forseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.[104]

According to comment f, "disproportionate" in this section means "an extreme disproportion between the loss (claimed by the injured party) and the price charged by the party whose liability for that loss is in question."[105] A finding of such disproportion apparently was intended to affect general as well as special damages and allow a court to award less than even clearly proved and foreseeable expectation damages.[106] For example, if the evidence showed cost of performance damages of $60,000, diminished value damages of $20,000, and that the defendant received consideration from the plaintiff worth only $10,000, section 351(3) would seem to allow an award of damages of less than $20,000 even though there is no traditional general damages measure which would yield that amount. If this comes to pass, damages will become more unpredictable, thus fostering litigation as opposed to settlement.[107]

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103. *Id.* § 348(2) (emphasis added).

104. *Id.* § 351(3).

105. *Id.* comment f.

106. Comment b to RESTATEMENT (SECOND) OF CONTRACTS § 351 provides that "it is not necessary to distinguish between 'general' and 'special' or 'consequential' damages for the purpose of the rule stated in this section." *See also* Harvey, *Discretionary Justice Under the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 666, 667-76 (1982) (indicating that early American Law Institute discussions reflect an intention by most participants to limit § 351(3) to special damages, but that Reporter Farnsworth's belief that the section should apply to all damages prevailed in the final drafting). See in reply to Harvey's comments, Farnsworth, *Some Prefatory Remarks: From Rules to Standards*, 67 CORNELL L. REV. 634, 637-39 (1982) (agreeing that § 351(3) is intended to be a broad "unfettering" section which will encourage judicial candor about the effect of disproportionate compensation on a court's award of damages).

107. Litigation, in turn, will greatly increase plaintiffs' attorneys' fees, which under current doctrine generally cannot be shifted to the defendant contract breacher, thus ensuring significant undercompensation even of plaintiffs who eventually obtain full expectancy damages. Those who obtain less than full expectancy damages will, of course, be even greater losers. Regardless of the direction that the law takes with regard to measuring plaintiffs' damages in breach of contract cases, all prevailing plaintiffs should be awarded court costs and attorneys' fees. At least this minimal protection should be given to the plaintiffs' expectancy interest. There is extensive literature on the subject of attorney fee shifting. For an excellent discussion of the full compensation

Fortunately, disproportionality between damages asserted by the plaintiff and the value received by the defendant is described in comment f to section 351(3) as only one circumstance in which it might be unjust to require the breaching party to pay for all foreseeable losses, and informality of dealing is mentioned as another relevant circumstance.[108] Professor Burnett Harvey suggests that the list should have been longer, and compiles his own list of possibly relevant factors which includes the degree of the defendant's fault.[109]

Harvey's emphasis on fault is commendable, but it does not go far enough. The willfulness factor is too important to be merely added to an open-ended list of relevant factors to be balanced by a court in its selection of an appropriate remedy for breach of a contract involving building construction or the repair of land after removal of valuable deposits of gravel, coal, etc. The new approach suggested in section III(E) of this Article would both properly increase the emphasis on the willfulness factor and keep the disproportionality factor within reasonable bounds.

D. *The Aesthetic Preference of the Owner*

In the preceding sections it has been suggested that some courts are applying a balancing technique in choosing between cost of repair and diminished value damages. The willfulness of the defendant's breach is balanced against any economic waste and/or disproportionality that is found by the court. However, a second group of courts has deemed the willfulness factor crucial, mandating cost of repair damages, while a third group has decided that either economic waste or disproportionality, or a combination of these two factors, should automatically trigger value damages.

There is also a fourth group of building contractor cases in which the owner of a residence is given cost of repair damages to protect his aesthetic preference without balancing other factors, including willfulness. Willfulness is not stressed in these cases because the courts attach such importance to the owner's aesthetic preferences, when expressed in the contract, that they are regarded as crucial and the willfulness factor is not needed to justify the choice of the higher cost of repair damages.

Cases in which the homeowner's aesthetic preferences are regarded as crucial, automatically triggering cost of repair damages, generally involve expressed preferences related to either the appearance of a house or the efficiency of its use. When these preferences are part of the contract speci-

rationale, see Rowe, *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 657-59.

108. RESTATEMENT (SECOND) OF CONTRACTS § 351 comment f (1979).

109. Harvey, *supra* note 106, at 677-78. Fault was also deemed possibly relevant in Sullivan v. O'Connor, 363 Mas. 579, 296 N.E.2d 183 (1973), on which Illustrtion 19 to § 351 is based. In *Sullivan*, the Massachusetts Supreme Judicial Court approved a reliance damages formula instead of the traditional expectancy measure against a non-negligent plastic surgeon who breached his promise to improve the appearance of plaintiff's nose. However, in footnote 6, the court stated that "a jurisdiction which would apply a reliance measure to the present facts might impose a more severe damages sanction for the wilful use by the physician of a method of operation that he undertook not to employ." *Id.* at 588 n.6, 296 N.E.2d at 189 n.6.

fications, the necessity of destroying completed work in order to repair the defects is either not considered or dismissed as unimportant. For example, in *Fox v. Webb*,[110] the Alabama Supreme Court affirmed the trial court's award of cost of repair damages against a contractor who made unauthorized substitutions of materials in ceilings and walls of a residence. Without discussing the economic waste, disproportionality, or willfulness factors the *Fox* court stated:

> It seems to us that when an owner contracts to have a dwelling constructed, he wants a particular structure, not just any structure that could be built for the same price. We, therefore, think that the trial court was correct in awarding damages equal to the amount required to reconstruct the dwelling so as to make it conform to the specifications, rather than adopting the difference in loan value on the dwelling as the measure of damages, as contended by appellant.[111]

In jurisdictions which do not regard the aesthetic preference of a homeowner as a crucial factor automatically mandating cost of repair damages, the courts vary widely in their results. The aesthetic factor collides with the economic waste and/or the disproportionality principles. In jurisdictions which have not adopted a balancing approach, courts are unlikely to state overtly that a particular owner's aesthetic preference should outweigh the economic factors. Instead one suspects the courts reach gutlevel decisions bottomed on the fairness of protecting aesthetic preferences and then manipulate the inconsistent disproportionality terminology to justify awarding the owner the higher cost of repair damages. If a court compares cost of repair with the contract price or the value of the entire house, it is much easier to find no disproportionality than it is if the cost of repair is compared to the often nominal diminished value of the house.

For example, in *Gory Associated Industries v. Juniper Roofing*,[112] the intermediate appellate court held that the owner should have cost of repair damages against a supplier of roofing tile which had faded and discolored. The total cost of replacing the defective roofing was $11,250, which the court found to be not grossly disproportionate to the value of the entire house, without ever disclosing the value of the entire house, and adding as an apparent afterthought this statement about the aesthetic factor:

> We would comment that we are sympathetic to a replacement of defective work. If a proud householder, who plans to live out his days in the home of his dreams, orders a new roof of red barrel tile and

110. 268 Ala. 111, 119, 105 So.2d 75, 82-83 (1958).

111. *Id.* This argument for considering aesthetic preference of the owner as crucial is appealing. However, it is too rigid because of the variations of intensity of aesthetic preference. The owner who receives a roof of the specified brand and quality of shingle but in a slightly darker shade of brown is unlikely to be as offended as he would have been had the contractor installed the specified shingle in green. Therefore, the aesthetic preference of the owner should be considered as one factor among many to be balanced in choosing the appropriate measure of damages against a nonwillfully breaching contractor. Section III(E), *infra*, describes this new approach and urges courts not to consider how the plaintiff may spend his damage award. It should be noted, however, that the owner's intention to replace or not replace the shingles might properly be deemed relevant as some evidence of the presence or absence of the aesthetic preference factor and, if present, of the weight it should be given.

112. 358 So.2d 93, 94 (Fla. Dist, Ct. App. 1978).

> the roofer instead installs a purple one, money damages for the reduced value of his house may not be enough to offset the strident offense to aesthetic sensibilities, continuing over the life of the roof.[113]

Juniper Roofing is a classic example of the imprecision of much disproportionality analysis. It demonstrates the importance courts often place on aesthetic preference even where the opinion neither clearly identifies this factor as crucial nor explicitly balances it against the two economic factors.

With regard to the construction of commercial buildings, no case has been found that clearly holds that the owner's aesthetic preferences should entitle him in every case to cost of repair damages even if the repairs would involve the economic waste inherent in the rebuilding of a usable completed structure. An occasional commercial construction case, however, will allude to the importance of appearance and will consider it as one factor to be taken into account in choosing the appropriate measure of damages. For example, in *Montgomery v. Karavas*,[114] the New Mexico Supreme Court, after describing the unsightly floor and stairs of a recently constructed hotel, stated "[t]he guests of the hotel are largely tourists. The trial court concluded, no doubt, that the unsightly and unattractive appearance of the lobby and stairways was detrimental to the appellees' business, and that it would be good business and not an economic waste to reconstruct them."[115]

It is not readily apparent that aesthetic preferences should be accorded less weight in commercial construction than in residential construction. Owners frequently maintain offices in their own commercial buildings and are entitled to have surroundings that are both efficient and visually pleasing to them. Even if the owner rents the entire building to others, he is entitled to have it conform to specifications that reflect his judgment about what will be attractive to tenants.

E. *A Summary of Current Doctrine and a Suggested New Approach*

No uniformly accepted doctrine has developed to guide courts in the choice between the cost of repair and the diminished value measures of damages. Willfulness, economic waste, disproportionality, and aesthetic preference have each been deemed the single crucial factor by some court in choosing between the cost of repair and the diminished value measures of damages. Other courts have refused to consider any one factor crucial and instead have either considered some combination of factors crucial or have engaged in open-ended balancing in which the willfulness and aesthetic preference factors, when present, incline the court toward awarding cost of repair damages, while the presence of economic waste and/or disproportionality pushes the court toward the lower value measure. Other factors such as the habitability of the building, and whether the contractor will lose money on the job if cost of repair damages are awarded, have

113. *Id.* at 95.
114. 45 N.M. 287, 114 P.2d 776 (1941).
115. *Id.* at 296, 114 P.2d at 782.

occasionally been considered. Unfortunately some courts also have speculated about the possibility of the plaintiff's "pocketing" the damages award rather than using it to repair the land or building. None of these approaches has worked particularly well because no one court has developed a comprehensive doctrine that focuses first, on the goal of enforcing contractual promises by deterring all deterrable breaches, and second, on selecting an appropriate remedial scheme, based on other goals, for breaches which are not deterrable (that is, the unknowing breaches).

A lawyer, representing an aggrieved owner against a willfully breaching contractor, who is seeking to present a new and better remedial scheme to a particular court might try the following approach. The aggrieved owner's lawyer should, if his client is willing,[116] seek specific performance as the preferred remedy,[117] and ask for damages in the alternative, to prevent the defendant's use of the misleading "windfall" argument. If so much ill feeling has developed between the parties that the owner refuses to have any further dealing with the contractor except in court, or if the owner simply prefers money damages over specific performance, plaintiff's counsel must convince the court that cost of full performance damages are more appropriate than diminished value damages.

In choosing the measure of damages, the willfulness factor should be considered first and should be deemed crucial. If willfulness is found, the court should automatically choose cost of repair damages because this higher measure tends to deter breach and more fully compensates the plaintiff's lost expectations. If the defendant's breach was inadvertent, and therefore unknowing, or if it was intended to benefit the plaintiff, the breach would be labeled nonwillful.[118] Since deterrence of an unknowing breach cannot be achieved by automatically awarding the higher cost damages, the court should decide which of the two measures, cost or value, is the more reasonable under the circumstances of the particular case.[119] To do this, the court should adopt an open-ended balancing approach in which the remaining factors are assigned weights and balanced against each other. Aesthetic preferences of the owner which are expressed through contract terms or specifications should be weighed more heavily than the economic factors of waste and disproportionality because reme-

116. The decision whether to pursue a particular remedy such as specific performance is properly left to the client under MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (Feb. 1981) [hereinafter cited as MODEL CODE]. However, under EC 7-5 and EC 7-8 the lawyer is urged to inform his client of all considerations, both legal and practical, that are relevant to the client's decision. MODEL CODE, *supra*, at EC 7-5 & EC -78.

117. *See generally* Linzer, *supra* note 65. Professor Linzer finds in the case law a current trend toward more liberal granting of specific performance. He applauds this means of holding parties to their bargain because it prevents outsiders from substituting their values for those of the parties and leaves the door open for the parties to negotiate a compromise if they so desire.

118. The burden of proof that the breach was nonwillful should be on the defendant because he possesses the facts about his reasons for nonperformance.

119. The burden of proof that the higher cost of repair measure is not appropriate should be on the defendant because the plaintiff's full expectation interest normally should be protected. Furthermore, the defendant should bear the risk of his misjudgment about potential difficulties in his performance. *See* Prier v. Refrigeration Eng'g Co., 74 Wash. 2d 25, 30-31, 442 P.2d 621, 625 (1968) (burden of proving unreasonable economic waste that would mandate lower diminished damages placed on defaulting contractor).

dies for breach of contract should focus most heavily on giving the plaintiff his precise expectations created at the time of the bargain. These expectations include not only any expected increase in the market value of plaintiff's house or land, but other more personal economic and noneconomic benefits as well.

Assuming that a defendant has been found to be a nonwillful breacher, and the open-ended balancing approach is being used to determine which measure of damages is more reasonable, it has been suggested that any relevant factors should be considered. However, some factors should not be deemed relevant. One irrelevant factor is how the plaintiff may spend his damage award. The court's job is to determine a reasonable monetary substitute for what plaintiff bargained for but did not get due to the defendant's breach. Once this is done, the plaintiff is free to spend that award as he wishes. If the court awards cost of repair damages and the plaintiff then takes a trip to Europe instead of replacing his defective roof or leveling his land, the court should wish him bon voyage without any second thought about the propriety of the award.

IV. WHY NOT A WILLFULNESS PRINCIPLE BASED ON THE REASONABLENESS OF DEFENDANT'S CONDUCT?

Willful breach of contract could be defined as "a knowing breach by a party capable of performing made with an unreasonable lack of regard for the other party." This definition arguably would bring contracts remedies more in line with tort doctrine which is bottomed on either lack of due care or intent to harm. The term "unreasonable," however, could easily be interpreted as requiring plaintiff to prove some intent on the defendant's part to gain an economic advantage for himself, which would be a difficult burden for most plaintiffs to carry. Also, it would immediately open the door to considerations of economic waste and disproportionality, hindsight criteria which frequently would preclude full protection of the aggrieved party's expectancy.

Emphasizing simple voluntariness has support in the case law. In cases involving breaching contractors, willfulness frequently has been equated with intentionality.[120] Labeling a knowing breach as willful unless (1) performance is excused under traditional doctrines such as mistake or frustration or (2) the defendant proves the breach was unknowing or was done to benefit the aggrieved plaintiff, is a straightforward approach that assumes the aggrieved party's expectancy normally should be protected fully. It is a simple concept which would promote the performance of contracts rather than encouraging breaches.

V. WHY NOT PUNITIVE DAMAGES AGAINST THE WILLFUL AND UNREASONABLE BREACHER?

Although the Restatement (Second) of Contracts declares that punitive damages are not allowed for breach of contract unless the conduct

120. *E.g.*, McKee v. Wheelus, 85 Ga. App. 525, 528, 69 S.E.2d 788, 791 (1952).

constituting the breach is also a tort,[121] there are longstanding exceptions to this general rule. Punitive damages have been allowed in suits for breach of contract where the contract was to marry, where the defendant was a public service company, where a fiduciary relationship existed between the parties, and where the defendant's breach was accompanied by fraud or by an independent tort.[122]

More recently, *Gruenberg v. Aetna Insurance Co.*[123] and its progeny have imposed punitive damages on insurance companies found to have breached an implied covenant of good faith and fair dealing owed to the insured. The *Gruenberg* court described this duty as sounding in both contract and tort.[124] *Gruenberg* arguably was simply an extension of the traditional public service company, fiduciary and accompanying tort exceptions to the general rule disfavoring punitive damages for breach of contract.[125] However, some post-*Gruenberg* cases have gone beyond its rationale and have imposed punitive damages for the contract breach itself rather than for tortious breach of the implied duty of good faith.[126]

Even outside the insurance area, some courts have become more willing to grant punitive damages for a bad faith breach of contract without requiring proof of an accompanying independent tort. For example, in *Whitfield Construction Co. v. Commercial Development Corp.*,[127] the court awarded $50,000 in punitive damages to a building contractor when the owner failed to meet the contractor's requests for payment. The breach was in bad faith and came toward the end of the $525,000 project.[128] And in *Boise Dodge, Inc. v. Clark*,[129] the court awarded plaintiff punitive damages when he found his "new" automobile was second-hand, stating, "[t]he rule . . . is that punitive damages may be assessed in contract actions where there is fraud, malice, oppression *or other sufficient reason for doing so*."[130]

Any breach of contract which is found to be willful and in unreasona-

121. RESTATEMENT (SECOND) OF CONTRACTS § 355 (1979).

122. Sullivan, *Punitive Damages in the Law of Contract: The Reality and The Illusion of Legal Changes*, 61 MINN. L. REV. 207, 220-40 (1977).

123. 9 Cal. 3d 566, 108 Cal. Rptr. 480, 510 P.2d 1032 (1973).

124. *Id.* at 573, 108 Cal. Rptr. at 484, 510 P.2d at 1036.

125. *See* Sullivan, *supra* note 122, at 242-43.

126. *Id.* at 245-46.

A discussion of the embryonic tort of bad faith breach of contract is beyond the scope of this Article. However, it should be noted that ramifications of adopting this new cause of action go beyond the punitive damages issue and affect not only other remedial issues but also such matters as applicable statutes of limitations and the proof required to show causation and lack of remoteness. For a discussion of whether and how bad faith breach of contract should be extended beyond the insurance cases, see Louderback & Jurika, *Standards for Limiting the Tort of Bad Faith Breach of Contract*, 16 U.S.F.L. REV. 187 (1982); Diamond, *The Tort of Bad Faith Breach of Contract: When, If At All, Should It Be Extended Beyond Insurance Transactions?* 64 MARQ. L. REV. 425 (1981). Those who conclude that this embryonic tort should be aborted may decide that developing remedial principles for breach of contract which more fully protect plaintiffs' expectancy interests would decrease efforts by plaintiff's attorneys to transform contract breaches into torts.

127. 392 F. Supp. 982, 1007 (D.V.I. 1975).

128. *Id.*

129. 92 Idaho 902, 453 P.2d 551 (1969).

130. *Id.* at 907, 453 P.2d at 556 (emphasis added).

ble disregard of the other party,[131] should subject the breaching party to punitive damages. Such a principle would effectively deter this particular subcategory of willful breacher who knows that his breach will have a detrimental effect on the other party but breaches anyway.

The strongest argument against expanding the availability of punitive damages for breach of contract comes from jury awards in insurance cases which reveal that juries sometimes are overly sympathetic toward the plaintiff. For example, in *Egan v. Mutual of Omaha Insurance Co.*,[132] the California Court of Appeals concluded that the jury award of $5,000,000 in punitive damages which far exceeded the compensatory damages of $123,600 was "excessive and was the result of passion and prejudice on the part of the jury," and therefore, reduced the punitive damage award to $2,500,000.[133] If there is to be a significant expansion of punitive damages for bad faith breach of contract outside of the insurance contract area, judges should carefully review jury verdicts, considering all relevant factors.[134]

VI. CONCLUSION

Courts should distinguish between willful and nonwillful breaches in selecting remedies for breach of contract. An unexcused, knowing breacher should be discouraged from future breaches by granting the aggrieved party either specific performance or the highest possible measure of expectation damages.[135] This will not only deter that particular defendant, but also will deter others who are tempted to breach contractual duties, thus fostering a general feeling of trust and confidence in business dealings.

Because strong expectations are created when a contract is entered, there should be a presumption favoring the highest possible measure of expectation damages for every breach of contract. However, where the breaching party proves that his breach was not a knowing, intentional breach, he should be allowed to present evidence of factors such as eco-

131. In B.B. Walker Co. v. Ashland Chemical Co., 475 F. Supp. 651 (M.D.N. 1979), the court emphasized both the defendant's willful breach and its tortious conduct following the breach as justifying punitive damages of $250,000. Another example of unreasonable disregard for the other party would be a contractor who willfully delays completion of a commercial building knowing that the owner will lose some competitive advantage.

132. 63 Cal. App. 3d 659, 133 Cal. Rptr. 899 (1976).

133. *Id.* at 691-92, 133 Cal. Rptr. at 919-20.

134. Judges have authority to do this under Rule 59 of the Federal Rules of Civil Procedure. See also Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 664-69 (1980), suggesting that judges, not juries, award punitive damages, and suggesting consideration by the judge of these factors: severity of threatened harm, degree of responsibility of defendant's conduct, financial position of the defendant, amount of compensatory damages, costs of litigation, potential criminal sanctions and other civil actions against the defendant based on the same conduct.

135. All prevailing plaintiffs should be awarded court costs and attorneys' fees without inquiring into circumstances surrounding the breach. This is necessary to fully compensate the plaintiff for his lost expectations. *See* Rowe, *supra* note 107. Prevailing plaintiffs also should be awarded prejudgment interest from the date repair costs are incurred. *See* Prier v. Refrigerated Eng'g Co., 74 Wash. 2d 25, 32-35, 442 P.2d 621, 625-27 (1968) (awarding prejudgment interest on cost of reconstructing an ice rink).

nomic waste and disproportionality in order to argue that a lower measure of damages is reasonable under the particular circumstances. The court should then balance the defendant's factors against factors brought up by the plaintiff, such as contractually expressed aesthetic preferences, and arrive at the measure of damages most appropriate under the particular circumstances. Where the court finds the breach to be not only willful, but also made in unreasonable disregard of the other party, the court should allow the jury to award punitive damages.

This Article rejects the notion that promoting economic efficiency is a realistic or proper goal of contract law, and challenges other writers and courts to develop improved remedial principles designed first, to encourage the keeping of contractual promises, and second, to fairly adjust the parties' rights when a contract has been broken.[136]

136. The definition of willfulness proposed in this Article can be used to develop appropriate remedies not only for breach of construction contracts but for breach of other contracts as well. For example, the concept of willfulness could be utilized in sale of goods cases. The starting point might be to regard willful breach as forbidden under the Uniform Commercial Code's principle of good faith found in sections 1-102(3), 1-203 and 2-103. Or the willfulness principle might be brought to bear on remedies questions through section 1-103 of the Code which states that unless displaced by another Code provision, existing principles of law and equity shall supplement the Code provisions.