

THE VALUE OF A PROMISE: A UTILITARIAN APPROACH TO CONTRACT LAW REMEDIES

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This Article critically examines the applicability of law and economics, or wealth maximization theory, to contract law by examining this theory from within the consequentialist framework of utilitarianism. Roughly speaking, wealth maximization theory is a consequentialist theory of justice holding that those actions that increase wealth are just and should be allowed, whereas those actions that decrease wealth are unjust and should be forbidden. This theory has been used not only to support such controversial doctrines as efficient breach, but also to inform the way that many scholars and judges think about remedies for the breach of contract. Although the growth and acceptance of wealth maximization theory has been rapid since it was first formalized several decades ago, it is by no means uncontroversial, having been subject to constant attack since its inception from many who, operating outside of consequentialism, have criticized the normative foundations upon which wealth maximization theory rests, expressing their dismay over a theory that encourages the breaking of a solemn oath in the name of efficiency. Until now, however, previous scholarship has not critically examined this theory from within the consequentialist framework to see whether it, in fact, actually maximizes wealth. This Article provides that approach.

Unlike other scholarship in this area, this Article does not challenge the normative foundations upon which wealth maximization theory rests, but rather argues that, on its own terms, this theory fails to maximize wealth within contract law. This is because wealth maximization theory is a fundamentally utilitarian theory that depends upon, and derives its legitimacy from, the utilitarian concept of value. Notably however, wealth maximization theory often prevents value from being maximized in the name of wealth. This insight has profound implications, suggesting not only that the continued application of this theory to contract law

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ought to be seriously questioned, but also that the way both consequentialists and nonconsequentialists think about remedies in contract law may need to be rethought. Indeed, this insight may even help reconcile these divergent theories within contract law because, as this Article suggests, the best way to achieve the consequentialist end of utility maximization is often through the nonconsequentialist means of contract enforcement, including the enforcement of liquidated damages clauses and specific performance.

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INTRODUCTION

Law and economics (L&E), or wealth maximization theory (WMT),¹ is a consequentialist theory of justice holding that those actions that increase wealth are just and should be allowed, whereas those actions that decrease wealth are unjust and should be forbidden. This theory has made important contributions to legal analysis generally, and contract law specifically, not only by helping us think in new ways about old problems,² but by changing the way that many scholars and judges think about remedies for the breach of contract. Although the growth and acceptance of the modern L&E movement has been

1. In this Article, law and economics (L&E) and wealth maximization theory (WMT) are used interchangeably.

2. See, e.g., RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 89–137 (4th ed. 1992) (applying law and economics analysis to the contract doctrines of consideration, damages, duress, fraud, impossibility, mistake, mutual assent, specific performance, and unconscionability).

rapid since the theory was first formalized only several decades ago,³ it has not been without controversy, having been subject to constant attack since its inception. Significantly, however, nearly all of these attacks have come from those who, operating outside of consequentialism, criticize the normative underpinnings upon which wealth maximization theory rests. These attacks often express their dismay over the merits of a theory that encourages the breaking of a solemn oath in the name of efficiency, while ignoring or dismissing as unimportant the efficiency gains the theory promises. According to these critics, the purpose of contract law is, and ought to be, the enforcement of promises, and not the promotion of efficiency or wealth maximization. Until now, however, no previous scholarship has critically examined L&E from within consequentialism itself to determine whether this theory, in fact, actually maximizes wealth. This Article is the first to provide that approach.

It must be noted from the outset that this Article does not challenge the normative foundations upon which the wealth maximization enterprise rests, but assumes, for purposes of argumentation, the legitimacy of these foundations. From this starting point, this Article critically examines the application of L&E to contract law remedies and finds that—in sharp contrast to the conclusions reached by many L&E theorists—L&E fails, on its own terms, to maximize wealth within contract law, and, even more perniciously, often ensures that wealth is not maximized in many cases in which L&E principles are applied. As I argue more fully below, this result occurs because the concept of value upon which law and economics rests is quintessentially utilitarian, despite protestations to the contrary.⁴ And because its foundations are utilitarian, the use of L&E—rather than utilitarianism—to determine contract law remedies often results in an misallocation of resources, which is not only anathema to wealth maximization theory, but should cause us to reject this approach outright when applied to contract law remedies on efficiency grounds alone. Even more interestingly, however, by rejecting L&E in favor of utilitarianism, one can make great strides in reconciling consequentialist and nonconsequentialist thought within contract law itself. The advantages of such an approach, I believe, are

3. See, e.g., Ejan Mackaay, *History of Law and Economics*, in 1 *ENCYCLOPEDIA OF LAW AND ECONOMICS* 66 (Boudewijn Bouckaert et al. eds., 2000) (explaining that the modern law and economics movement “originated in the United States in the late 1950s and found acceptance amongst the legal community from the 1970s onwards, as a result, in particular, of the writings of Richard A. Posner”); see also Richard A. Posner, *The Economic Approach to Law*, 53 *TEX. L. REV.* 757, 759 (1975) (dating the modern law and economics movement from the early 1960s).

4. See, e.g., Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 *J. LEGAL STUD.* 103 (1979).

profound, and suggest changing the way we think about awarding damages for the breach of contract.

In Part I, I discuss the two dominant theories of contract law—consequentialism and nonconsequentialism—and illustrate the differences between them by examining how each awards damages for the efficient breach of a contract. Having done so, I then locate L&E as firmly within the consequentialist tradition, and as incompatible with competing nonconsequentialist theories of contract law, such as *pacta sunt servanda*.

In Part II, I then trace the history of consequentialist thought in contract law from utilitarianism to wealth maximization theory, allowing us to place contemporary L&E thought in its appropriate historical context, which in turn will allow us to more carefully examine whether the assumptions upon which the theory rests are valid when applied to contract law. Specifically, Part II.A briefly sketches the theory of utilitarianism, Part II.B discusses some of the criticisms that utilitarianism has been subject to from WMT theorists and others, and Part II.C introduces the concept of WMT, not only as a utilitarian substitute, but as an independent theory that has been marketed (with some justification) as being able to overcome many of the criticisms associated with utilitarianism that were identified in Part II.B. It is not my intention in Part II to explore all of the nuances of utilitarianism, but rather to provide enough background to set up the discussion that will follow in Part III, where I argue that L&E—even if the normative foundations upon which it is based are sound—fails to deliver in practice what it promises in theory, even on its own terms.

More specifically, the arguments made in Part III take the following form. First, I will argue that, in spite of the criticisms raised in Part II.B, utilitarianism is both normatively and (surprisingly) descriptively superior to L&E in many respects, when its analysis is restricted to contract law. This is true because, as I will argue, the voluntary process of mutually exchanging promises ensures, where this assumption holds, that nearly every contract entered into will maximize utility, but not necessarily wealth.⁵ Indeed, as I argue in Part III.A, WMT is a meaningless concept except to the extent that

5. *But see* Cento G. Veljanovski, *Wealth Maximization, Law and Ethics—On the Limits of Economic Efficiency*, 1 INT'L REV. LAW & ECON. 5, 8 (1981), reprinted in LAW AND ECONOMICS ANTHOLOGY 549, 552 (Kenneth G. Dau-Schmidt & Thomas S. Ulen eds., 1998) (“The only people who are strict wealth maximizers in a competitive market are firms in the guise of profit maximizers.”). This assertion is not entirely correct, however. As I discuss in greater length in Parts III.A and III.B below, every contract, even those entered into by profit maximizing firms, is entered into in order to maximize utility, not wealth, but this distinction is often (but usually harmlessly) overlooked with respect to a firm because the dual maximands of utility and wealth are nearly perfectly correlated in those cases.

it serves to maximize utility, so that its entire legitimacy depends upon its viability as a utilitarian substitute, which in turn depends upon the validity of the utilitarian criticisms discussed in Part II.B. But, as I argue in Part III.B, these criticisms are usually not applicable to the application of utilitarianism within contract law (although they may be applicable to the application of utilitarianism outside of contract law—for example, tort law) due to the voluntary nature of contracts. Part III.C then addresses some of the remaining objections to utilitarianism pressed by wealth maximization theorists, and concludes by suggesting that many of the seemingly disparate goals of consequentialism and nonconsequentialism can be reconciled within contract law through the simple judicial enforcement of contracts.

I. CONSEQUENTIALISM, NONCONSEQUENTIALISM, AND EFFICIENT BREACH

The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves him free from interference until the time for fulfillment has gone by, and therefore free to break his contract if he chooses.⁶

—Oliver Wendell Holmes

What does it really mean to make a contract?⁷ Is the promisor legally and/or morally obligated to perform her promise, or is she merely obligated to choose between keeping her promise, on the one hand, or breaching and paying damages, on the other? Throughout history, this question has been answered in several ways, two of which I shall focus on in this Article.⁸

6. OLIVER WENDELL HOLMES, *THE COMMON LAW* 301 (1881).

7. The Restatement (Second) of Contracts § 1 defines a contract as “a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.” *RESTATEMENT (SECOND) OF CONTRACTS* § 1 (1981).

8. Although this Article will focus on the consequentialist and nonconsequentialist approaches to answering this question, there is, in fact, a third approach, called virtue ethics, which has grown in popularity as of late, and is based on the Aristotelian idea that a good or just act is one that makes those who follow it virtuous. While a discussion of this theory is not necessary here, the interested reader should consult generally ARISTOTLE, *THE NICOMACHEAN ETHICS OF ARISTOTLE*, book V (David Ross trans., Oxford Univ. Press 1954) (1925), and G.E.M. Anscombe’s seminal article, *Modern Moral Philosophy*, 33 *PHILOSOPHY* 1 (1958), which offers powerful criticisms of consequentialist and nonconsequentialist theories of justice, and invites a return to an Aristotelian virtue-based system of ethics. See also Michael Stocker, *The Schizophrenia of Modern Ethical Theories*, 73 *J. PHIL.* 453 (1976) (providing a convenient summary of virtue ethics theory’s criticisms of consequentialist and nonconsequentialist theories of justice). A powerful critique of virtue ethics, in turn, can be found in Robert B. Louden, *On Some Vices of Virtue Ethics*, 21 *AMER. PHIL. Q.* 227 (1984).

The first way of answering this question is to hold that a promisor, upon entering into a contract, is and ought to be both legally and morally bound to keep his or her promise, as the very institution of contract law is,⁹ and ought to be,¹⁰ one of promise-keeping. This position, which has been maintained by nonconsequentialist thinkers stretching back hundreds of years, has been justified on the grounds that the rightness or wrongness of an act ought not depend (at least exclusively) upon the good or bad consequences that follow from the act, but rather upon some quality intrinsic to the act itself.¹¹ It is a rough, but not entirely inaccurate, characterization to say that whereas a consequentialist would focus on the end of a given act to determine whether or not that act is just or unjust, a nonconsequentialist making a similar determination would focus instead on the means used to achieve that end.¹² And because nonconsequentialist theories do “not appeal to the consequences of our actions,”¹³ but rather “to conformity with certain rules of duty,”¹⁴ this philosophy provides an important process by which we can obtain answers to our initial inquiry concerning the meaning of enforceable promises (that is, contracts). Specifically, under the nonconsequentialist view, a promisor ought to keep his or her promise because, simply stated, it is the right thing to do.¹⁵ Stated differently, under this view, one ought to keep one’s promise if

9. See, e.g., Immanuel Kant, *General Introduction to the Metaphysics of Morals*, reprinted in 39 THE GREAT BOOKS 390 (1994) (“[I]t is an external duty to keep a promise entered into by contract.”).

10. *Id.* at 389 (“[T]o keep one’s promise, even when no compulsion can be applied to enforce it, is, at the same time, a virtuous action, and a proof of virtue.”).

11. See generally IMMANUEL KANT, *CRITIQUE OF PRACTICAL REASON* (Lewis W. Beck trans., Bobbs-Merrill Co., 11th ed. 1975) (1788); IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* (Mary Gregor ed., Cambridge Univ. Press 2006) (1785); IMMANUEL KANT, *LECTURES ON ETHICS* (Peter Heath ed., Cambridge Univ. Press 1997) (1781).

12. See, e.g., Immanuel Kant, *Fundamental Principles of the Metaphysics of Morals*, reprinted in 39 THE GREAT BOOKS, *supra* note 9, at 271–72 (arguing that an individual should be treated “as an end in himself, not merely as a means,” and that an individual should “[s]o act as to treat humanity, whether in thine own person or in that of any other, in every case as an end withal, never as means only”).

13. See, e.g., SAMUEL SCHEFFLER, *THE REJECTION OF CONSEQUENTIALISM 2* (1994) (“In contrast to consequentialist conceptions, standard deontological views maintain that it is sometimes wrong to do what will produce the best available outcome overall.”).

14. J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM FOR AND AGAINST 5* (1973).

15. It should be noted that, even within nonconsequentialism, the rightness of keeping one’s promise has been justified in different ways. Compare, for example, the work of John Calamari and Joseph Perillo, who point out that “[a]ccording to the canon lawyers and rabbinical scholars of the late middle ages and the Renaissance, promises were binding in natural law as well as in morality because failure to perform a promise made by a free act of the will was an offense against the Deity,” JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS 7–8* (2d ed. 1977), with Immanuel Kant, whose Categorical Imperative requiring that one must “[a]ct only in accordance with that maxim through which you can at the same time will that it become a universal law” prevents an individual from doing anything other than keeping his or her promise, IMMANUEL KANT, *PRACTICAL PHILOSOPHY 73* (Mary J. Gregor ed. & trans., Cambridge Univ. Press 1996) (1785).

only for promise's sake.¹⁶ This view was powerfully expressed by Immanuel Kant over two centuries ago, who argued that the Categorical Imperative¹⁷ required that "promises made and accepted must be kept,"¹⁸ even though "the other party might not be able to compel [him or her] to do so."¹⁹ Kant's ideas have continued to hold sway, not only over modern contract-law theorists,²⁰ but, even more importantly for our purposes, over the law itself²¹ and the way that judges decide contract-law disputes.

Consider, for instance, the famous case of *Lumley v. Wagner*,²² in which Benjamin Lumley, the lessee and manager of Her Majesty's Theatre, entered into a series of contracts with opera singer Johanna Wagner, pursuant to which Wagner promised to sing in Lumley's theatre for a period of three months (the affirmative covenant), and promised not to sing at another competitor's theatre (the negative covenant) during this time, in exchange for a consideration of several hundred pounds.²³ Wagner was subsequently approached by one of Lumley's competitors, Frederick Gye, who offered Wagner more money to sing at his rival theatre, the Royal Italian Opera, if

16. To be sure, these two ideas are related, as it will likely be the case that a promisee will seek a promisor's promise for the purpose of maximizing some end, but once the promisee has obtained this promise, the promisee will not expect the promisor (who may not even be aware of the end the promisee sought to maximize) to promote that end. Indeed, what the promisee really contracts for, and what the promisee expects from the promisor, is for the promisor to fulfill his or her promise. As I will argue in Part II, it is through the means of promise-keeping that the promisee places his or her hopes of maximizing the ends he or she originally sought to maximize when entering into the promise-keeping institution of contract.

17. See Kant, *supra* note 9.

18. *Id.* at 390.

19. *Id.* This view is justified on the ground that an individual "who is thinking of making a lying promise to others will see at once that he would be using another man *merely as a mean*, without the latter containing at the same time the end in himself," and so could not break his promise to the promisee without "us[ing] the person of others merely as a means, without considering that as rational beings they ought always to be esteemed also as ends." Kant, *supra* note 12, at 272.

20. The most popular and generally accessible modern expression of this view can be found in CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 17 (1981) ("If I make a promise to you, I should do as I promise; and if I fail to keep my promise, it is fair that I should be made to hand over the equivalent of the promised performance.").

21. The Uniform Commercial Code, for example, appears to take a similar stance. See, e.g., Melvin Eisenberg, *The Theory of Efficient Breach and the Theory of Efficient Termination* 43 (Law & Econ. Workshop, Univ. of Cal. Berkeley, Paper No. 14, 2004), available at http://repositories.cdlib.org/berkeley_law_econ/spring2004/14 ("As stated in the Comments to the U.C.C., 'the essential purpose of a contract between commercial [actors] is actual performance and they do not bargain merely for a promise, or for a promise plus the right to win a lawsuit.' Accordingly, 'a continuing sense of reliance and security that the promised performance will be forthcoming when due . . . is an important feature of the bargain.'" (citing U.C.C. § 2-609, cmt. 1 (2004))).

22. (1852) 42 ENG. REP. 687 (Q.B.).

23. *Id.* at 687–88.

she would agree to abandon her agreement with Lumley.²⁴ She did, and Lumley brought a breach of contract action against her, seeking to indirectly enforce the affirmative covenant by obtaining direct enforcement of the negative covenant.²⁵ In its decision, the court began by stating that, although it did not have the power to specifically enforce the Lumley-Wagner contract,²⁶ it did have the power to “bind men’s consciences, as far as they can be bound, to a true and literal performance of their agreements; and [that] it w[ould] not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give.”²⁷ In refusing to allow Wagner to breach her contract with Lumley, it is not without significance that the Lord Chancellor not only proclaimed Wagner to be legally bound to perform her agreement (or, at least, legally unable to perform for Lumley’s competitor, Gye)—but morally bound to uphold her end of the bargain with Lumley. Even more notable is the fact that the Lord Chancellor explicitly rejected the view—popular among law and economics scholars today—that Wagner was free to choose between performance, on the one hand, and nonperformance plus a payment of money damages, on the other.

Although the nonconsequentialist position reflected in the Lord Chancellor’s decision still exercises powerful influence over many jurists today, it has come under increasing attack from consequentialists, who, in sharp contrast to nonconsequentialists, hold that the goodness or justness of an act is determined solely by reference to its consequences. Simply put, an act that maximizes good consequences is just, and one that does not is unjust.²⁸ As applied to contract law, the implications of consequentialist

24. *Id.* at 688.

25. *Id.* at 689. Lumley sought to indirectly enforce the agreement by means of the negative covenant, rather than attempt to directly enforce the agreement through the affirmative covenant, because specific performance was generally not available for the enforcement of contracts for personal services.

26. “I quite admit that this Court cannot enforce the performance of such an affirmative stipulation . . . I may at once declare, that if I had only to deal with the affirmative covenant of the Defendant J. Wagner that she would perform at Her Majesty’s Theatre, I should not have granted any injunction.” *Id.* at 694.

27. *Id.* at 693 (emphasis added).

28. See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 11–33 (J.H. Burns & H.L.A. Hart eds., Univ. of London: The Athlone Press 1970) (1780); JOHN STUART MILL, *Utilitarianism*, reprinted in THE BASIC WRITINGS OF JOHN STUART MILL 231, 234 (Random House 2002) (1863) (“All action is for the sake of some end, and rules of action, it seems natural to suppose, must take their whole character and colour from the end to which they are subservient.”); see also SAMUEL SCHEFFLER, CONSEQUENTIALISM AND ITS CRITICS 1 (Samuel Scheffler ed., Oxford Univ. Press 1988) (“[I]n its purest and simplest form, consequentialism “is a moral doctrine which says that the right act in any given situation is the one that will produce the best overall outcome.”).

thought are readily apparent. A promisor, under this view, should not be obligated, either morally or legally, to absolutely perform his or her promise, but should instead be obligated to choose between performance, on the one hand, and breach plus a payment of money damages, on the other, depending on which of the two choices leads to better consequences. It was this approach that was championed by Holmes over a century ago, who forcefully sought to ameliorate the “evil effects of the confusion between legal and moral ideas . . . in the law of contract”²⁹ by holding that “[t]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else.”³⁰ By disambiguating the word “obligation” into its normative and descriptive components,³¹ Holmes sought to deemphasize the promisor’s moral obligation to keep her promises by emphasizing instead her legal right to choose between performance, on the one hand, and breach plus a payment of money damages to the aggrieved party,³² on the other. Without exaggeration, it can be said that this approach revolutionized Anglo-American contract law by creating a rift between legal and moral ideas³³ whose aftershocks can still be felt on the legal landscape to this day.³⁴

29. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897). Holmes’ views were remarkably consistent over his career. In a book written nearly two decades earlier, Holmes similarly wrote that “[t]he only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass. In every case, it leaves him free from interference until the time for fulfillment has gone by, and therefore free to break his contract if he chooses.” HOLMES, *supra* note 6, at 301.

30. Holmes, *supra* note 29, at 462.

31. Holmes understood the novelty of his approach, noting the separation of legal and moral obligations probably “stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can.” *Id.*

32. See Clark A. Remington, *Intentional Interference With Contract and the Doctrine of Efficient Breach: Fine Tuning the Notion of the Contract Breacher as Wrongdoer*, 47 BUFF. L. REV. 645, 647 (1999) (“The law has come to regard the obligation to perform a contract as being generally equivalent to an option to perform or pay damages. Holmes saw the matter this way more than one hundred years ago.”). *But see* Joseph M. Perillo, *Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference*, 68 FORDHAM L. REV. 1085, 1086–89 (2000) (arguing that Holmes has been misread and never intended to suggest that the promisor had an option to perform the contract or breach and pay damages instead). The distinction between what Holmes thought, and what others thought he thought, however, need not detain us here, for the significance of this phenomenon has nevertheless been to “tie the economists’ notion of efficient breach to the towering legal authority of Holmes,” and it is this point I wish to emphasize in this Article. *Id.* at 1090.

33. See, e.g., *id.* at 1089 (“The basis of Holmes’s theory of contract was his attempt to separate legal from moral notions.”).

34. See, e.g., Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554, 558 (1977) (“The modern law of contract damages is based on the premise that a contractual obligation is not necessarily an obligation to perform, but rather an obligation to choose between performance and compensatory damages.”).

Although Holmes' jurisprudential contribution was profound—especially for the history of Anglo-American contract law—his insight was not unique,³⁵ but can, I think, best be characterized as a weighing in on a deep and longstanding philosophical struggle between the two diametrically opposed schools of thought just discussed: consequentialism and nonconsequentialism.³⁶ With Holmes' encouragement, this war, which was once fought in the realm of philosophy, has since been waged on the jurisprudential battlefield as well. There, over the past hundred years, each side has sent its champion to do battle,³⁷ and, although bloodied, scarred, and exhausted from the fight, each is still standing, with no clear winner or end in sight.

This battle, and the resulting doctrinal differences that have manifested themselves in our law, can perhaps best be illustrated by examining the contrasting views of each camp through the lens of efficient breach theory. Let us suppose, for example, that A has agreed to sell to B his last one hundred widgets for \$10 per widget, but C then approaches A and offers to buy these widgets for \$12 per widget. A, of course, is confronted with the following question: Should he perform his contract with B, or should he breach his contract and pay damages instead, the amount of which should be more than compensated by the additional profit he makes from C? The answer, of course, will largely be determined by whether the legal system will allow A to breach his contract with B at all. And this, as I suggest, depends on whether the legal system has adopted a nonconsequentialist theory of contract law

35. As pointed out by John Finnis, Francisco Suárez, in his *De Legibus* (1612), foreshadowed Holmes in his principle analytical device by several hundred years in stating that “a ‘purely penal law’ is one that, whatever its form, is to be interpreted as imposing on the subject (citizen) a disjunctive obligation: to *either* [perform] or submit to a ‘penalty.’” JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 329 (1980) (citations omitted).

36. “Nonconsequentialism” is sometimes also referred to as “deontological” or “Kantian” ethics.

37. Compare, e.g., FRIED, *supra* note 20, at 16–17 (“The obligation to keep a promise is grounded not in arguments of utility but in respect for individual autonomy and in trust By virtue of the basic Kantian principles of trust and respect, it is wrong to invoke that convention [of mutual trust] in order to make a promise, and then to break it.”), JOHN RAWLS, A THEORY OF JUSTICE 22 (1971) (“My aim is to work out a theory of justice that represents an alternative to utilitarian thought generally and so to all of the[] different versions of it.”), and Roscoe Pound, *Promise or Bargain?*, 33 TUL. L. REV. 455, 455 (1959) (“From antiquity the moral obligations to keep a promise [have] been a cardinal tenet of ethical philosophers, publicists, and philosophical jurists.”), with RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 48 (1981) (noting that “the severest of critics of the economic approach to law are those who attack it as a version of utilitarianism” by “equat[ing] economics with utilitarianism and then attack[ing] utilitarianism” (citing Richard A. Epstein, *The Next Generation of Legal Scholarship?*, 30 STAN. L. REV. 635, 645 n.35 (1978); Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 74–75 (1979))), Holmes, *supra* note 29, at 459–62 (arguing for a separation between legal and moral ideas, and recognizing that his view probably “stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can”), and Posner, *supra* note 4, at 119 (offering wealth maximization theory “as an alternative moral system to both utilitarianism and Kantianism”).

(whereby A would be morally and legally obligated to perform his contract with B,³⁸ thereby protecting B's right to A's performance with a property rule³⁹), or whether it has instead adopted a consequentialist theory of contract law (whereby A would be free to choose between performance and breach,⁴⁰ protecting B's right to A's performance with a liability rule instead⁴¹).

If the legal system has adopted a nonconsequentialist property rule, it has, in effect, decided to protect B's interest in A's performance in such a way that "someone [C] who wishes to remove the entitlement [to A's performance] from its holder [B] must buy it from [B] in a voluntary transaction in which the value of the entitlement is agreed upon by the seller [B]."⁴² In doing so, it should be noted that C will not be entitled to buy the widgets from A for \$12, but will instead be forced to negotiate with B to reach a mutually agreeable price. And, in the course of these negotiations, it should be noted that C will only be entitled to purchase these widgets if he values them more than B does. Thus, for example, if B values A's widgets at \$11 per widget, whereas C values them at \$13 per widget, B and C should be able to negotiate a mutually

38. This approach was taken by the Lord Chancellor in *Lumley v. Wagner*, see *supra* text accompanying notes 22–27, who noted: "The moralist of duty thus posits a general obligation to keep promises, of which the obligation of contract will only be a special case—that special case in which certain promises have attained legal as well as moral force." FRIED, *supra* note 20, at 17.

39. As Professors Calabresi and Melamed explained in their seminal article:

An entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller. It is the form of entitlement which gives rise to the least amount of state intervention: once the original entitlement is decided upon, the state does not try to decide its value. It lets each of the parties say how much the entitlement is worth to him, and gives the seller a veto if the buyer does not offer enough. Property rules involve a collective decision as to who is to be given an initial entitlement but not as to the value of the entitlement.

Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972).

40. This approach was taken by Holmes. See, e.g., HOLMES, *supra* note 6, at 301 ("In every case [the law] leaves [the promisor] free from interference until the time for fulfillment has gone by, and therefore free to break his contract if he chooses.").

41. As explained by Professors Calabresi and Melamed:

Whenever someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it, an entitlement is protected by a liability rule. This value may be what it is thought the original holder of the entitlement would have sold it for. But the holder's complaint that he would have demanded more will not avail him once the objectively determined value is set. Obviously, liability rules involve an additional stage of state intervention: not only are entitlements protected, but their transfer or destruction is allowed on the basis of a value determined by some organ of the state rather than by the parties themselves.

Calabresi & Melamed, *supra* note 39, at 1092.

42. *Id.*

agreeable price between these two amounts.⁴³ If, on the other hand, B values A's widgets at \$14 per widget, whereas C only values them at \$13 per widget, the parties would not reach an agreement through their negotiations, because C did not value the widgets more than B did.

If, on the other hand, the legal system has adopted a consequentialist liability rule, it has, in effect, stated that B's interest in A's performance is protected in such a way that "[A] may destroy [B's] initial entitlement if he is willing to pay an objectively determined value for it."⁴⁴ In our Anglo-American legal system, the "objectively determined value" that A would be required to pay to B would be measured by the expectation interest, which is the amount of money needed "to put [B] in as good a position as [B] would have been in had the contract been performed"⁴⁵—but with an important caveat. This "objectively determined value" would be "determine[d] by some organ of the state rather than by the parties themselves" based upon what courts determine "the original holder of the entitlement [B] would have sold it for."⁴⁶ This, of course, "necessitates a prediction [by the court] of what the injured party's [B's] situation would have been had the contract been performed,"⁴⁷ so that if the court predicts that B values A's widgets at \$11, for example, A will be able breach his contract with B and sell the widgets to C, so long as A agrees to pay B the difference between what B objectively valued the widgets at (\$11), and the contract price (\$10), multiplied by the number of widgets, one hundred, or \$100.

43. This argument excludes, but does not ignore, transaction costs, the inclusion of which would likely strengthen the claims made in this Article. Many scholars—including law and economics scholars—who have considered transaction costs, have persuasively challenged the remedial implications of wealth maximization theory on the grounds that WMT sometimes does not, in practice, lead to the most efficient outcome once transactions costs are taken into account. This approach is not, properly speaking, either consequentialist or nonconsequentialist, but it does have important implications for the way damages are awarded under either regime. Of particular importance is the fact that, once the practical implications of transaction costs are added to the theoretical conclusions reached here, the argument against the applicability of WMT to contract law becomes all the more powerful. See, e.g., ROBERT E. SCOTT & DOUGLAS L. LESLIE, *CONTRACT LAW AND THEORY* 90–95 (2d ed. 1993); Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. LEGAL STUD. 1, 6–7 (1989); Ian R. Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947, 950–53 (1982); William J. Woodward, Jr., *Contractarians, Community, and the Tort of Interference With Contract*, 80 MINN. L. REV. 1103, 1138–40, 1146–47 (1996). And where transaction costs cannot be determined at all, or where the empirical evidence is mixed, this would seem to suggest determining rights based on noneconomic factors, which would also seem to favor a property rule. For the seminal article discussing the importance of taking into account transaction costs in a remedial regime, see R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

44. Calabresi & Melamed, *supra* note 39.

45. E. ALLAN FARNSWORTH, *CONTRACTS* § 12.1, at 730 (4th ed. 2004).

46. Calabresi & Melamed, *supra* note 39.

47. FARNSWORTH, *supra* note 45.

As will be discussed in greater detail in Part III, the subjective value that B attaches to A's widgets will often deviate (with important implications) from the court's objectively determined value, but for present purposes, it is sufficient to note that it is at least possible, by adopting the wealth maximization theorist's liability rule, that C will sometimes be able to obtain A's widgets over B's objection, even though B values the widgets more than C does. It is this rather counterintuitive⁴⁸ scenario that has been popularly described as efficient breach theory, which, in its weak form, allows promisors to breach their contracts⁴⁹ whenever it is efficient⁵⁰ to do so,⁵¹ and, in its strong form,

48. The theory is intriguing in more ways than one: Despite the pecuniary advantages guaranteed to its practitioners, many people who make contracts in the real world consider the practice to be unethical and refuse to follow the theory's dictates, preferring instead, it would seem, wealth-minimizing intuition over wealth-maximizing logic. For example,

[t]he conclusion that a contracting promisee normally expects that the promisor is committed to performance, rather than performance or damages at the promisor's election, is backed not only by experience and theory, but by empirical evidence. In 1990, David Baumer and Patricia Marschall surveyed 119 North Carolina corporations about their attitudes towards willful breach. One question was, "If a trading partner deliberately breaches a contract because a better deal can be had elsewhere, is such behavior unethical?" One hundred and five respondents said Yes.

Eisenberg, *supra* note 21, at 41 (citing David Baumer & Patricia Marschall, *Willful Breach of Contract for the Sale of Goods: Can the Bane of Business Be an Economic Bonanza?*, 65 TEMP. L. REV. 159, 165–66 (1992)). In addition, eighty-six respondents said that they would always or almost always withhold future business from a party who had willfully breached. Eisenberg, *supra* note 21, at 42 n.48 (citing Baumer & Marschall, *supra*, at 166).

49. See, e.g., *Patton v. Mid-Continent Systems*, 841 F.2d 742, 750 (7th Cir. 1988) (Posner, J.) ("Even if the breach is deliberate, it is not necessarily blameworthy. The promisor may simply have discovered that his performance is worth more to someone else. If so, efficiency is promoted by allowing him to break his promise, provided he makes good the promisee's actual losses." (emphasis added)).

50. The concept of efficiency is usually defined in one of two ways, and there is no agreement even among efficient breach theorists as to which of the two definitions should control. First, under the Paretian model of efficiency, a breach of contract is efficient if it is Pareto superior, that is, if the breaching party's gains exceed, and are actually used to compensate, the nonbreaching party's losses. See, e.g., Posner, *supra* note 4, at 114 ("[A] transaction is Pareto optimal if it makes at least one person better off and no one worse off."). Second, under the less-restrictive Kaldor-Hicks test, a breach of contract is efficient (and social welfare is maximized) if the breaching party's gains exceed the nonbreaching party's losses, regardless of whether the breaching party compensates the nonbreaching party for her losses. See, e.g., Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 ECON. J. 549 (1939) (stating that allocation A is preferable to allocation B if the gainers from A could theoretically compensate the losers from B while still remaining better off); J.R. Hicks, *The Foundations of Welfare Economics*, 49 ECON. J. 696 (1939) (stating that allocation A is preferable to allocation B if those who would lose from allocation A could not profitably bribe the gainers into not switching from B to A).

51. Whether or not the breach is efficient, of course, will be determined by using the court's—and not the parties'—"objectively determined value." See *supra* text accompanying notes 44–47.

actually encourages⁵² promisors to breach their contracts whenever it is efficient to do so, without regard to whether or not it is the right⁵³ thing to do.⁵⁴

But ought we take the “ought” of promise-keeping into account, as the nonconsequentialist would suggest, or is it enough to seek efficiency, as the consequentialist would hold? This question, of course, brings us back full circle to where we began, and it is easy to see why Holmes so eagerly desired to take morality out of contract law in the first place. Indeed, whether we parse the issue in terms of consequentialism versus nonconsequentialism, in terms of liability rules versus property rules, or in terms of those who favor efficient breach versus those who oppose it, when we return to the inquiry posed at the beginning of this Article and consider the modern debate over what it really means to make a contract, we can appreciate why a resolution over the meaning of contract law has appeared to be intractable. It is for this reason that this Article takes a different approach. Rather than entering into this normative debate and attempting to either defend or attack consequentialism, nonconsequentialism, or any other theory,⁵⁵ for that matter, this Article will instead attempt to render this problem tractable by critically examining the consequentialist wealth maximization enterprise from within consequentialism itself.

In other words, by assuming—for purposes of argumentation—that the consequentialist theory of contract law is normatively justifiable, and that the law and economics emphasis on efficiency is well placed, we can examine

52. See, e.g., Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273, 284 (1970) (“Repudiation of obligations *should be encouraged* where the promisor is able to profit from his default after placing his promisee in as good a position as he would have occupied had performance been rendered.” (emphasis added)); see also POSNER, *supra* note 2, at 119 (“[I]n some cases a party [to a contract] is tempted to break his contract simply because his profit from breach would exceed his [expected] profit from completion of the contract. If [his profit from breach] would also exceed the expected profit to the other party from completion of the contract, and if damages are limited to the loss of [expected] profit, there will be an incentive to commit a breach. *But there should be.*” (emphasis added)).

53. See *supra* text accompanying notes 9–21.

54. A sharp line must be drawn at the outset between efficient breach, which concerns a promisor’s decision to breach and pay damages or perform, and tortious interference with contract, which concerns a third party’s decision to entice a promisor to breach her contract with the promisee. Although the economic effect of the two may be similar, their legal treatment is different, in that the law allows the former, but prohibits the latter. See The Restatement (Second) of Torts § 766, which states:

One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

RESTATEMENT (SECOND) OF TORTS § 766 (1977).

55. See, e.g., *supra* note 8.

whether, on its own terms and by its own rules, the application of L&E to contract law really maximizes efficiency. Surprisingly, this Article finds that it does not. Ironically, as I argue in Part III, the L&E approach to contract law actually decreases efficiency in many cases, whereas the nonconsequentialist emphasis on promise keeping often (and unexpectedly) ensures that it is increased. The implication of this oddity is that, within contract law, much of the debate over the meaning of making an enforceable promise becomes superfluous once it is realized that, in most cases, parties enlist the means of promise-keeping (that is, contract law) to effectuate the ends of utility maximization, however defined. The remainder of this Article fleshes out the implications of this claim, the result of which, I believe, has important implications for contract law by not only uniting in a single theory the remedial claims of both consequentialism and nonconsequentialism, but by rejecting the applicability of law and economics to a large body of contract law on the same (consequentialist) grounds that have been used to justify its validity.

II. FROM UTILITARIANISM TO WEALTH MAXIMIZATION

This Part examines the historical transition within consequentialism from utilitarianism to law and economics (L&E) or wealth maximization theory (WMT) in contract law. Subpart A provides a brief sketch of utilitarian theory, Subpart B discusses some of the criticisms to which utilitarianism has been subject, and Subpart C shows how the theory of wealth maximization developed, in large part, to solve many of the problems associated with utilitarianism discussed in Subpart B.

A. Utilitarianism Defined

Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne. They govern us in all we do, in all we say, in all we think: every effort we can make to throw off our subjection, will serve but to demonstrate and confirm it.⁵⁶

—Jeremy Bentham

56. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 11 (J.H. Burns & H.L.A. Hart eds., Oxford: Clarendon Press 1996) (1780).

Utilitarianism, which, in its classical form, is most commonly associated with the English philosophers Bentham, Mill, and Sidgwick, is a consequentialist theory of justice based upon the simple idea that an act is just to the extent that it increases utility, and unjust to the extent that it decreases utility.⁵⁷ Although the definition of “utility” is fluid and has changed over time,⁵⁸ it is usually thought to mean “happiness,” which is itself often defined in terms of “pleasure.”⁵⁹ Thus, according to most utilitarians, an act is usually said to be just to the extent that it increases pleasure, and unjust to the extent that it decreases pleasure, or increases its opposite, pain.⁶⁰ If utilitarianism is to be a universal theory, as it claims to be, it must be able to say something about how courts ought to award damages for the breach of contract. And it does.

Indeed, because utilitarianism is a consequentialist theory concerned with results,⁶¹ only one short move is required before we are able to connect this theory to Holmes’ classic formulation of contract law damages, under which, it will be recalled, a promisor’s only obligation to the promisee is to perform or “pay damages if the promised event does not come to pass,” before which time the promisor has the right to “break his contract if he chooses.”⁶² Wrapped in the robes of utilitarianism, however, this classic formulation has

57. However, utilitarian thought seems to have begun even earlier, with Anthony Ashley Cooper, *An Inquiry Concerning Virtue, or Merit*, in 2 CHARACTERISTICKS OF MEN, MANNERS, OPINIONS, TIMES (1711), and FRANCIS HUTCHESON, *An Inquiry Concerning Moral Good and Evil*, in AN INQUIRY INTO THE ORIGINAL OF OUR IDEAS OF BEAUTY AND VIRTUE; IN TWO TREATISES (London, J. Darby 1725), where Hutcheson stated the principle of utility as follows: “that action is best, which procures the greatest happiness for the greatest numbers; and that, worst, which, in like manner, occasions misery.” *Id.* sec. III, § 8, cited in RAWLS, *supra* note 37, at 22 n.9; see also Posner, *supra* note 4, at 111 (according to a utilitarian, “[a] good man is one who strives to maximize the sum total of happiness (his own plus others’) and the good society is the society that seeks to maximize that sum total”).

58. See *infra* Part II.B.2.

59. See, e.g., BENTHAM, *supra* note 56, at 12 (“By utility is meant that property in any object, whereby it tends to produce benefit, advantage, pleasure, good, or happiness . . . or . . . to prevent the happening of mischief, pain, evil, or unhappiness . . .”); MILL, *supra* note 28, at 239 (“Utility, or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure, and the absence of pain; by unhappiness, pain, and the privation of pleasure.”); HENRY SIDGWICK, *THE METHODS OF ETHICS* 411, 413 (7th ed. 1907) (defining utilitarianism as “conduct which . . . will produce the greatest amount of happiness on the whole”, and defining happiness as “the greatest possible surplus of pleasure over pain, the pain being conceived as balanced against an equal amount of pleasure, so that the two contrasted amounts annihilate each other for purposes of ethical calculation”).

60. See, e.g., Posner, *supra* note 4, at 111 (“An act or practice is right or good or just in the utilitarian view insofar as it tends to maximize happiness, usually defined as the surplus of pleasure over pain.”).

61. This is as opposed to a nonconsequentialist theory concerned with the means used to achieve results, as discussed *supra* Part I.

62. HOLMES, *supra* note 6.

something to say about the way courts should award damages for the breach of contract, and can be modified to read as follows: “A promisor should be free to break his or her contract, depending, as the case may be, on whether his or her decision results in greater utility.”⁶³ It is important to note that this utilitarian formulation of contract law damages not only provides the normative foundation upon which theories such as efficient breach may rest, but has, until recently, provided the normative foundation upon which the entire fabric of contract law damages has rested.⁶⁴ It is therefore to the abandonment of this utilitarian framework that we shall turn to next.

B. Utilitarianism Critiqued

Although utilitarianism has predictably been attacked by nonconsequentialists⁶⁵ and others⁶⁶ throughout the years, it has increasingly come under attack as of late from within consequentialism itself, particularly among law and economics scholars whose criticisms have revolved in large part around the dizzying number of iterations utilitarianism is subject to at each stage of its formulation. This Part discusses these iterations and WMT’s criticisms of them, many of which were outlined by Judge Richard Posner in his excellent article, *Utilitarianism, Economics, and Legal Theory*.⁶⁷ In particular, Part II.B.1 discusses the criticisms associated with the various ways utilitarianism has been defined over the years, Part II.B.2 discusses criticisms regarding the various ends utilitarians have sought to maximize, and how the boundaries of those ends have been defined, and Part II.B.3 discusses perhaps the most enduring and powerful criticism utilitarianism has been subject to over the years: its inability to measure, intersubjectively compare, and maximize utility. These practical shortcomings, it has been argued, render utilitarianism useless

63. Posner, *supra* note 4, at 106 n.17 (“Holmes’s rejection of any moral obligation to fulfill a promise, expressed in his famous statement that the obligation created by contract is to perform or pay damages, has a utilitarian (not to mention economic) flavor.”).

64. See, e.g., Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 510 (1980) (“Until recently proponents of economic analysis have traded on the initial plausibility of utilitarianism in order to provide a normative basis for the various efficiency criteria.”).

65. See *supra* text accompanying notes 1–3; see also Coleman, *supra* note 64, at 510–11 (“Utilitarianism, however, has been the target of powerful, and, in the minds of many philosophers, decisive objections.”); Posner, *supra* note 4, at 103 (noting that wealth maximization theory is usually attacked by opponents of utilitarianism who “attack the economic underpinnings of [wealth maximization] theory as a version of utilitarianism . . . [by equating] economics with utilitarianism and then . . . attack[ing] utilitarianism,” perhaps in order to “exploit the current tide of philosophical hostility to utilitarianism”).

66. See *supra* note 8.

67. Posner, *supra* note 4, at 111–19. Many of these criticisms are also discussed in Coleman, *supra* note 64, at 510–12.

as a theory that courts can use to determine how to award damages for (among other things) the breach of contract.⁶⁸

1. Choosing Among Utilitarian Theories

Before one is able to advocate utilitarianism as a theory capable of serving as the basis upon which courts may award damages for the breach of contract, one must first decide which brand of utilitarianism he or she wishes to endorse. As anyone familiar with the history of utilitarianism only too painfully knows, this has not been an easy task—even amongst utilitarians themselves—who seem to have more in common with nonconsequentialists in their disagreements with other utilitarians over the shortcomings of utilitarian theories not their own. For instance, act utilitarians⁶⁹ hold that the “rightness or wrongness of an action is to be judged by the consequences, good or bad, of the action itself,”⁷⁰ and therefore reject rule-utilitarianism, which holds that “the rightness or wrongness of an action is to be judged by the goodness and badness of the consequences of a rule that everyone should perform the action in like circumstances.”⁷¹ Whereas the former theory must be individually

68. See generally Posner, *supra* note 4.

69. Act-utilitarianism is probably the most familiar expression of utilitarianism, and was the brand of utilitarianism advocated by Bentham, Mill, and Sidgwick. See *supra* notes 28, 56–59, and text accompanying notes 56–59. But see ROBERT WRIGHT, *THE MORAL ANIMAL: THE NEW SCIENCE OF EVOLUTIONARY PSYCHOLOGY* 334 (1994), classifying Mill as a rule utilitarian.

70. SMART & WILLIAMS, *supra* note 14, at 9.

71. *Id.* There are, in turn, at least “two sub-varieties of rule-utilitarianism according to whether one construes ‘rule’ here as ‘actual rule’ or ‘possible rule.’ With the former, one gets a view like that of S.E. Toulmin and with the latter, one like Kant’s.” *Id.* (internal citations omitted); see also WILLIAM PALEY, *THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY* 51 (London, Baldwin 1821) (defining a just act as one that is “expedient on the whole, at the long run, in all its effects collateral and remote, as well as in those which are immediate and direct; as it is obvious, that, in computing consequences, it makes no difference in what way or what distance they ensue”). The complexity, however, does not end here, as rule-utilitarians have been further subdivided into Ideal Rule Utilitarians, whereby one “should act in accordance with the set of ‘ideal rules’ that would maximize utility if everyone were actually to act in conformity with the rules,” Actual Rule Utilitarians, whereby one “should act in *accord* with the set of ‘actual rules’ that would maximize utility if it were adopted as the moral code of a real society in which persons will sometimes fail to live up to the requirements of the moral code,” and Legal Rule Utilitarians, which responds to the way utilitarianism is applied to the law and is “concerned [both] with individual acts (e.g. an individual judge’s decision in an individual case at the trial level), [and also] with rule-creating acts (e.g. the decision of a legislator to vote for or against a given bill),” which, perhaps not surprisingly, has its own “set of variants,” so that “we can distinguish the utility of an ideal system of legal rules (with perfect compliance) versus an actual system of legal rules (with disobedience and enforcement costs) versus a single nonideal actual rule (where the status quo system of rules is assumed and we look at the utility of changing only a single rule).” Legal Theory Lexicon, *Utilitarianism*, available at http://lsolum.typepad.com/legal_theory_lexicon/2003/11/legal_theory_le_4.html (last visited Aug. 1, 2008) (emphasis added).

applied to each action on an act-by-act basis, the latter theory need only be applied to classes of acts by which a rule can be articulated to guide all related future actions. To the two-level utilitarians, however, each of these utilitarian theories are incomplete, and they instead advocate combining act- and rule-utilitarianism into a single system allowing room for nonconsequential intuitions, including the intuition that some acts should simply not be done regardless of their resulting consequences.⁷² To these schools of thought we must also add motive utilitarians, who hold that “one pattern of motivation is morally better than another to the extent that the former has more utility than the latter,”⁷³ negative utilitarians, who define utility negatively and seek to minimize the greatest amount of suffering rather than to maximize the greatest amount of pleasure,⁷⁴ and many other viable brands of utilitarians,⁷⁵ all who claim to have a monopoly over utilitarian “truth.”

It is neither necessary nor productive to weigh the pros and cons of each of these theories or discuss them at any great depth for the purposes of this Article,⁷⁶ although one who is serious about advocating utilitarianism as an ethical theory must necessarily navigate these inhospitable waters. For my purposes, it is sufficient to note the sheer variety of these theories and the difficulty of choosing between them, all of which have provided wealth maximization theorists and others with powerful grounds for rejecting the applicability of such a seemingly contradictory web of theories to serve as the basis for legal analysis, let alone as a theory capable of allowing courts to award damages for the breach of contract. These criticisms will be responded to in Part III, but before we get there, let us look at some other criticisms to which utilitarianism is thought to be subject.

72. See generally R.M. HARE, *MORAL THINKING* (1981) (combining rule-based Kantianism and act-based utilitarianism into a single, coherent theory of ethics).

73. See, e.g., Robert M. Adams, *Motive Utilitarianism*, 73 *J. PHIL.* 467, 470 (1976). Motive utilitarianism can itself be divided into individualistic motive utilitarianism and universalistic motive utilitarianism. *Id.* at 480–81.

74. See, e.g., KARL R. POPPER, 1 *THE OPEN SOCIETY AND ITS ENEMIES* 285 n.2 (rev. 5th ed. 1966) (“Instead of the greatest happiness for the greatest number, one should demand, more modestly, the least amount of avoidable suffering at all.”). Negative utilitarians would have to further be divided into negative act-utilitarians and negative-rule-utilitarians, and within the latter category, would have to be further subdivided into those who construe “rule” to mean “actual rule” versus “possible rule”. See, e.g., *supra* notes 69–71 and accompanying text.

75. For example, one could also add objective utilitarians or preference utilitarians.

76. For an excellent introduction to these theories, the interested reader should consult SMART & WILLIAMS, *supra* note 14.

2. Defining the Maximand and Determining Its Scope

Even if utilitarians could agree upon a single utilitarian theory (for example, act-utilitarianism), they would still need to overcome an additional, and no less significant, hurdle. According to Posner, most utilitarians agree that the maximand, or the end to be maximized, ought to be “the broadest possible concept of satisfaction.”⁷⁷ Although this is probably true as an empirical matter,⁷⁸ it is by no means clear (and others have persuasively argued elsewhere) that numerous other maximands could not serve utilitarianism at least as well, if not better, than the traditional maximand emphasizing happiness. Indeed, other theorists have argued that the ends of beauty, ecstasy, knowledge, and virtue, to name only a few, are maximands worth pursuing, both in addition to, and instead of, “happiness,” as it has been traditionally defined in the utilitarian sense.⁷⁹ Again, we need not discuss these maximands at any great length here—weighing their pros and cons—but need merely point out, once again, the plethora of variations from which an aspiring utilitarian could choose, and the disagreement among utilitarians over which maximand(s) should govern, all of which would seem to strengthen the wealth maximization theorist’s critique of this theory.

Further, even if utilitarians could agree upon a universal maximand, they would still be confronted with the additional problem of distinguishing, for the purpose of weighing, the various qualities of the maximand. That is to say, even if utilitarians could agree, for example, upon happiness as the universal maximand, they would still need to decide whether to weigh all states of happiness equally for purposes of maximizing and intersubjectively comparing utility, or instead attempt to distinguish among different types or states of happiness, weighing happiness derived from the higher pleasures (for example, reading great works of literature) more heavily than happiness derived from the lower pleasures (for example, playing pinball). This process, in turn, could be accomplished in at least one of three ways.

The first approach, associated with Jeremy Bentham and sometimes referred to as “hedonistic act-utilitarianism,”⁸⁰ would only consider the quantity of pleasure derived from a particular activity, rather than its quality, for purposes

77. POSNER, *supra* note 37, at 52 (“Happiness, or utility, is maximized when people (or creatures) are able to satisfy their preferences, whatever those preferences may be, to the greatest possible extent.”).

78. See *supra* Part II.A.

79. See generally JAMIE MAYERFELD, SUFFERING AND MORAL RESPONSIBILITY 101, 110 (1999) (arguing that happiness is not “the sole intrinsic good,” and that “[w]e should acknowledge other values that contribute to human wellbeing besides happiness . . . such as longevity, liberty, knowledge, accomplishment, and moral goodness”).

80. See SMART & WILLIAMS, *supra* note 14, at 12.

of calculating the utility associated with a given act.⁸¹ Adopting such an approach would mean that no distinctions could be drawn between the types of pleasures derived from two separate individuals engaging in two separate activities, so that the actions of an individual who derived one hundred units of utility by feeding pigeons could not be favored over an individual who derived one hundred units of utility by pulling the wings off of flies.⁸² Even more notably, by failing to distinguish between the various qualities of the maximand, this type of utilitarianism could potentially result in a type of “moral monstrosity” that would force one who accepted this theory to judge a person who derived one hundred units of utility by “pulling wings off flies” as a better person than another who derived, say, ninety-nine units of utility by “feeding pigeons,”⁸³ and weigh the former’s utility more heavily than the latter’s for purposes of calculating utility.

The second approach to the problem of weighing the qualities of the maximand, and one that is very unlike Bentham’s, is what is sometimes referred to as “ideal utilitarianism.” This form of utilitarianism, associated with the philosopher G.E. Moore, holds “that some states of mind, such as those of acquiring knowledge, ha[ve] intrinsic value quite independent of their pleasantness.”⁸⁴ This approach takes a much broader conception of the

81. See, e.g., JEREMY BENTHAM, 2 THE WORKS OF JEREMY BENTHAM 253–54 (1843) (“[T]he game of push-pin is of equal value with the arts and sciences of music and poetry. If the game of push-pin furnish more pleasure, it is more valuable than either.”).

82. POSNER, *supra* note 37, at 56–57.

83. Posner, *supra* note 4, at 116. Judge Posner goes on to identify another related form of “moral monstrosity” that may also result from a failure to distinguish between a maximand’s qualities, which he calls “utilitarian’s readiness to sacrifice the innocent individual on the altar of social need.” For example, as Alan Donagan points out in *Is There a Credible Form of Utilitarianism?*, “it might well be the case that more good and less evil would result from your painlessly and undetectedly murdering your malicious, old and unhappy grandfather than from your forbearing to do so: he would be freed from his wretched existence; his children would be rejoiced by their inheritances and would no longer suffer from his mischief; and you might anticipate the reward promised to those who do good in secret. Nobody seriously doubts that a position with such a consequence is monstrous.” Alan Donagan, *Is There a Credible Form of Utilitarianism?*, in CONTEMPORARY UTILITARIANISM 187, 188 (Michael D. Bayles ed., 1968) (cited in Posner, *supra* note 4, at 116). Posner further develops this argument by pointing out that “[t]he consistent utilitarian would find it hard to denounce extermination in” circumstances where, for example, “there were a group of people who were at once so few relative to the rest of society, so miserable, and so hated that their extermination would increase the total happiness of the society.” Posner, *supra* note 4, at 117. An excellent literary example of utilitarian-justified moral monstrosity can be found in FYODOR DOSTOYEVSKY, CRIME AND PUNISHMENT 101–02 (David McDuff trans., Penguin Classics 1991) (1866) (justifying the robbing and murdering of a rich, “nasty, stupid, worthless, meaningless, sick old woman who’s no use to anyone and is, indeed, actually harmful to people” so that “a thousand good deeds and undertakings . . . could be arranged and expedited with [her] money”).

84. See SMART & WILLIAMS, *supra* note 14, at 12–13; see also G.E. MOORE, ETHICS 232 (1912) (“[I]t must always be the duty of every agent to do that one among all actions which he can do on any given occasion, whose total consequences will have the greatest intrinsic value.”).

good, and would take into account not only the pleasantness generated by a good or an activity, but the intrinsic value associated with the good or activity itself. Under this view, a museum deciding whether to purchase a great work of art, for example, would need to take into account not only the happiness or pleasure that would be generated by the visitors who came to view the art, but also the intrinsic value of the art itself. A notable implication of this approach is that an ideal utilitarian might conclude that a certain good or activity has positive utility by virtue of its intrinsic value alone, even though the particular good or activity resulted in negative hedonistic pleasure. Thus, for example, a work of modern art that was deemed to have an intrinsic value of one hundred units of utility would be purchased by a museum, for the right price, even though it offended everyone who looked at it and caused them to collectively suffer ninety units of disutility.⁸⁵

The third approach to weighing the qualities of the maximand is provided by “quasi-ideal utilitarianism.”⁸⁶ This approach, associated with J.S. Mill, recognizes the qualitative difference between lower and higher pleasures, between, for example, playing push-pin and reading poetry, or between pulling wings off flies and reading great literature.⁸⁷ According to Smart, this form of utilitarianism implies “that pleasure is a necessary condition for goodness,”⁸⁸ but allows the qualitative difference of this pleasure to be taken into account.⁸⁹ Under this version, a utilitarian would be concerned about assigning too much value to lower-quality pleasures, disallowing (or making more difficult) the type of moral monstrosity that could result from a theory

85. Chris Ofili's painting *The Holy Virgin Mary* readily comes to mind. In this painting, the artist depicted a black Virgin Mary covered in elephant dung, and the predictable result was outrage (and significant disutility) among the general public. Nevertheless, the work itself was thought to have a high enough intrinsic value to earn its painter the Turner Prize in 1998, one of the art world's most well-known and sought-after awards, which is given annually to “a British artist under fifty for an outstanding exhibition or other presentation of their work in the twelve months preceding.” Tate Online, Turner Prize, <http://www.tate.org.uk/britain/turnerprize> (last visited Aug. 1, 2008).

86. See SMART & WILLIAMS, *supra* note 14, at 13.

87. As Mill famously wrote in his work *Utilitarianism*, “It is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied.” MILL, *supra* note 28, at 242.

88. See SMART & WILLIAM, *supra* note 14, at 13.

89. See *id.* (“For Mill, pleasantness functions like x in the algebraic product, $x \times y \times z$. If $x = 0$ the product is zero. For Moore pleasantness functions more like x in $(x + 1) \times y \times z$. If $x = 0$ the product need not be zero.”). It is not clear, however, if Mill would go so far as to claim that y , quality, could also be set to 0 such that if $y = 0$, the product would also be zero, in which case a utilitarian would refuse to accord any utility to a person deriving personal pleasure from engaging in low-quality activities such as committing arson or pulling wings off flies. Perhaps a theory that took into account the product of the quantity and quality of utility derived from an activity, especially where such quanta were limited to a continuum ranging from zero to one hundred, might help reach a workable solution to many of the problems discussed in this Part.

(for example, Bentham's hedonistic act-utilitarianism) not willing to draw such distinctions. Thus, for instance, suppose that A is a sadist capable of deriving great pleasure from extremely cruel acts, whereas B is a clinically depressed philanthropist incapable of deriving much pleasure at all from even extremely beneficent acts. For purposes of calculating (and maximizing) utility, Bentham would be forced to weigh A's pleasure more highly than B's, even if it were the case that A was a child molester and B helped clothe and feed the homeless. Mill, on the other hand, would likely assign a value of zero to the quality of A's pleasure so that, no matter how much pleasure A derived from his nefarious activities, quasi-ideal utilitarianism would refuse to acknowledge them for purposes of utilitarian calculation.⁹⁰

Even assuming that utilitarians could agree on how the quality of the maximand should (or should not) be accounted for, they would still be confronted with the further problem of determining the maximand's scope. To put the point differently, utilitarians, even if they could resolve all of the problems associated with utilitarianism discussed up to this point, would still need to reach an agreement regarding whose utility (however defined at each of the above stages of formulation) should be maximized.⁹¹ This issue of scope can be further subdivided into its vertical and horizontal axes, the former being concerned with the types of entities targeted by the maximand, and the latter being concerned with the number of those targeted entities that could serve as the unit of analysis.⁹² Thus, for example, in focusing on the vertical scope of the maximand, one would need to decide whether utilitarianism's

90. See *id.*

91. This point was raised by Sidgwick, who wrote:

We have next to consider who the 'all' are, whose happiness is to be taken into account. Are we to extend our concern to all the beings capable of pleasure and pain whose feelings are affected by our conduct? or are we to confine our view to human happiness? The former view is the one adopted by Bentham and Mill, and (I believe) by the Utilitarian school generally: and is obviously most in accordance with the universality that is characteristic of their principle.

SIDGWICK, *supra* note 59, at 414.

92. To my knowledge, this distinction between the vertical and horizontal scope of the maximand, and the analysis that follows, has not been explicitly formalized elsewhere, although both types seem to be have been implicitly recognized in the literature. See, e.g., Posner, *supra* note 4, at 103 ("Utilitarianism . . . holds that the moral worth of an action . . . is to be judged by its effect in promoting happiness—the surplus of pleasure over pain'—aggregated across all of the inhabitants (in some versions of utilitarianism, all of the sentient beings) of 'society' (which might be a single nation, or the whole world).") (emphasis added) (citing SIDGWICK, *supra* note 59, at 413)). Of course, the horizontal axis need not be defined exclusively by reference to a geographical territory, but could just as easily be defined in terms of any other group, boundary, or region that could be limited by number. For example, it could be limited to Catholics, expanded to include all Christians, further expanded to include Judeo-Christians, and further expanded still to include People of the Book. The variety of these iterations, of course, is limitless.

maximand should be limited to measuring the utility of sentient, living human beings, or whether, for example, this conception should be broadened to include all sentient human beings, born and unborn.⁹³ One could, if they desired, similarly expand the vertical scope to include primates, mammals, animals,⁹⁴ sentient life, plant life, bacteria, or artificial life. Or, one could just as easily constrict the vertical scope of the maximand by limiting it, for example, to alive, male human beings, or alive, propertied, male human beings, or to alive, propertied, literate, male human beings, or even more narrowly to propertied, literate, white, male human beings, as was the case not so long ago in America.⁹⁵ Though not easily resolved, the issue of determining the maximand's scope, as can be seen, is one with important implications.⁹⁶

But even assuming, arguendo, that utilitarians could reach some sort of agreement regarding the vertical scope of the maximand, a utilitarian would next have to determine the scope of the maximand's horizontal axis. Thus, for example, suppose that a utilitarian, following Protagoras, determines "man" to be the measure of all things, and decides to restrict the vertical axis

93. Sidgwick acknowledged that circumstances would arise under which "the interests of posterity [would] . . . seem to conflict with those of existing human beings," and thought that "the interests of posterity must concern a Utilitarian as much as those of his contemporaries." SIDGWICK, *supra* note 59, at 414.

94. See, e.g., Peter Singer, *Ethics Beyond Species and Beyond Instincts: A Response to Richard Posner*, in ANIMAL RIGHTS 78, 79 (Sunstein & Nussbaum eds., Oxford Univ. Press 2004) ("Once we understand that in respect of any valuable characteristic we can think of, there is no gap between humans and animal, but rather an overlap in possession of that characteristic by individuals of different species, it is easy to see the belief that all humans are somehow infinitely more valuable than any animal is a prejudice."). This view, though not in so dramatic a form, finds some support in Sidgwick, who defined utilitarianism as "conduct which . . . will produce the greatest amount of happiness on the whole; that is, taking into account *all whose happiness* is affected by the conduct." SIDGWICK, *supra* note 59, at 411 (emphasis added); see also MILL, *supra* note 28, at 244–45 (stating that the scope of utility ought not only concern "the agent's own greatest happiness, but the greatest amount of happiness altogether . . . secured to all mankind; and not to them only, but, so far as the nature of things admits, to the whole sentient creation").

95. See ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 2* (2000).

96. This problem has been beautifully captured in J.J.C. Smart's essay *An Outline of a System of Utilitarian Ethics*:

Perhaps strictly in itself and at a particular moment, a contented sheep is as good as a contented philosopher. However it is hard to agree to this. If we did we should have to agree that the human population ought ideally to be reduced by contraceptive methods and the sheep population more than correspondingly increased. Perhaps just so many humans should be left as could keep innumerable millions of placid sheep in contented idleness and immunity from depredations by ferocious animals. Indeed if a contented idiot is as good as a contented philosopher, and if a contented sheep is as good as a contented idiot, then a contented fish is as good as a contented sheep, and a contented beetle is as good as a contented fish. Where shall we stop?

SMART & WILLIAMS, *supra* note 14, at 16.

to living human beings. Such a utilitarian would still have to decide whether to broaden the maximand's horizontal scope to include, for example, all human beings living in a pre-defined geographical territory, such as a nation state, continent, hemisphere, or planet, or, conversely, to reduce its horizontal scope to include a narrower geographical region, such as a state, county, city, household, or even a single individual. The fact is, utilitarianism provides no clear answer to these questions, and no basis for choosing between any of these alternatives, which helps explain both the great variety of utilitarian theories, and the numerous criticisms to which these theories have been subject.⁹⁷

Although utilitarianism would have come a long way if general consensus could be reached regarding the type of utilitarianism to be used, the maximand to be employed, the distinctions to be drawn (or not) between the higher and lower qualities of the maximand, and the maximand's vertical and horizontal scope, utilitarianism would still need to overcome a number of other difficult hurdles before it could hope to serve as the basis for legal analysis, broadly defined, or, more narrowly, as the basis for determining the award of damages for breach of contract, and it is to these even more powerful and—some would say—fatal criticisms of utilitarianism to which this Article now turns.

3. Observing, Measuring, Comparing, and Maximizing Utility

Suppose, for the moment, that utilitarianism was able to resolve all of the previously identified objections. It would then be faced with attempting to overcome its most difficult challenge yet: its perceived inability to maximize utility in the real world, which in turn stems from its perceived inability to observe, measure, calculate, and intersubjectively compare utility.⁹⁸ The scope

97. See, e.g., Posner, *supra* note 4, at 112 (noting that although Smart “finds it ‘hard to agree’ to equating the contented sheep with the contented philosopher, he can find no basis in utilitarian theory for distinguishing them”). Posner then goes on to note that “there is something amiss in a philosophical system that cannot distinguish between people and sheep” and points out that “a driver who swerved to avoid two sheep and deliberately killed a child could not be considered a bad man [under utilitarian theory], since his action may have increased the amount of happiness in the world [although] [t]his result is contrary to every ethical intuition we have.” *Id.* According to Posner “it is not the fact that utilitarianism has a ‘boundary problem’ that is troubling. It is that the obvious solution—the inclusion of animal feelings—is unacceptable.” *Id.*

98. Indeed, as Sidgwick himself pointed out, the theory of utilitarianism presupposes “that all pleasures . . . are capable of being compared quantitatively with one another and with all pains; that every such feeling has a certain intensive quantity, positive or negative (or, perhaps, zero), in respect of its desirableness, and that this quantity may be to some extent known: so that each may be at least roughly weighed in ideal scales against any other.” SIDGWICK, *supra* note 59, at 413.

of this task, and the challenge it poses to the legitimacy of utilitarianism, cannot be overstated. To begin, one must first be able to solve the problem of observing utility before one can attempt to measure it, and this challenge alone has, historically, seemed next to impossible to overcome.⁹⁹ This challenge exists because utilitarians are not equipped with a special device allowing them to peer into someone else's mind and observe, in a calculable way, the amount of utility that an individual derives from a particular activity, although, it must be noted, scientists are now closer than they have ever been before.¹⁰⁰ This problem alone has stymied the development of utilitarianism in countless ways, but even assuming that it too could be overcome, a utilitarian would next need to resolve the second-order problem of measuring the observed utility, a problem to which Jeremy Bentham turned his attention when he proposed the now infamous¹⁰¹ felicific or hedonistic calculus.¹⁰² Other methods, of course, have been proposed,¹⁰³ but the fact

99. "Utility is not an objective or observable concept, but merely a shorthand description of the consumer's relative preference for a market basket of goods." A. Mitchell Polinsky, *Economic Analysis as a Potentially Defective Product: A Buyer's Guide to Posner's Economic Analysis of Law*, 87 HARV. L. REV. 1655, 1666 n.62 (1974).

100. And even if a utilitarian could observe this maximand, they would next need to determine over what period of time (for example, one day, one month, or one year) to observe it for purposes of utilitarian calculation.

101. I am using the word "infamous" here not only in the Websterian sense of "having a reputation of the worst kind," MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 597 (10th ed. 1999), but also in the sense made famous by the movie *THREE AMIGOS!* (HBO Home Videos 1986) (Dusty Bottoms: "What does that mean, in-famous?" Ned Nederlander: "Oh, Dusty. In-famous is when you're MORE than famous. This man El Guapo, he's not just famous, he's IN-famous."). This double entendre, in my mind, perfectly captures the state of the felicific calculus today.

102. In short, Bentham believed that utility could be measured and calculated by observing and assigning numerical values to the surpluses of pleasure over pain in the following seven categories: according to the pleasure's: (1) *intensity*, or the strength of the pleasure or pain; (2) *duration*, or the amount of time the pleasure or pain lasts; (3) *certainty*, or the probability of the pleasure or pain occurring; (4) *propinquity*, or the amount of time it will take before the pleasure or pain occurs; (5) *fecundity*, or the probability the pleasure will lead to other pleasures, or that the pain will lead to other pains; (6) *purity*, or the probability that pleasure will not lead to pain and that pain will not lead to pleasure; and (7) *extent*, or the number of people who will be affected by the pleasure or pain. See BENTHAM, *supra* note 56, at 38–41.

103. See, e.g., Posner, *supra* note 4, at 114 ("Paretian welfare economics is advanced by some as the solution to the problem of measuring satisfactions. The basic Paretian argument is that a voluntary market transaction—e.g., A offers, and B accepts, \$5 for B's bag of oranges, or A proposes marriage, and again B accepts A's offer—*must* make both parties better off, and so increase the level of welfare or happiness in the society, for if both A and B were not made better off by the transaction at least one of them would refuse to consent to it. This approach does not, however, meet the utilitarian's need for a dependable metric even if we accept (as I am inclined to do . . .) that a market transaction increases the happiness of the parties over what it was immediately before the transaction took place . . . because the total effects of a transaction on human happiness, contentment, or satisfaction are rarely ascertainable. I conclude that Paretian analysis does not solve the utilitarians' problem of measuring happiness."). It should be noted that in this critical passage Posner acknowledges the validity of utility as applied to voluntary transactions, but questions its applicability

that there has been no scientifically meaningful way to observe, let alone measure, utility for more than two centuries is a testament to the problem's intractability.¹⁰⁴

Further, even if utilitarianism could observe, measure, and calculate utility, those advocating its use would be confronted with the related challenge of trying to intersubjectively compare utilities between two or more (presumably sentient) entities.¹⁰⁵ Of course, if one could objectively measure utility to begin with, the task of intersubjectively comparing them would be a job better suited to the grade-school mathematics student than to the philosopher. However, because it appears as though utilitarians are incapable¹⁰⁶ (at least for the time being¹⁰⁷) of measuring and calculating utility

to nonvoluntary transactions due to its lack of a measurable metric. As I argue in Part II.B.4, however, while this metric is perhaps necessary in other areas of law, it is not necessary within contract law, due to the fact that parties, and not courts, assign value to their bargains, which is then fossilized and preserved in the amber of a contract.

104. See, e.g., *id.* at 113–14 (“Even if attention is confined to the human population, there is no reliable technique for measuring a change in the level of satisfaction of one individual relative to a change in the level of satisfaction of another.”); see also *id.* at 113 n.41 (paraphrasing Hayek as noting that “utilitarianism presupposes omniscience”). Posner then further critiques the theory by pointing out that “[i]f the impracticality of the felicific calculus is taken to justify utilitarian’s use of guesswork, the possibilities for plausible public intervention becomes virtually unlimited.” *Id.* at 115; see also 2 FRIEDRICH. A. HAYEK, *LAW, LEGISLATION, AND LIBERTY* 20, 23 (1976) (arguing that one can only attempt to determine an act’s effect on utility by “proceed[ing] on a factual assumption of omniscience which is never satisfied in real life,” and noting that we may “aim at the ‘greatest happiness of the greatest number’ [only] if we do not delude ourselves that we can determine the sum of this happiness by some calculation, or that there is a known aggregate of results at any one time . . . because we [can never] have any idea of the sum of utility of pleasure which we have produced”).

105. See, e.g., Frank I. Michelman, *Norms and Normativity in the Economic Theory of Law*, 62 *MINN. L. REV.* 1015, 1019–21, 1032–34 (1978) (“Value is what the affected individual experiences; it is transrational, not amenable to public or intersubjective discussion or determination.”).

106. See, e.g., KENNETH ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 9 (2d ed., Wiley 1963) (1951) (“The viewpoint will be taken here that interpersonal comparison of utilities has no meaning and, in fact, that there is no meaning relevant to welfare comparisons in the measurability of individual utility.”); LIONEL ROBBINS, *AN ESSAY ON THE NATURE AND SIGNIFICANCE OF ECONOMIC SCIENCE* 139–40 (1962) (“There is no means of testing the magnitude of *A*’s satisfaction as compared with *B*’s Introspection does not enable *A* to measure what is going on in *B*’s mind, nor *B* to measure what is going on in *A*’s. There is no way of comparing the satisfactions of different people.” (emphasis omitted)). But see Ilmar Waldner, *The Empirical Meaningfulness of Interpersonal Utility Comparisons*, 4 *J. PHIL.* 87, 89 (1972) (arguing against “the widespread belief that no empirical foundation for such [interpersonal comparisons of utility are] possible”); I.M.D. LITTLE, *A CRITIQUE OF WELFARE ECONOMICS* (2d ed., Oxford Univ. Press 1957) (arguing “that statements purporting to make interpersonal comparisons are meaningful in the sense of being well established in everyday discourse”).

Sidgwick himself acknowledged the difficulty of comparing “the pleasures and pains of other men accurately with our own,” and lamented the even more complex question of comparing human utility “with the pleasures and pains of brutes,” but seems to have taken comfort in the fact that “the difficulty is at least not greater for Utilitarians than it is for any other moralists who recoil from the paradox of disregarding altogether the pleasures and pains of brutes.” SIDGWICK, *supra* note 59, at 414.

with any degree of certainty, attempting to subsequently compare these nonmeasurable values is a nonsensical endeavor at best,¹⁰⁸ and one which causes obvious problems for any philosopher proposing to use utilitarianism as the basis for legal analysis.

This brings us to yet another difficulty with utilitarianism. Assume, for the moment, that utilitarians could solve each of the above-discussed problems, in that they could agree upon the type of utilitarianism that should be used, the maximand to be employed,¹⁰⁹ could settle the issue of accounting for (or not) the maximand's quality, could agree upon the maximand's scope, and could still further (through means yet unknown) measure and intersubjectively compare utilities, it would still be by no means clear how such a society would go about maximizing this utility. A utilitarian who made it this far would still need to resolve whether a just society is one that ought to maximize the sum total of its member's utilities, average utility, or whether it should

107. See, e.g., Waldner, *supra* note 106, at 95 (noting that "there exists very little that would count as any kind of precise, empirically supported theory involving desires," but that "work in psychology on motivation could well be taken as preparing the ground for such a theory. Despite the fact that a satisfactory theory has not been developed, there seems no reason to think that it could not be developed on the basis of further research.").

108. This point was forcefully articulated by Ludwig von Mises, who noted that "[o]nly the ordinal numbers can be applied to [a judgment of value], but not the cardinal numbers" and explained that

[p]referring always means to love or to desire *a* more than *b*. Just as there is no standard and no measurement of sexual love, of friendship and sympathy, and of aesthetic enjoyment, so there is no measurement of the value of commodities. If a man exchanges two pounds of butter for a shirt, all we can assert with regard to this transaction is that he—at the instant of the transaction—and under the conditions which this instant offers to him—prefers one shirt to two pounds of butter. It is certain that every act of preferring is characterized by a definite psychic intensity of the feeling it implies. There are grades in the intensity of the desire to attain a definite goal and this intensity determines the psychic profit which the successful action brings to the acting individual. But psychic quantities can only be felt. They are entirely personal, and there is no semantic means to express their intensity and to convey information about them to other people.

LUDWIG VON MISES, HUMAN ACTION: A TREATISE ON ECONOMICS 97, 204–05 (rev. ed. 1963) (third emphasis added).

For a more recent expression of this view in response to Posner's theory of wealth maximization, see Veljanovski, *supra* note 5 ("Utility in economics is an ordinal notion, an index that is used to rank an individual's preferences among alternatives. It is simply a way of representing axiomatically the choices made by an individual. A utility function *describes* choice, it does not explain it. Thus, when the economist says that an individual is rational or maximizing utility, he is saying no more than in the choice among alternative commodities or actions the individual acts consistently in the sense that if A is preferred to B and B to C, A will be preferred to C.").

109. Which could, of course, change the definition of utility slightly by substituting another good, perhaps "knowledge" or "love," with that of "pleasure" or "happiness." See *supra* Part II.B.2.

maximize something else entirely,¹¹⁰ and this choice, like the others, would have profound consequences for legal analysis.

For instance, the decision to maximize the sum total of a society's utility would mean that a society where every member was miserable would be, de facto, superior to a society where every member was relatively happy, so long as the size of the former group was sufficiently large, or the size of the latter group was sufficiently small, so that the sum total of the former's member's utilities exceeded the sum total of the latter's member's utilities.¹¹¹ Under such a regime, any society could be made better off by sufficiently increasing its population to the point where a marginal increase (that is, the addition of one more member) would fail to further increase the sum total of society's utility, even though such an increase would reduce the average utility of its members.¹¹² Common sense, however, suggests the absurdity of such an approach, for if such a policy were adopted, policy recommendations to many third world countries would shift from sensible population reduction to incautious population expansion in the name of making those societies "better off."

Some have attempted to solve this problem by shifting utilitarian's focus from total to average utility, but this, too, is subject to several important criticisms.¹¹³ For example, a utilitarian theory concerned with maximizing

110. The problem with maximizing the sum total of utility—which is the approach of Jeremy Bentham—seems to have been first noticed by Henry Sidgwick, who wrote that, if "Utilitarian[s] [are] to prescribe, as the ultimate end of action, happiness on the whole, and not any individual's happiness, unless considered as an element of the whole, it would follow that, if the additional population enjoy on the whole positive happiness, we ought to weigh the amount of happiness gained by the extra number against the amount lost by the remainder." SIDGWICK, *supra* note 59, at 415. Sidgwick's solution to this problem was that, in such situations, "population ought to be encouraged to increase . . . not [to the point] at which average happiness is the greatest possible . . . but that at which the product formed by multiplying the number of persons living into the amount of average happiness reaches its maximum." *Id.* at 415–16.

111. See generally DEREK PARFIT, REASONS AND PERSONS (1984) (arguing that a theory of utilitarianism advocating the maximization of the sum total of a population's utility would lead to the "Repugnant Conclusion" that a society with a sufficiently large population under which each member lives a miserable life—so long as such a life is even marginally worth living—is to be preferred to a smaller society where every member of its population is living in euphoric bliss).

112. See, e.g., Posner, *supra* note 4, at 113 ("[A] high birth rate may cause a reduction in the standard of living of a crowded country and, along with it, in the average happiness of the country, but this loss may be more than offset by the satisfactions, even if somewhat meager, of the added population.").

113. Indeed, other commentators have pointed out that it is preferable to maximize utility in other ways besides merely summing or averaging them. It is not necessary to discuss those theories here, but the interested reader may consult NICOLA ACOCELA, THE FOUNDATIONS OF ECONOMIC POLICY: VALUES AND TECHNIQUES 53–58 (Brendan Jones trans., 1998) (discussing the benefits of maximizing utility by (1) multiplying the utilities of all members in society, (2) focusing on the utility of the worst-off individual, and (3) employing the Pareto principle to ensure that an increase in utility of one member of society does not result in the decrease in utility of another member of society).

average utility would be forced to conclude that a small group consisting of one hundred members who each derived ninety-nine units of satisfaction engaging in various activities ought to be preferred to a larger society made up of a billion members where each person derived ninety-eight units of satisfaction engaging in their respective activities. Even more decisively, I think, an approach that sought to maximize average utility at the expense of total utility would be forced to prefer a single “utility monster”¹¹⁴ (for example, one who was able to derive one hundred units of satisfaction by engaging in socially destructive activities) to both the small group and the larger society, even if it meant the mistreatment (and, perhaps, sacrifice) of these society’s members at the hands of this utility monster.¹¹⁵ If such a theory were adopted, one could maximize society’s utility by simply killing off the more miserable half (or more) of the population, even though doing so would reduce the sum total of utility in that society.¹¹⁶ And, even assuming that utilitarians could resolve the previously discussed objections, they would still be confronted with the further problem of choosing between them, or something else entirely,¹¹⁷ even though there would be no clear basis for doing so.¹¹⁸

4. Application to Contract Law

Having considered the previous objections, let us now pause for a moment to consider how a utilitarian might hope to use her theory to analyze something as seemingly concrete as awarding damages for the breach of contract. Recall our earlier example, in which A agreed to sell one hundred widgets to B for

114. This term was invented by Robert Nozick, who argued that “Utilitarian theory is embarrassed by the possibility of utility monsters who get enormously greater gains in utility from any sacrifice of others than these others lose. For, unacceptably, the theory seems to require that we all be sacrificed in the monster’s maw, in order to increase total utility.” ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 41 (1974).

115. It would be worse if, having previously agreed to expand the scope of utilitarian’s maximand to include all sentient life, this utility monster turned out to be, say, a cockroach, at whose altar the rest of us could be sacrificed.

116. See, e.g., Posner, *supra* note 4, at 113 (“If the poorer half of the population of Bangladesh were killed, the standard of living of the remaining half, and for all one knows their subjective happiness as well, would rise because of the higher ratio of people to land and other natural resources. However, the *total* happiness might well be less.”).

117. See *supra* notes 91–97 and accompanying text.

118. See, e.g., Posner, *supra* note 4, at 113 (“There is no clear basis in utilitarian theory for choosing between average and total happiness,” although total happiness “is more consistent with a simple insistence on utility as the maximand.”). *But see* SMART & WILLIAMS, *supra* note 14, at 28 (discounting the practical differences between average and total happiness by arguing that “[i]n most cases the difference between the two types of utilitarianism will not lead to disagreement in practice. For in most cases the most effective way to increase the total happiness is to increase the average happiness, and vice versa.”).

\$10 per widget, and C offered to pay A \$12 per widget, and we asked whether A should breach his contract with B?¹¹⁹ Analyzing this problem through the lens of utilitarianism, we said that A should perform his contract with B if doing so maximized utility, but that A should breach his contract with B and pay damages instead if that maximized his utility.¹²⁰ We can now be more specific. A utilitarian following Holmes's consequentialist proclivities could now say something like the following: A, the promisor (of whatever species), should be allowed to perform or breach (as the case may be) its contract with B, the promisee (of whatever species), at A's election, as long as society's (however composed vertically and/or horizontally) utility (however defined) was maximized (however measured) as a result (however calculated).¹²¹

The numerous qualifications that this formulation is subject to renders it almost laughable, and the above-discussed criticisms regarding each of these qualifications suggests that such a theory could result (at best) in little more than fancy guesswork,¹²² leaving a judge with more discretion than many of us would be comfortable with, and (at worst) a system whereby damages were determined by judicial fiat. And when one considers how futile such an endeavor appears when applied to something as seemingly concrete as determining damages for the breach of contract, it is easy to see why a committed consequentialist may wish to abandon the utilitarian enterprise altogether in favor of a form of consequentialism better able to cope with these problems for the purposes of legal analysis. In other words, although utilitarianism may work fine in theory, or so goes the argument, it is all but worthless in practice and utterly incapable of serving as a basis for determining damages for the breach of contract. And, for this reason, the "new form of consequentialism" many would-have-been utilitarians have turned to is law and economics, or wealth maximization theory, and it is also to this theory that we shall now turn.

C. Utilitarianism Replaced

Well aware of the above-discussed criticisms,¹²³ but unwilling to abandon consequentialism in favor of nonconsequentialist ethics, law and economics scholars have proposed "an alternative moral system to both utilitarianism

119. See *supra* Part I.

120. See *id.*

121. Or, perhaps, as long as it resulted in a rule tending to maximize society's utility. See *supra* Part II.B.1.

122. See, e.g., Posner, *supra* note 4, at 116 ("Utilitarianism thus seems to base rights of great importance on no firmer ground than an empirical hunch that they promote 'happiness.' That hunch cannot be verified by any tools we have or are likely to acquire."); see also POSNER, *supra* note 37, at 56.

123. See *supra* Part II.B.

and Kantianism”¹²⁴ that promises to solve many of the above-discussed problems: wealth maximization theory (WMT). By proposing to “define the maximand more narrowly, as . . . wealth,” which is itself defined as “the value in dollars or dollar equivalents . . . of everything in society,”¹²⁵ WMT claims to have solved the most pertinent criticism plaguing utilitarians since the days of Bentham—its inability to measure, compare, and maximize utility.¹²⁶ Let us therefore consider WMT’s claim that, by cashing out units of happiness in exchange for units of wealth, consequentialists (and courts) are (finally) able to rest legal analysis on firm theoretical and practical grounds by straightforwardly holding that actions that increase society’s wealth should be allowed, while those that reduce it should be forbidden.¹²⁷

Notably, by defining the maximand narrowly to include only wealth as measured in dollars, in one stroke WMT attempts to resolve in its favor two key criticisms leveled against utilitarianism. First, WMT dispenses with the need to distinguish between the qualities of the maximand because, under WMT, all dollars count equally. And second, the “measurement problem that so plagues utilitarianism” is also easily solved under WMT by restricting the maximand’s domain “to actual markets that are free from serious problems of monopoly or externality” because “any voluntary transaction that occurs in such a market must increase the *wealth* of the society.”¹²⁸ Indeed, it is commendable

124. Posner, *supra* note 4, at 119. Posner’s use of the term “Kantianism” is used in the same sense that this Article uses the term “nonconsequentialism.” See *id.* at 104 n.4 (defining “Kantianism” as “a family of related ethical theories that, rejecting any form of consequentialism, instead premise themselves on notions of human autonomy and self-respect,” and suggesting that “[s]uch theories need not resemble very closely the thought of Immanuel Kant”).

125. *Id.* at 119 (“[W]ealth] is measured by what people are willing to pay for something or, if they already own it, what they demand in money to give it up.”).

126. Indeed, as I argue in Part III, this maximand acts as a keystone in holding the wealth maximization enterprise together: Remove it, and the entire edifice built around it crumbles.

127. The gulf between utilitarians and wealth maximization theorists is not as wide as it is sometimes made out, however. Indeed, contrary to the WMT portrait of Bentham painted above, Bentham seems to have been a proto-wealth maximization theorist himself, although he never fully developed this approach. See, e.g., Wesley C. Mitchell, *Bentham’s Felicific Calculus*, in JEREMY BENTHAM: TEN CRITICAL ESSAYS 168, 174 (Bhikhu Parekh ed., 1974) (noting that Bentham himself once wrote that “[m]oney is the instrument for measuring the quantity of pain and pleasure,” but then “did not follow up this promising lead” because “[e]very time he began thinking about money measures of feeling he was checked by the diminishing utility of wealth”).

128. Posner, *supra* note 4, at 129–30 (emphasis added). Judge Posner thinks that “[t]his proposition is not the Pareto principle in the sense discussed earlier, which is a principle of utility, but is an essentially tautologous principle of wealth maximization.” *Id.* at 130. Notably, however, Posner goes on to state that “[v]oluntariness is . . . too restrictive a condition to impose on the wealth-maximization criterion, and once its domain is expanded to include hypothetical markets a problem of measurement arises. But it is a less serious problem than that of measuring happiness.” *Id.* at 130. He is correct that voluntariness is too restrictive a condition to impose on a theory that is to serve the law generally, but, as applied to contract

that there seems to be so little disagreement among wealth maximization theorists regarding their maximand's definition and, to the utilitarian's chagrin, WMT's ability to meaningfully measure and intersubjectively compare dollars seems beyond reproach, as anyone attempting to question it could be proven wrong by a child asked to count two piles of cash.

Having resolved the above criticisms, then, WMT next turns its attention to defining the vertical and horizontal scope of the maximand, which it accomplishes with characteristic alacrity: The maximand should be expanded to include those who have wealth (or are "part of the utility function of someone who has wealth")¹²⁹ and constricted to exclude those who do not (or are not). Thus, according to this view, the vertical axis should be expanded (or constricted) to include (or exclude), for example, animals or sentient life, to the extent that they "enhance wealth."¹³⁰

Similarly, WMT also seems to provide a mechanism for determining the horizontal scope of the maximand. Take, for example, the issue of unborn children. According to wealth maximization theorists, the horizontal scope of the former can be determined by taking into account "whether the social product of the additional population exceeds its social cost" so that if the "additional population would be economically self-supporting," then the maximand's scope should be broadened to include them,¹³¹ but if not, then it should be constricted to exclude them.¹³²

It may seem, then, that WMT has successfully overcome many of the problems associated with utilitarianism,¹³³ but before we are ready to adopt it

law, voluntariness captures perfectly its main operating principle: that of the voluntary agreement reached after bargaining through the process of mutual assent.

129. *Id.* at 119, 128 ("The only kind of preference that counts in a system of wealth maximization is thus one that is backed up by money.").

130. *Id.* at 128.

131. *Id.* at 129.

132. The problem of foreigners can be dealt with in a similar fashion. *Id.* at 129.

133. To be sure, WMT is still subject to some of the same criticisms that haunted utilitarianism, but because these criticisms furnish the consequentialist with no basis for preferring one theory to the other, they are here relegated to the status of a footnote. For instance, Posner believes that "there is no real conflict between" determining whether to maximize the average or total maximand "in a system of wealth maximization," but his explanation is specifically confined to the areas of immigration and trade restrictions and therefore generally unconvincing. Posner, *supra* note 4, at 129.

In addition, it is by no means clear that wealth maximization theory has even attempted to address the meta-question of whether to adopt act-WMT, rule-WMT (my own terms), or something else entirely, yet these choices entail important consequences for WMT, some of which could be profound. See, e.g., *supra* Part II.B.1. For example, a version of act-WMT might hold that "an act is just and should be allowed to the extent that it increases wealth, and unjust and disallowed to the extent that it decreases wealth," whereas a version of rule-WMT might instead hold that "an act is just and should be allowed to the extent that, were it a rule followed by others, it would tend to increase wealth, and unjust and disallowed to the extent that, were it a rule followed by others, it would tend to decrease wealth."

for purposes of calculating damages for the breach of contract, it is worth pausing to consider exactly how these objections have been overcome. In cashing out units of happiness in exchange for units of wealth (that is, by defining its maximand in terms of dollars or dollar equivalents), it should be noted that WMT has not shown itself to be superior to utilitarianism as a theoretical concept,¹³⁴ but rather as a practical substitute able to implement in practice what utilitarians can only promise in theory—the ability, as a consequentialist theory of justice, to define, measure, compare, and maximize utility in the real world. This concept can be illustrated by returning once again to our earlier treatment of an “efficient” breach, whereby we can examine the various ways in which utilitarians and wealth maximization theorists would treat this problem.

Recall that, in the hands of a utilitarian, the theory of efficient breach would allow a promisor to breach her promise so long as the breach made society better off as measured in terms of utility, however defined.¹³⁵ But, as previously discussed, a judge would have a difficult time applying this theory in the real world to determine, to the dollar, the amount of damages necessary to compensate a promisee for a promisor’s breach of contract. To be sure, a judge hoping to perform this herculean task would not only have to find a way to observe, measure, and calculate the sum total of the utility gained (or lost) by both the promisor and the promisee¹³⁶ as a result of the promisor’s breach, but she would next need to engage in the sort of intersubjective comparison of utility between these parties that has already been shown to be nearly impossible.¹³⁷ And, discomfortingly, the judge’s job would still not be done. Next, she would have to determine how much utility each party attached to various monetary sums, and then award the promisee an amount sufficient to compensate her for this lost utility.

On the other hand, the problem of efficient breach in the hands of a

In any event, I do not wish to make too much of these distinctions here, except to point out that WMT does at least some things as poorly as the theory it attempts to replace.

134. But see Posner, *supra* note 4, who believes that WMT “is distinguishable in ethically significant ways from the utilitarian ideal,” *id.* at 105, and provides “a firmer basis for a normative theory of law than does utilitarianism,” *id.* at 103. See also POSNER, *supra* note 37 (“My doubts that Benthamism, utilitarianism in its most uncompromising form, is an adequate ethical system may seem also to undermine the economic analysis of law in both its positive and normative versions . . . I believe [utilitarianism and economics are distinguishable] and that the economic norm I shall call ‘wealth maximization’ provides a firmer basis for ethical theory than utilitarianism does.”); Posner, *supra* note 4, at 110 (“[E]conomic analysis has some claim to being regarded as a coherent and attractive basis for ethical judgments. I am less clear that utilitarianism has such a claim.”). These objections will be discussed at great length *infra* Part III.

135. See *supra* Parts II.A and II.B.

136. And, many would argue, society.

137. See *supra* Part II.B.3.

wealth maximization theorist becomes manageable. Recall that, under WMT, the theory of efficient breach would allow a promisor, at his or her election, to breach her promise so long as the breach made the parties¹³⁸ better off as measured in terms of dollars or dollar equivalents. In other words, if the promisor can make enough money from the third party to compensate the promisee for his or her breach, putting the promisee in the same position he or she would have been in had the contract been performed, he or she should do so. And here, because a judge can observe, compare, and maximize dollars, the judge is able to determine damages by simply calculating the expectancy, or the quantum of the harm suffered by the promisee, and ordering the promisor to pay this amount. In such a way, so goes the theory, the breach is Pareto-efficient in that the promisor and the third party are better off than before while the promisee is no worse off than before because the promisor made an additional profit, the contracted-for item moved to its highest-valued use (the third party), and the promisee got his or her expectancy.¹³⁹ There are, however, numerous problems associated with this approach, not least of which is the fact that the expectancy awarded to the promisee may result in undercompensation whenever the promisee, as a result of the breach, suffered damages that were unforeseeable to the promisor at the time of entering into the contract,¹⁴⁰ cannot be calculated with the requisite degree of certainty,¹⁴¹ or are of an intrinsic and/or nonquantifiable nature.¹⁴² It is to these problems that this Article now turns.

138. And, some would say, society.

139. See Posner, *supra* note 4, at 114 (defining a Pareto-superior breach as one in which at least one person is made better off while no person is made worse off as a result of the breach).

140. See, e.g., FARNSWORTH, *supra* note 45, § 12.14 (“The Restatement Second states: ‘Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.’ It adds that loss may be foreseeable if, as under the first rule of *Hadley v. Baxendale*, it follows ‘in the ordinary course of events’ or if, as under the second rule, it follows ‘as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.’” (quoting RESTATEMENT (SECOND) OF CONTRACTS § 351)).

141. See, e.g., *id.* § 12.15 (“The doctrine of certainty required ‘damages for breach of contract to ‘be shown, by clear and satisfactory evidence, to have been actually sustained’ and to ‘be shown with certainty, and not left to speculation or conjecture.’” (quoting *Griffin v. Colver*, 16 N.Y. 489, 491 (1858))). This requirement of certainty imposes severe limitations on recovery potential lost profits on collateral transactions. *Id.* § 12.14.

142. An additional limitation on damages—avoidability—is unrelated to this issue and need not detain us here. See, e.g., FARNSWORTH, *supra* note 45, § 12.12 (“A court ordinarily will not compensate an injured party for loss that that party could have avoided by making efforts appropriate, in the eyes of the court, to the circumstances.”). Farnsworth goes on to note that

once a party has reason to know that the other’s return performance will not be forthcoming, the former is ordinarily expected to stop performing in order to avoid further cost. On this ground, a builder that had contracted with a county to construct a bridge for a county road was denied recovery for expenditures incurred after the county had decided not to build the road and notified the builder to stop.

Id. (citing *Rockingham County v. Luten Bridge Co.*, 35 F.2d 301, 307 (4th Cir. 1929)).

III. A UTILITARIAN CRITIQUE OF WEALTH MAXIMIZATION THEORY

One of the great ironies of wealth maximization theory (WMT) as applied to contract law is that, by narrowly defining its maximand as wealth,¹⁴³ it has made itself dependent on the very theory it seeks to disclaim (utilitarianism) by ensuring that the maximand it (erroneously, as it turns out) accused utilitarianism of being unable to maximize now cannot be maximized. To see why, let us turn to the WMT concept of value inherent in Posner's famous illustration of an efficient breach:

Suppose I sign a contract to deliver 100,000 custom-ground widgets at \$0.10 apiece to A, for use in his boiler factory. After I have delivered 10,000, B comes to me, explains that he desperately needs 25,000 custom-ground widgets at once since otherwise he will be forced to close his pianola factory at great cost, and offers me \$0.15 apiece for 25,000 widgets. I sell him the widgets and as a result do not complete timely delivery to A, who sustains \$1000 in damages from my breach. Having obtained an additional profit of \$1250 on the sale to B, I am better off even after reimbursing A for his loss. Society is also better off. Since B was willing to pay me \$0.15 per widget, it must mean that each widget was worth at least \$0.15 to him. But it was worth only \$0.14 to A—\$0.10, what he paid, plus \$0.04 (\$1000 divided by 25,000), his expected profit. Thus the breach resulted in a transfer of the 25,000 widgets from a lower valued to a higher valued use.¹⁴⁴

Adding to the above hypothetical, let us assume further that A negotiated a \$5000 liquidated damages provision with Posner (P), and that, after P's breach, A brought suit against him and asked a court to enforce the liquidated damages provision or, in the alternative, to compel specific performance. Under this set of facts, what would a court actually do? From a wealth maximization theory perspective, what ought a court to do?

First, a court would likely refuse to enforce the liquidated damages provision, holding that it constitutes an unenforceable penalty clause in that the liquidated amount (\$5000) is disproportionate to the damages actually suffered by A (\$1000).¹⁴⁵ The wealth maximization theorists would likely

143. Posner, *supra* note 4, at 119.

144. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 57 (1972). The above calculation assumes, of course, that the potential loss of future business from A has adequately been accounted for, because A, fearing that another "B" may come along in the future, may refuse to do business with the widget manufacturer, or may only do so at a much lower price to take into account the higher risk of breach. See also *infra* note 160.

145. See, e.g., FARNSWORTH, *supra* note 45, § 12.18 (stating that a "stipulated sum [that] is significantly larger than the amount required to compensate the injured party for its loss . . . would allow the parties to depart from the fundamental principle that the law's goal on breach of contract is

approve of this result, on the theory that enforcement of the penalty clause could prevent efficient breaches by compelling performance.¹⁴⁶ Second, a court would almost certainly find that the remedy at law (\$1000) is adequate, and refuse to award specific performance on that ground alone.¹⁴⁷ The wealth maximization theorist would be likely to agree with this result, on the theory that if a court did not allow this breach to take place, but compelled performance instead, this would likely operate to prevent parties from entering into such transactions in the first place, which would, in this case, have cost society (or P) \$250. Therefore, a court would likely order P to pay \$1000 to A for his losses, which P would, of course, be happy to do, because even after compensating A, P would still make an additional \$250 as a result of the breach.¹⁴⁸ Indeed, in dicta, a court might¹⁴⁹ (and a wealth maximization theorist certainly

not to deter breach by compelling the promisor to perform, but rather to redress breach by compensating the promisee [sic]” and therefore is prohibited “when a court characterizes such a provision as a penalty”).

146. See, e.g., Anthony T. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 365–69 (1978) (arguing that expanding the remedy of specific performance could hurt efficiency by increasing prebreach negotiation costs), and RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 88–89 (2d ed. 1977) (arguing that expanding the remedy of specific performance could hurt efficiency by increasing postbreach negotiation costs). But see *Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284, 1289 (7th Cir. 1985) (Posner, J.) (responding to the argument that penalty clauses may discourage efficient breaches by arguing that competent parties will have taken these costs into account before entering into the contract and would have only included the penalty clause “if the benefits exceed those costs as well as other costs”); see also Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 291 (1979) (arguing that “making specific performance widely available at the election of the promisee would not result in more costly pre- or post-breach negotiations than the damage remedy does at present” and would “produce certain efficiency gains” by “minimiz[ing] the inefficiencies of undercompensation, reduc[ing] the need for liquidated damage clauses, minimiz[ing] strategic behavior, and sav[ing] the costs of litigating complex damage issues”); Goetz & Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554, 578, 584 (1977) (arguing that courts should enforce all liquidated damages clauses to maximize efficiency).

147. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 359(1) (1979) (reflecting the common law view that specific performance is only available where the damage remedy is inadequate); see also Schwartz, *supra* note 146, at 272–73 (“The paradigm cases in which the specific performance remedy is currently granted include sales of ‘unique goods,’ in which substitutional damages are difficult to compute; sales of land, because land is presumed unique; and, more recently, long-term requirements contracts, for which damages from breach are hard to calculate.” (citations omitted)).

148. Note that a wealth maximization theorist adopting the Paretian test of efficiency would require P to compensate A, leaving him with only \$250 after his breach, but a wealth maximization theorist adopting the Kaldor-Hicks test of efficiency would not require P to compensate A (so long as P were able to do so), thus leaving P with \$1250 after the breach. See *supra* note 5.

149. See e.g., *Patton v. Mid-Continent Systems, Inc.*, 841 F.2d 742, 750 (7th Cir. 1988) (Posner, J.) (“Even if the breach is deliberate, it is not necessarily blameworthy. The promisor may simply have discovered that his performance is worth more to someone else. If so, efficiency is promoted by allowing him to break his promise, provided he makes good the promisee’s actual losses.”); see also EISENBERG, *supra* note 21 (“The theory is approved in the Reporter’s Note to the Introduction to Chapter 16 of the RESTATEMENT (SECOND) OF CONTRACTS (1981), but Reporter’s

would¹⁵⁰) go even further, praising P for his actions, and noting that his breach was Pareto-optimal¹⁵¹ in that it made society better off because, after compensating A for his loss, A is no worse off than he was before, whereas P is better off to the tune of \$250, and B is better off because he got the widgets, which moved from a lower valued to a higher valued use.

Society, it would seem, is better off. But is it? Would the court's decision (and its treatment of the doctrines of efficient breach, specific performance, and penalty clauses) really maximize welfare? In this Part, I argue that it would not, because the theory of value that WMT relies upon is ephemeral at best, and completely breaks down upon closer examination, unless it is tied to the utilitarian concept of utility.

A. The Concept of Value

Recall that, according to WMT, courts should substitute dollar values for intrinsic values (that is, utility) not because maximizing dollars maximizes utility (it does not), but because dollars are easier to measure, and therefore maximize, than utility. To be sure, L&E scholars would reject this characterization of WMT, and argue that the utilitarian concept of welfare (happiness) is both analytically distinct from, and inferior to, the WMT concept of welfare (value or dollars).¹⁵² This distinction, however, cannot be maintained, because the very basis upon which the WMT concept of value rests is quintessentially utilitarian.

To see why, let us return to Judge Posner's widget hypothetical, and examine more carefully the claim that the breach there was efficient,¹⁵³ in that it left the parties and society better off.¹⁵⁴ If we examine this argument closely, it will be noted that the linchpin holding it together is the utilitarian assumption that the each widget was only worth \$0.14 to A, which was arrived

Notes reflect only the position of the Reporter, not that of the ALI. The theory has also been referred to in several cases as a reason for not granting punitive damages.”). *But see* Craig S. Warkol, Note, *Resolving the Paradox Between Legal Theory and Legal Fact: The Judicial Rejection of the Theory of Efficient Breach*, 20 CARDOZO L. REV. 321 (1998) (arguing that efficient breach theory has little influence over what judges do in practice).

150. See *supra* text accompanying notes 1–4.

151. See Posner, *supra* note 4, at 114.

152. See, e.g., POSNER, *supra* note 37, at 65 (arguing that “wealth is not just another name for happiness” and claiming that “the pursuit of wealth [is] . . . morally superior to the pursuit of happiness”).

153. Posner's claim is actually that the breach is efficient in a Paretian because both P and B are better off, while A is no worse off than before. See *supra* note 50 (discussing different types of efficiency).

154. See POSNER, *supra* note 144.

at by adding the \$0.10 A paid for each widget to the \$0.04 in damages¹⁵⁵ that would be awarded to A as a result of the breach.¹⁵⁶ But there is no evidence supporting the conclusion that A only valued these widgets at \$0.14 each, and thus no basis for equating value with price, because, although it is true that it is impossible to objectively measure the actual value A assigned to the widgets (an important point to which I shall return in Part III.B), it is almost certain that he valued them more than \$0.14. To see why, note that the efficient breach calculation above ignored, among other things, the intrinsic value (or utility) A may have attached to P's actual performance¹⁵⁷ by failing to take into account such factors as the "personal element ([including,] for example, embarrassment or humiliation resulting from breach of contract),"¹⁵⁸ the inconvenience and emotional stress caused by the breach,¹⁵⁹ the possible loss of customers from A (who could not meet customer demand) to B (who could), and the possible resulting damage to A's reputation,¹⁶⁰ just to name a few

155. This amount, of course, would be limited by the doctrines of avoidability, certainty, and foreseeability. See *supra* notes 140–142. These doctrines will be considered at greater length *infra* Part III.B.

156. See POSNER, *supra* note 144.

157. "Consider the well-known case of *Peevyhouse v. Garland Coal & Mining Co.*], 382 P.2d 109 (Okla. 1962)], in which a strip mining company breached its promise to restore a couple's farmland. If the land was important to them as a home as well as a source of income, the loss caused them by the breach could not be measured solely by a reduction in market value. Any economic analysis that assigns no value to their love of their home or treats the promise to restore the land as merely instrumental to protecting its market value is incapable of measuring the true costs and benefits of breach." Peter Linzer, *On the Amoralism of Contract Remedies—Efficiency, Equity, and the Second Restatement*, 81 COLUM. L. REV. 111, 117 (1981); see also *Jacob & Youngs v. Kent*, 129 N.E. 889, 891 (N.Y. 1921) (Cardozo, J.) ("It is true that in most cases the cost of replacement is the measure [of damages]. The owner is entitled to the money which will permit him to complete, unless the cost of completion is grossly and unfairly out of proportion to the good to be attained. When that is true, the measure [of damages] is the difference in value." (internal citations omitted)); see also Timothy J. Muris, *Cost of Completion or Diminution in Market Value: The Relevance of Subjective Value*, 12 J. LEGAL STUD. 379, 384 (1983) ("Subjective value necessarily exists if the original price of the performance exceeds the value in the market of that performance to other potential purchasers.").

158. LAWRENCE M. FRIEDMAN, *CONTRACT LAW IN AMERICA—A SOCIAL AND ECONOMIC CASE STUDY* 21 (1965).

159. John A. Sebort, *Punitive and Nonpecuniary Damages in Actions Based Upon Contract: Toward Achieving the Objective of Full Compensation*, 33 UCLA L. REV. 1565, 1647–48 (1986).

160. See, e.g., Thomas S. Ulen, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies*, 83 MICH. L. REV. 341, 347 (1984) (arguing that reputation is probably the most important nonlegal market force). Although it is impossible to measure its influence in enforcing performance, a clear relationship exists between "a regard for one's reputation and the decision not to breach a contract . . . All other things being equal, a business prefers to contract with a partner known to have completed his promises promptly and without contentiousness." *Id.* Of course, B must also worry about his reputation as a contract-breaker. As pointed out by Ulen in the same article, the market will effectively prevent B from breaching his contract where "the value of lost future exchanges is powerful" but may do a poor job where "the value of lost future exchanges is low," in which case "court-imposed remedies will be more efficient." *Id.* at 348. Indeed, Ulen has the good authority of the Bard on his side, who wrote over four hundred years ago that "[t]he purest treasure mortal times afford [i]s spotless reputation." WILLIAM SHAKESPEARE, *THE TRAGEDY OF KING RICHARD THE SECOND*, act 1, sc. 1.

of the more obvious considerations that would bear in significant ways on A's intrinsic value. These costs may be reflected in the price, but they need not be, especially—and this point has been largely ignored by WMT theorists—where A is a good negotiator.

To see why, suppose that A, taking into account his expected profit, but also factoring in the intrinsic value he assigned to performance (as discussed above), really valued P's widgets at \$0.20, not \$0.10. Further, assume that A was a good negotiator, and was able to talk P into selling him the widgets for \$0.10 (we would not expect a good negotiator to pay his highest price, would we?). Now, assume that B approaches P, as before, and offers him \$0.15 apiece per widget, a price above which A would have gladly paid had P been a better (or A been a worse) negotiator. Could we now hold that allowing P to breach his contract with A was efficient? The answer, of course, is no,¹⁶¹ and this illustrates nicely one of the more bizarre results of using market price (as opposed to the promisee's subjective valuation) as the basis for awarding contract damages: It tends to punish more severely those individuals that wealth maximization theorists should most want to reward (for example, good bargainers) because it is to them that wealth maximization theorists look to make their theory work by moving goods to those individuals who value them most.

Indeed, the better A can negotiate, the more surplus he or she will create in wealth maximization terms (by paying a lower price than is reflective of the true intrinsic value he or she attached to the promisor's performance), which would, in turn, not only make it more likely that an efficiently made contract be inefficiently breached, but would practically ensure that the judicially determined expectation measure of damages¹⁶² would be undercompensatory in most cases in which it was awarded. This outcome results because the larger the surplus A creates,¹⁶³ the greater the probability a third party such as B will swoop in and appropriate it by maneuvering between A's true intrinsic value and the contract price.¹⁶⁴ This outcome can be illustrated by returning to the widget hypothetical discussed above, where we can see that any breach

161. Unless, of course, it was the case that B happened to value the widgets even more than A did (in other words, more than \$0.20 per widget).

162. See FARNSWORTH, *supra* note 45.

163. Measured here as the difference between the true intrinsic value that A attached to the widgets and the price he or she actually paid.

164. A striking corollary to this is that such a theory could also operate to reward bad bargainers (like P) by leaving third parties (like B) more room to negotiate between the actual contract price and A's true intrinsic value, which would, in effect, reward P (by giving him a better price) for poorly negotiating his contract while punishing A (by giving him a price below his true intrinsic value) for his superior negotiating skills.

by the promisor would be inefficient whenever it was the case that B valued the widgets less than A did, but more than the contract price (for example between \$0.11 and \$0.19 in the pianola hypothetical). And this, in turn, would often happen whenever A was a particularly good negotiator. Thus, for example, if we assume that A valued the widgets at \$0.20, then the breach at \$0.15 (which was postulated in the widget hypothetical) would clearly be inefficient, and the award of \$1000 would undercompensate A by not giving him the benefit of his bargain, which is, after all, the very purpose of contract law damages.¹⁶⁵ Even more strikingly, under this regime, bad bargainers (such as the seller of the widgets above) may be rewarded because third parties (such as B) have more room to negotiate between the previously negotiated contract price (which would be low in proportion to the seller's poor bargaining skills) and A's true intrinsic value,¹⁶⁶ which would, in effect, reward the bad bargainer for poorly negotiating his contract (by giving him a better price than he originally bargained for), while simultaneously punishing A for his superior negotiating skills (by giving him a price below his true intrinsic value). To be sure, the greater the difference between the promisor's poor bargaining skills and the promisee's superior bargaining skills, the more pronounced the distinction will become, much to the chagrin of the wealth maximization theorist wishing to promote efficiency.

In the previous example, the contract price of \$0.10 failed to fully capture the intrinsic value the promisee attached to the promisor's performance (that is, the intrinsic value represented by the difference between \$0.10 and \$0.20), but it at least captured some of that value (that is, the intrinsic value represented by the difference between \$0 and contract price, or \$0.10). There are, however, some situations in which the damages awarded under a WMT approach are not related at all, and sometimes even inversely related, to utility. This illustration can most clearly be shown in those instances where a party enters into an agreement that can simultaneously be characterized as both a "winning" utilitarian contract and a "losing" wealth maximization contract, which is to say, a contract that simultaneously increases a party's utility while decreasing that party's wealth.

Consider, for example, a vain homeowner who contracts with a sculptor to erect a colossal (and, in the minds of many, hideous) concrete statue of himself in the front lawn of his \$500,000 home, the completion of which would dramatically increase the homeowner's intrinsic value, or utility, while reducing

165. The purpose of contract damages is to give the injured party their expectation interest, or "benefit of the bargain." FARNSWORTH, *supra* note 45, § 12.1.

166. Which must always be higher than the price actually paid, as will be discussed later in this Part.

the dollar value of his home to \$300,000.¹⁶⁷ If the sculptor begins to build the statue but then breaches by abandoning the project when a more lucrative opportunity presents itself, the homeowner bringing suit will find that he is compensated quite differently under a regime seeking to maximize utility rather than wealth. Under the first regime, a utility-maximizing court would be most likely to award the homeowner specific performance¹⁶⁸ or “cost of completion” damages,¹⁶⁹ both of which would give the homeowner (or allow the homeowner to get) exactly what he bargained for—a colossal (even if, in the eyes of many, ugly) statue of himself in his front yard, even though doing so would reduce the dollar value of his home. On the other hand, a court that operated under the WMT framework would be most likely to refuse to award the cost of completion remedy (because it would operate to decrease the wealth of society and the parties to the contract), and opt instead for “diminution in value,”¹⁷⁰ or the difference between the dollar value of the home before the breach (\$500,000) and after the breach (\$300,000). Because this amount is negative—in other words, because the sculptor’s breach actually saved the homeowner \$200,000—the court will refuse to award any damages at all, even though the promisee not only contemplated—but contracted for—a loss in dollar value to his property in exchange for an increase in utility at the time of entering into the contract. To be sure, an exchange of wealth for utility was not only the sole purpose of this particular promisee’s contract, but, as can be shown, is the sole purpose of nearly every legally enforceable contract that is freely entered into by consenting adults.

Be that as it may, a wealth maximization theorist would probably shrug her shoulders at the above analysis, and would certainly be puzzled by all the discussion surrounding utility and intrinsic value, reminding this author that these concepts are fraught with problems still unsolved, and cannot hope to serve as a meaningful basis upon which calculating damages for the breach of contract may rest.¹⁷¹ Indeed, even if a wealth maximization theorist agreed with the above analysis and conceded that WMT’s reliance on the expectancy does not perfectly capture a promisee’s intrinsic value, she would likely dismiss

167. This example is loosely based on RESTATEMENT (FIRST) OF CONTRACTS § 346, illus. 4 (1932), which itself was likely inspired by *Chamberlain v. Parker*, 45 N.Y. 569, 572 (1871).

168. Although, if the contract is characterized as a personal services contract, the court would be unlikely to award this remedy as doing so would violate public policy. See, e.g., *Lumley v. Wagner*, (1852) 42 Eng. Rep. 687, 693 (Q.B.).

169. See, e.g., *Groves v. John Wunder Co.*, 286 N.W. 235, 245 (Minn. 1939) (awarding cost of completion damages).

170. See, e.g., *Peevyhouse v. Garland Coal Mining Co.*, 382 P.2d 109, 114 (Okla. 1962) (awarding loss in value damages); see also *supra* note 157.

171. See *supra* Part II.B.

it as a moot point, arguing that a judge, being unable to measure intrinsic value, cannot use this concept as the basis for determining damages for the breach of contract. She might then conclude by pointing out that the criticisms of WMT discussed above, even if true, miss the mark in that wealth maximization theory, and the expectancy interest, even with its shortcomings, is the best practical alternative for solving the sticky issue of determining damages for the breach of contract, and it was largely because of this reason that wealth replaced utility as the maximand in the first place.¹⁷²

But what are these dollars that serve as the foundation of wealth maximization theory? What, really, is this maximand called wealth? To be sure, monetary value is nothing more than the average price (or market price) of a good or service, determined through the forces of supply and demand, of numerous individuals coming together in a marketplace and, through their transactions, revealing their idiosyncratic preferences, or utilities, which are in turn reflected in collective averages known as price. And during this revelatory process, it can be shown that consumers who subjectively value a good or service offered in the marketplace more than the market price attached to that good or service will buy it, and those who value the good or service less than the market price will not.¹⁷³ To see why, consider the following example.

Suppose Johnny goes to a car dealership to buy a car, and there sees a Honda Accord selling for \$20,000 that he likes very much. What forces will determine whether Johnny buys that car or walks off the lot? There are numerous psychological forces at work, to be sure, but it is safe to say that Johnny will buy the car if, at the time of making his decision, he intrinsically values the car more than the market values the car (for example, more than the average value, or price, placed on the car by the collective agreement of every participant in the market). In other words, if Johnny's intrinsic value, or utility, exceeds the monetary value, or price, placed on the car by the market, Johnny will buy the car. Why? Because he will attach more

172. See, e.g., Posner, *supra* note 4, at 119.

173. See, e.g., Ulen, *supra* note 160, at 344 n.7 (“Consumers’ surplus is the area beneath the demand curve and above the market price. It is a measure of the difference between what consumers are willing to pay for various units of a commodity, as measured by the points on the demand curve, and what they in fact paid, as measured by the market price. In the law and economics literature, this difference between the market price of an item and the consumer’s valuation of it is frequently said to be due to the consumer’s ‘subjective valuation.’ One of the tenets of modern microeconomics is that in a competitive market, the market price will just equal the subjective valuation of only the last, or marginal, consumer to purchase the commodity. All other consumers, called ‘inframarginal’ consumers, place a subjective value on the commodity that is greater than the market price.” (quoting HEINZ KOHLER, INTERMEDIATE MICROECONOMICS 203–04 (1982))).

satisfaction, or intrinsic value, to owning the car, than he would lose by parting with the \$20,000 dollars, and people, who are defined by wealth maximization theorists as “rational maximizers of their satisfaction,”¹⁷⁴ should logically engage in such satisfaction-maximizing transactions.¹⁷⁵

If, on other hand, Johnny intrinsically values the car at only \$15,000, while society values it at \$20,000, Johnny will not buy the car. Why? Because the satisfaction or utility Johnny would derive from keeping the \$20,000 would exceed the utility he would derive from buying the car. But would Johnny buy the car if he intrinsically valued it at exactly \$20,000, and saw the car selling for exactly that price? The answer is still no, because if Johnny would derive the same amount of utility from keeping the money in his pocket as he would by purchasing the car, then the transaction costs alone, as measured in terms of utility, of reaching into his back pocket to pull out his wallet would disincentivize him from doing so (unless, of course, he derived utility from pulling out his wallet, in which case he might buy the car after all).¹⁷⁶

It can thus be seen, then, that Johnny’s decision to purchase or not purchase the car was determined exclusively by reference to utility, and not wealth. Indeed, the dollar amount attached to a good need not (and usually will not) reflect the intrinsic value that a particular individual will attach to a good, but will operate instead to facilitate exchange by allowing a party to compare his or her intrinsic value to the collective average intrinsic value (or price) that a marketplace attaches to that good. And, it can further be shown that, like Johnny, an individual will buy the good in question if, at the time of the transaction, they associate a higher intrinsic value to the good (or a lower intrinsic value to their dollars) than does the market, whereas the individual will not buy (or will become a seller of) the good where the opposite is true. Dollars, then, simply serve as a convenient medium of exchange by which to facilitate this comparison between intrinsic and market values, and have no intrinsic value of their own of which to speak—a relatively straightforward point that should not need mentioning but for the fact that it is all too frequently forgotten. Certainly, there is nothing particularly special about dollars (or any other currency, for that matter), as the dollar-based universe inhabited by wealth maximization theorists is but one of many possible universes that could have been so inhabited, and it is just as easy to imagine the

174. POSNER, *supra* note 37, at 1.

175. See, e.g., Birmingham, *supra* note 52, at 279 n.20 (“Individual preferences are taken to indicate changes in individual well-being, and a man is said to be better off when he voluntarily changes his position from A to B when he could have remained in A.”).

176. For a discussion of the importance of transaction costs, see *supra* note 43.

use of pebbles, seashells, or whale teeth as our commonly-agreed-upon medium of exchange, in which case a wealth maximization theorist would be forced to advocate, in the name of wealth, the maximization of those items instead.

But maximizing the medium of exchange—for its own sake—is silly, as a society with more whale teeth could not be better off than a society with fewer whale teeth, at least on account of the whale teeth. And—to be clear—I do not believe (or at least I do not hope) that wealth maximization theorists are making this claim, either in terms of dollars or whale teeth. Rather, to make sense of the theory, what I understand wealth maximization theorists to be saying is that, because we cannot directly measure (and therefore maximize) intrinsic value, we ought instead to capture it as best we can by maximizing the medium of exchange (for example, dollars) that best approximates this value. And, if this is correct, then what the wealth maximization theorist is really concerned about is not maximizing the medium of exchange at all, but rather maximizing intrinsic value, or the satisfaction that individuals attach to the medium of exchange. Therefore, the wealth maximization theorists' desire to maximize dollars should only be understood as valid to the extent that it functions as a proxy for maximizing satisfaction. And if we presume, as discussed above, that utilitarians are unable to measure and intersubjectively compare different levels of satisfaction,¹⁷⁷ the wealth maximization theorists' decision to substitute dollars for utility seems to be an entirely sensible one.

It should be clear, then, that expressing the concept of value through the concept of wealth as measured by a medium of exchange (such as, dollars) is meaningful in proportion to the extent that the medium of exchange actually reflects intrinsic value, and in inverse proportion to the extent that it does not. This outcome results because, as was previously discussed, the medium of exchange is meaningless except to the extent it reflects individual expressions of utility. It should thus be clear that no theory, including WMT, can be based on the underlying premise that wealth is pursued for its own sake, because, as we have seen, wealth must be pursued as a means of satisfying intrinsic value, or “utility.”¹⁷⁸ Indeed, although wealth maximization theorists

177. Not surprisingly, Aristotle recognized the function of the medium of exchange as helping to solve the problem of measuring and intersubjectively comparing values over 2000 years ago, noting that “all things that are exchanged must be somehow comparable [and] it is for this end that money has been introduced, and it becomes in a sense an intermediate; for it measures all things.” ARISTOTLE, *supra* note 8.

178. See, e.g., Veljanovski, *supra* note 5 (“Economic man does not have a preference for wealth but for some end captured by the term ‘maximizing utility.’ Wealth is a means not an end.”); see also Coleman, *supra* note 64, at 527 (“Unlike happiness or well-being, wealth is not something of intrinsic value. If the pursuit of wealth is a good, it must be because pursuing wealth promotes other things of value.”). Indeed,

insist upon a firm separation between the concepts of utility and wealth, even they are unable to escape employing the utilitarian concept of value in furtherance of their wealth maximization aims. Consider, for instance, the following example:

[Suppose] I offer you \$5 for a bag of oranges, you accept, and the exchange is consummated. We can be confident that the *wealth* of society has been increased. Before the transaction you had a bag of oranges *worth* less than \$5 to you and I had \$5; after the transaction you have \$5 and I have a bag of oranges *worth* more than \$5 to me. We are both richer, as measured by the *money value* we attach to the goods in question.¹⁷⁹

The above example insists that the transaction is beneficial from a wealth maximization perspective because it increases the wealth of society and the wealth of the parties. And “wealth,” it will be recalled, has been defined by wealth maximization theorists as the “value in *dollars* or *dollar equivalents* . . . of everything in society.”¹⁸⁰ So far, so good. But how, exactly, can it be that an exchange of dollars for oranges resulted in an increase in wealth? The key move is made in the third sentence, where the author resorts to the utilitarian concept of “worth” (that is, intrinsic value) to justify the claim that society’s wealth (“dollars or dollar equivalents”) has increased. Parsing the language more carefully, we note that two very different concepts of worth (that is, the utilitarian concept of intrinsic value and the wealth maximization concept of “dollars or dollar equivalents”) are being used interchangeably with one another, the utilitarian concept of intrinsic value carrying the weight at the very moment the wealth maximization concept of value begins to break down. If we disambiguate these two concepts of value and more accurately reconstruct the above example, however, what we are told is that, in essence, a society and both parties to the transaction are wealthier because the party who sold the oranges intrinsically valued them less than he

even a miser who claims to maximize wealth for its own sake only does so because he is unaware of his true intentions: He really maximizes it to satiate his utilitarian urges, even if those urges are understood to be the maximization of dollars for the sheer joy of maximizing dollars.

This point is demonstrated even among wealth maximization theorists, who have themselves been unable to meaningfully separate the idea of “wealth” in wealth maximization theory from the idea of “utility” in utilitarianism, as can be seen in their very definition of “wealth” itself as the “*value* in dollars and dollar equivalents of everything in society,” and “efficiency” as the “exploit[ation of] resources in such a way that ‘*value*’—human satisfaction as measured by aggregate willingness to pay for goods and services—is maximized.” Veljanovski, *supra* note 5, at 550 (emphasis added). As explained above, both definitions are meaningless without recourse to utilitarianism to explain this sense of “value” relied upon by the wealth maximization theorist.

179. Posner, *supra* note 4, at 120 (emphasis added).

180. *Id.* at 119 (emphasis added).

or she intrinsically valued the \$5, and the party who bought them intrinsically valued them more than he or she intrinsically valued the \$5.

But when we look at the matter from this perspective, what we see is that something significant has happened from a utilitarian perspective (that is, the intrinsic values of both parties to the transaction has been increased), while little that is remarkable has happened from the perspective of wealth maximization theory. Why? Because, as measured in terms of dollars or dollar equivalents, we observe that, before the transaction, there existed one bag of oranges and one \$5 bill. After the transaction, we still observe the same bag of oranges and the same \$5 bill—and nothing more. Society's wealth, as measured in terms of dollars, is exactly the same as it was before.¹⁸¹ If the parties are better off at all, they are better off only in the utilitarian sense of the word. And indeed, this is exactly what the explanation embedded in the example above really suggests has changed: Society and the parties are better off in the utilitarian sense because each party was able to exchange something intrinsically worth less to them for something intrinsically worth more to them. As a result of this transaction, the goods have moved from a lower-value to a higher-value use in a utilitarian sense because each party valued the thing he or she gave up less than the thing he or she received in return. Both parties feel better off, and are better off after the exchange than they were before the exchange, but again, only in utilitarian terms. In terms of dollars, however, the *collective wealth of the parties and of society is exactly the same as what it was before* (the money and the oranges have simply changed hands). Even more notably, in terms of dollars, one of the parties is actually richer than he or she was before by \$5, while one of the parties is now poorer than he or she was before by \$5, a result that simply cannot be explained on the basis of wealth maximization theory alone.

181. See, e.g., Coleman, *supra* note 64, at 523 ("A's exchange of his last orange for B's last two apples is neither wealth maximizing nor wealth reducing. While we can infer from the exchange that A prefers B's last two apples to his last orange—that A's utility increases when he has the two apples—and that B prefers A's last orange to her last two apples—that her utility increases when she has that one orange—we cannot say anything at all about whether the transaction has increased wealth—A's, B's, or society's—in the absence of prices."). One could argue, however, that if a large company such as Tropicana bought these oranges because they have large industrial juicers that can immediately convert these \$5 oranges to \$10 orange juice, thereby moving the oranges to higher valued uses, then such a transaction really has created wealth, and a court recognizes this fact by allowing such an established business to recover their lost profits in the case of breach. Although such a company does (and ought to) recover lost profits, I would argue that these profits, too, can only be justified on utilitarian grounds. In other words, it is the fact that the company, because of their industrial juicers, intrinsically values the oranges so highly (because they can make money by juicing them) that their recovery of lost profits is justified, because in the case of a corporation operating solely to maximize profits, its intrinsic value will be identical to its expected profit.

Indeed, it can at this time be said that a party will only contract for land, goods, or services if that party believes, at the time of entering into the contract, that he or she will derive more utility from the land, good, or service to be obtained than the disutility he or she will suffer from having to give up the thing required to obtain it (for example land, goods, services, or money).¹⁸² To be sure, it must therefore be the case that, in the absence of duress, fraud, unconscionability, and the like, transactions that are voluntarily entered into (and protected via the mechanism of contract) are agreed to because the utility (and not the wealth)¹⁸³ that the person acquiring the land, good, or service expects to gain exceeds the utility (and not the wealth) that the person expects to lose in giving up the consideration required to obtain it, and that the utility or intrinsic value referred to above is, in all cases, necessarily subjective.¹⁸⁴

The implications of this distinction cut decisively against the applicability of WMT to contract law, for reasons that will be discussed in greater detail in Part III.B below. But one immediate implication is that, in an action brought for damages for the breach of contract, an award of an objective expectation remedy is an illusion and will rarely fully compensate a party for the thing for which he or she contracted. This is because, by definition, the person who entered into the contract must have, at the time of contracting, intrinsically valued the land, good, or services he or she contracted for more than he or she valued the consideration he or she had to give up to obtain it, and therefore more than the market price attached to the land, good, or service, which is what courts often use to calculate expectation damages.¹⁸⁵

182. See, e.g., Muris, *supra* note 157 (“Subjective value necessarily exists if the original price of performance exceeds the value in the market of that performance to other potential purchasers.”). This claim, of course, assumes that each party acted freely and without coercion. Where this assumption does not hold, the traditional contract defenses of duress, fraud, unconscionability, and the like should operate to preclude the enforcement of the contract.

183. See *supra* text accompanying note 135.

184. For purposes of argumentation, this Article assumes, along with wealth maximization theorists, that individuals act rationally and properly evaluate their own satisfactions, two assumptions that have (rightly) come under attack as of late by behavioral economists. While this condition probably holds true much of the time, there are undoubtedly important exceptions where it does not. See, e.g., *infra* text accompanying notes 187 and 203.

185. See, e.g., Richard Craswell, *Contract Remedies, Renegotiation, and the Theory of Efficient Breach*, 61 S. CAL. L. REV. 629, 636 (1988) (“The stated goal of contract damages is . . . ‘to put the plaintiff in as good a position as he would have been in had the defendant kept his contract.’ In economic analysis, this is usually translated as . . . the amount necessary to leave the plaintiff absolutely indifferent, in *subjective* terms, between having the defendant breach and pay damages or having the defendant perform.” (emphasis added) (quoting *Hawkins v. McGee*, 84 N.H. 114, 117 (1929))); Melvin Eisenberg, *Actual and Virtual Specific Performance, The Theory of Efficient Breach, and the Indifference Principle in Contract Law*, 93 CAL. L. REV. 975, 991 (2005) (“[I]f damages are based on a market-price

There are at least two reasons for believing that the promisee's claim to the promisor's performance vis-à-vis an award of expectation damages may be, in utilitarian terms, even stronger than the case that has been made out so far. First, in addition to the fact that the utility a promisee attaches to a promisor's performance will almost always exceed the disutility the promisee must incur to purchase the promisor's performance ex ante, research suggests that, once the deal has been made, if the promisee comes to think of the performance owed to him or her as a property entitlement,¹⁸⁶ the promisee will then attach additional utility to the promisor's promise ex post due to the endowment effect.¹⁸⁷ And second, there is strong evidence indicating that poor people may value their dollars more than rich people, so that the marginal value of each dollar is worth more to them, in utilitarian terms, than someone with more dollars at their disposal.¹⁸⁸ This implies that, in those cases where the promisee is relatively poor vis-à-vis the promisor, he or she will intrinsically value the promisor's performance even more than a court is likely to take into account in awarding damages for the breach of contract.¹⁸⁹

In sum, then, it is clear that utility, or intrinsic value, is almost always a more accurate measure of the true value an individual places on a good or service than is its price. And because intrinsic value is more accurate, if we are really interested in maximizing the welfare or utility of individuals and/or society, courts that rely on money damages via the expectancy as a crude proxy for utility will never fully succeed in doing so.

construct, rather than on the buyer's valuation, there will be regular shortfalls between expectation damages and the amount required to make the buyer indifferent between performance and damages.”)

186. See *supra* note 39.

187. “The endowment effect describes the fact that people demand much more to give up an object than they are willing to spend to acquire it.” Steffen Huck, Georg Kirchsteiger, and Jörg Oechssler, *Learning to Like What You Have—Explaining the Endowment Effect*, 115 *ECON. J.* 689, 689 (2005). Holmes himself suggested the existence of such a principle when he wrote in 1897 that [a] thing which you enjoyed and used as your own for a long time, whether property or opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man.

Holmes, *supra* note 29, at 477. Although, admittedly, Holmes' approach seems to apply only to those situations where a property right in a particular good has been established for some time, it is remarkable how similar his ideas are to the instant endowment effect referred to here. See, e.g., Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 *J. POL. ECON.* 1325, 1342 (1990) (describing the “instant endowment effect” by noting that “the value that an individual assigns to [objects] appears to increase substantially as soon as that individual is given the object”).

188. See, e.g., STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 648 (2004) (“[T]he marginal utility of a dollar to a poor person is likely to exceed the marginal utility of a dollar to a rich person.”).

189. Although this trend will operate in the other direction where the promisee is relatively rich vis-à-vis the promisor.

B. The Problem of Measurement

We must now return to the problem of measurement discussed at the outset of this Article.¹⁹⁰ A wealth maximization theorist might well agree that reference to the concept of utility better explains market transactions than does the concept of wealth, and might even agree that, in an ideal world, a consequentialist should be concerned with maximizing utility rather than wealth. They would point out, however, that because utility cannot be observed in any meaningful way, it cannot be measured with any accuracy. And because it cannot be measured with any accuracy, it cannot be maximized. And because it cannot be maximized, it cannot be used as the basis for legal analysis, which largely explains why WMT recommended substituting in place of utility a calculable and comparable maximand, which they found in wealth or dollars.¹⁹¹ Thus, a wealth maximization theorist might conclude, these arguments, even if true, are, once again, irrelevant.

And, as a purely theoretical matter, they would be correct. But, as a practical matter, they would be wrong. Ironically, even though intrinsic value (for example, utility) cannot be measured with any precision, whereas wealth (such as dollars) can be measured perfectly, it is only intrinsic value (and not wealth) that can be maximized in contract law. How? Through the judicial enforcement of specific performance¹⁹² and liquidated damages¹⁹³ provisions as default remedies.¹⁹⁴

190. See *supra* Part II.B.3.

191. This line of reasoning, for example, is adopted by Posner, who observed that if A proposed marriage to B, and B accepted A's offer, Paretian welfare economics suggest that both parties must be better off in a utilitarian sense (that is, their welfare or happiness must have increased), "for if both A and B were not made better off by the transaction at least one of them would refuse to consent to it." Posner, *supra* note 4, at 114. Although Posner is aware that such "a market transaction increases the happiness of the parties over what it was immediately before the transaction took place," he nevertheless abandons the utilitarian approach, pointing out (correctly) that "happiness" does not "meet the utilitarian's need for a dependable metric" for the reasons discussed in Part II.B. above. *Id.*

192. "The most direct form of equitable relief for breach of contract is specific performance. By ordering the promisor to render the promised performance, the court attempts to produce, as nearly as is practicable, the same effect as if the contract had been performed." FARNSWORTH, *supra* note 45, § 12.5.

193. Liquidated damages allow the parties to stipulate in advance a sum payable as damages, which generally takes into consideration the risks of the transaction and may ultimately reduce the cost of proof should litigation later arise. FARNSWORTH, *supra* note 45, § 12.18.

194. There are, to be sure, other remedies that have been proposed that provide more adequate compensation to the promisee than traditional expectation damages, but I do not believe that any of them are able to capture the promisee's ex ante intrinsic value as well as either specific performance or liquidated damages provisions. However, it should be noted that other remedies may perform other important functions better than either specific performance or liquidated damages, such as dissuading a promisor from breaching, promoting justice, or ensuring that a breaching party does not profit from her own wrongs. See, e.g., Richard R.W. Brooks, *The Efficient Performance Hypothesis*, 116 YALE L.J. 568, 578–86 (2006) (arguing for increased use of disgorgement as a judicial remedy in

To see why, recall that specific performance, or the good or service contracted for, must, by definition, always be worth more to an individual at the time of entering into the contract than the utility that he or she attached to the consideration exchanged to obtain that good or service.¹⁹⁵ Otherwise, as previously discussed, this individual would have never entered into the contract in the first place. By specifically enforcing the contract, then, courts can ensure that they fully capture (and maximize) ex post the utility the promisee assigned to the promisor's performance ex ante, even though the utility cannot (and indeed, need not) be measured.¹⁹⁶

The same holds true with regard to liquidated damages provisions, because the amount provided for, even if seemingly high, may be set in such a way as to not only compel performance (which, from a utility standpoint, might be desirable), but to price it ex ante by putting the promisor (and the

cases of efficient breach); Daniel Friedmann, *Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong*, 80 COLUM. L. REV. 504, 515 (1980).

195. This is why it is incorrect to limit the availability of specific performance to those cases where money damages are inadequate to protect the promisee's expectation interest—they will always be inadequate. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 359(1) (1979) ("Specific performance . . . will not be ordered if damages would be adequate to protect the expectation interest of the injured party."). Similarly, there is no reason to limit specific performance to those cases where the goods are unique on the grounds that parties attach idiosyncratic value to such goods, because, as has been shown, parties attach at least some idiosyncratic value to every good or service for which they contract. See, e.g., Kronman, *supra* note 146, at 370–74.

In common discourse "unique" means without a substitute or equivalent. In the framework of conventional economic analysis, however, the concept of uniqueness is troublesome.

Although it might seem reasonable to define the economic uniqueness of a good in terms of its attributes or properties, this is not the definition economists employ. Economists recognize this sort of uniqueness . . . but they do not define the substitutability of goods in these terms.

Id. at 358–59. Even Professor Ulen, who goes further than most in advocating specific performance as the default remedy for breach of contract, merely suggests that parties be allowed to opt for specific performance instead of damages "where the promisee attached some particular *subjective valuation* to the promisor's performance." Ulen, *supra* note 160, at 375. This formulation is entirely correct, of course, but it suggests that there may be instances where a promisee does not attach a subjective value to the promisor's performance, but this is a contractual impossibility for the reasons that have been discussed.

196. See, e.g., Remington, *supra* note 32, at 684 (arguing that by enforcing specific performance, courts need not second-guess the value each party placed on the contract); see also Ulen, *supra* note 160, at 365–66 (arguing that specific performance "offers the most efficient mechanism for protecting subjective values attached to performance," "promotes contract breach only if it is efficient," and reduces postbreach negotiation costs by ensuring that parties, not courts, determine and reveal through the process of negotiation their intrinsic values). It is important to point out at this time that the utility realized by the parties ex post will frequently differ—sometimes dramatically—from the utility the parties assigned to the transaction ex ante. This is due to the fact that the forward-looking nature of all contracts implies an element of risk that must necessarily be borne by the parties to the contract, and the future may reward (or not) the parties by giving them more (or less) than they bargained for by attaching greater (or lesser) utility to the actual transaction ex post than was assigned by the parties themselves ex ante.

court) on notice regarding the intrinsic value that the promisee places on the promisor's full performance.¹⁹⁷ In light of the fact that these clauses probably reflect the best way for parties to quantify and reveal their intrinsic values at the time of entering into a contract, a court's refusal to enforce them *ex post* seems to be not only paternalistic and inefficient,¹⁹⁸ but often pernicious (even from a consequentialist perspective) in that it can incentivize inefficient breaches by converting the promisee's utility-maximizing liquidated damages provision into a windfall payment rewarding the breaching party's utility-reducing nonperformance.

These principles can be illustrated by returning, once again, to the widget example discussed above.¹⁹⁹ Recall that, even after paying \$1000 in damages to A, P's breach yielded a \$250 profit, which, as viewed by WMT, appeared to be an efficient breach in that it "created" \$250 of wealth while simultaneously transferring widgets to a "higher valued use."²⁰⁰ But, as we have just seen, the breach may have actually been inefficient because wealth was not created (it was merely transferred from one party to another), and the goods would have only moved to a higher valued use if B intrinsically valued

197. See, e.g., *Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284, 1289 (7th Cir. 1985) (Posner, J.) (responding to the argument that penalty clauses may discourage efficient breaches by arguing that competent parties will have taken these costs into account before entering into the contract and would have only included the penalty clause "if the benefits exceed those costs as well as other costs"); see also Ulen, *supra* note 160, at 351 ("If the parties are convinced that the clause will be enforced, the contract will be breached only when it is more efficient to breach than perform."). It is therefore odd that courts should require as one of the conditions that must be satisfied before enforcing a liquidated damages provision that the provision reflect "a reasonable estimate at the time of contracting of the likely damages from breach," as one should expect a liquidated damages provision to exceed monetary damages, because, as we have seen, people will only enter into contracts if their intrinsic value exceeds the market price at the time of transacting. *Lake River Corp.*, 769 F.2d at 1289 (emphasis added).

The promisee, of course, would have to pay a premium to the promisor for the inclusion of such a clause, which the promisor would collect as an insurance premium guaranteeing her performance. But this is desirable, as the promisor, having more control over her performance than anyone else, can provide this insurance more cheaply than anyone else, which increases the utilities of both parties. See, e.g., Ulen, *supra* note 160, at 351 ("Consider a construction contract in which the buyer is especially eager to have the project completed by a specified date. Suppose that he is extremely doubtful of the contractor's ability to meet that deadline, but that the contractor is certain of his ability to complete performance by the specified date. It may be that the least expensive way for the contractor to convey to the seller his conviction about his ability to perform is for him to stipulate his willingness to pay seemingly punitive damages for each day beyond the deadline that the project remains uncompleted.").

198. Ulen, *supra* note 160, at 363-64 ("It is probably the case that stipulated damages, if enforced even with a seemingly punitive element, are a less costly way to protect subjective valuation than are expectation damages.").

199. See *supra* text accompanying note 144.

200. See Posner, *supra* note 4, at 119.

them more than A, a fact about which we know nothing.²⁰¹ But we do not need to. If a court enforced specific performance and refused to let P breach his contract, he would be forced to buy his way out of the contract by negotiating a release with A.²⁰² If A intrinsically valued the widgets between \$0.10 and \$0.15, he should agree to mutually rescind the contract at a price between the contract price (\$0.10) and his intrinsic value (say, \$0.14), after which P could then subsequently contract with B at a price between this amount (\$0.14) and the price B attaches to his own intrinsic value.²⁰³ If, on the other hand, A intrinsically valued P's performance more than B, P would not be

201. See, e.g., Linzer, *supra* note 157, at 116 ("Efficiency theory requires valuing all costs and benefits of breach; consequently, much of the scholarship in law and economics has been devoted to measuring values for which there is no conventional market. The problem with this approach, however, is that it is hypothetical—there is no actual auction going on. The economist can only speculate about what is important to the parties, and is likely to ignore or denigrate those values that only the parties can accurately assess.").

202. Or, if he refused to breach, B could have attempted to negotiate directly with A, which again A would only agree to if the intrinsic value B attached to the widgets exceeded the intrinsic value A attached to the widgets. Posner frowns on such a result, claiming that it would have "introduced an additional step, with additional transaction costs—and high ones, because it would be a bilateral-monopoly negotiation. On the other hand, litigation costs would be reduced." POSNER, *supra* note 2, at 119. I will return to the issue of transaction costs in Part III.C, but it is worth noting here that, if the breach is allowed, there will be two bilateral-monopoly negotiations (one between P and B, and another between A and a new supplier). Posner is right to take into account these costs, but they need not be given any special consideration as they exist in all contracts, whether one is negotiating under a regime allowing or forbidding efficient breach. Further, as Posner himself recognizes, whether any potential reduction in transaction costs would outweigh any increases in litigation costs is an empirical question that may be resolved either in favor of, or against, efficient breach theory.

203. As Professor Daniel Farber noted, if transaction costs are nonexistent, a third party (C) who values X more than the promisee (B), will end up with X, even if the promisor (A) does not breach because, for example, breach is a capital offense. Daniel A. Farber, *Reassessing the Economic Efficiency of Compensatory Damages for Breach of Contract*, 66 VA. L. REV. 1443, 1449–50 (1980) ("[Assume that] B, a buyer, and S, a seller, contract for the production of unique goods. Before the delivery date, X (a third party) offers to buy the goods from S. Assum[e] zero transaction costs. . . . To take the most extreme case, suppose that breach of contract w[as] a capital offense. S would not be willing to breach even if X offered to pay far more than the goods are worth to B. X would still ultimately receive the goods, however, as X would either pay B to assign him the contract or buy the goods from B after delivery. Absent transaction costs, no assignment of liability will prevent the parties from achieving this distribution of goods. In short, in a world without transaction costs, commodities always flow to higher-valued uses. But commodities will normally flow to higher-valued uses even in a world with transaction costs and universal specific performance."); see also Craswell, *supra* note 185, at 632 ("Whatever the legal rule, the parties will always negotiate to their most preferred remedy, and will always adjust the price to the level appropriate to that remedy."). But see, e.g., Kahneman, Knetsch & Thaler, *supra* note 187, at 1326 (arguing that the "wide acceptance of the Coase theorem assertion that, subject to income effects, the allocation of resources will be independent of the assignment of property rights when costless trades are possible . . . contrasts sharply with empirical observations of significantly higher selling than buying prices").

able to buy his way out of the contract. But this would be desirable, because such a breach would be inefficient.²⁰⁴

The same can be said with regard to liquidated damages provisions, even those including so-called penalty clauses, which, like specific performance, may help capture the parties' utilities, but from a different perspective. When parties negotiate a liquidated damages provision, they are, in essence, revealing and pricing their ex ante utilities, whereas when parties perform (or where specific performance is enforced by a court), it is the ex post utilities, or the utility at which the promisee happens to intrinsically value the promisor's performance at the time that performance comes due, that is captured.²⁰⁵

204. This Article should not be read as advocating the absolutism of specific performance, however. There are clearly certain instances in which, economics aside, it would be imprudent to award specific performance, such as where the traditional contract defenses of frustration of purpose, impossibility, and impracticability apply, and perhaps even where the costs of a court monitoring specific performance are prohibitively high, although this would be less of a concern in the case of liquidated damages, where the court need only monitor the payment of money damages. See, e.g., *Grossman v. Wegman's Food Mkts., Inc.*, 350 N.Y.S.2d 484 (App. Div. 1973) (“[C]ourts of equity are reluctant to grant specific performance in situations where such performance would require judicial supervision over a long period of time.”); Ulen, *supra* note 160, at 397–401. This Article, then, should not be read as advocating the sacrifice of these firmly embedded contract law principles at the altar of specific performance, which, from a utilitarian perspective, would itself require the measuring and comparing of utility to do so—a task I readily concede utilitarianism is unable to perform. Nor should this Article be read as advocating the complete overthrow of other principles of contract law, such as the requirements of good faith and fair dealing, which again would require a thorough utilitarian analysis to make this determination. Rather, the argument advanced in this Article is that utility, rather than wealth, should be maximized within the confines of contract law—including the presently existing contract law defenses and doctrines of good faith and fair dealing—so that, in those situations in which a court formerly sought to maximize wealth, it should now look to maximize utility.

205. Indeed, the importance of this distinction can best be illustrated by considering the three ways in which the difference between the ex ante and ex post utilities at which a promisee values a promisor's performance can affect the relationship between the specific performance remedy and the liquidated damages remedy. The first scenario, in which the ex ante utility at which a promisee intrinsically values a promisor's performance remains unchanged between the time of entering into the contract and the time of the promisor's breach, is probably the least interesting of the three scenarios, for in this instance the promisee should be indifferent between receiving specific performance and having a court enforce the liquidated damages clause. In the second scenario, however, the ex ante utility a promisee attaches to a promisor's performance may increase between the time that the contract was made and the time of the promisor's breach. In this case, the promisee would clearly prefer specific performance to the enforcement of the liquidated damages clause, as the enforcement of the latter would represent a lower ex ante intrinsic value than the promisee currently attaches to the promisor's performance. Indeed, awarding specific performance here would result in a windfall of sorts, because the promisee presumably would have collected a premium from the promisor at the time of entering into the contract for the inclusion of the liquidated damages provision, and the award of specific performance would thereby allow the promisee to keep this premium without appropriately compensating the promisor, which would be in clear violation of both parties' ex ante intent. Under the third scenario, where the ex ante utility a promisee attached to a promisor's performance decreased in the interim, a promisee would clearly prefer to have a court enforce the liquidated damages clause, which reflected the higher ex ante intrinsic value the promisee once attached to the promisor's performance, which is for some reason now worth less to the promisee. Even here, however, a court should not be reluctant to enforce the liquidated damages clause because, although it

Taken as a whole, the above analysis reveals a hierarchy of remedies that courts should employ when compensating promisees in breach of contract cases: First, where parties have stipulated damages in a liquidated damages provision, courts should give serious weight to these expressed *ex ante* intentions, and enforce these clauses to the exclusion of all other remedies.²⁰⁶ This is because these clauses constitute the only device available to a party wishing to reveal his or her utility to a court by accurately pricing the *ex ante* intrinsic value he or she assigns to the other party's performance. In addition, enforcing such clauses not only takes seriously the parties' original intent by allowing courts to enforce the parties' original allocation of risk—including specifically the risk of nonperformance—but a failure to do so will result in a forfeiture to the party who paid a risk premium for a clause that was not enforced. Further, it is only through the enforcement of such clauses that truly efficient breaches are even possible, for it is only in such cases that courts can be sure that a promisor paying a liquidated sum to a promisee is not failing to capture accurately the promisee's *ex ante* intrinsic value or any unforeseeable or uncertain damages that may be suffered by the promisee as a result of the promisor's breach, unless the promisee himself failed to disclose these risks to the promisor at the time of entering into the contract.²⁰⁷

There is, however, an additional benefit to liquidated damages provisions that should also be discussed at this time, which is that by having a provision that stipulates a specific dollar amount that would need to be paid in the event of breach, an efficient renegotiation between the parties becomes

is no longer an accurate reflection of the *ex post* utility the promisee attaches to the promisor's performance, it nonetheless more accurately reflects the way in which the parties themselves allocated the risk of nonperformance at the time they entered into the contract, in addition to further suggesting that the parties themselves contemplated (and planned for) the possibility of breach. On this view, refusing to awarding liquidated damages would not only upset the *ex ante*, risk-distribution mechanism the parties created when they made their contract, but would replace the parties' *ex ante* intent with the court's *ex post* judicial discretion.

206. This statement should not be read to mean, however, that liquidated damages provisions, where they exist, should be enforced absolutely. Rather, this remedy, like all remedies proposed in this Article, should be subject to the same qualifications as the specific performance remedy detailed *supra* note 204 (that is, the traditional contract law defenses and the doctrines of good faith and fair dealing). Thus, for instance, under this regime, one need not fear the demands of a promisee seeking the enforcement of a penalty clause allowing him to cut a pound of flesh from the promisor for the latter's breach of contract, as such a provision would clearly violate public policy. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE*, act 4, sc. 1.

207. Notably, where the parties had first negotiated a liquidated damages provision, and were then subsequently faced with the option of performing or breaching their contractual obligations to the other party, both consequentialists and nonconsequentialists would be forced to accept, under the remedial regime described above, the descriptive validity of the Holmesian approach to contract law, which held that "[t]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else." Holmes, *supra* note 29, at 462.

possible. Returning to our hypothetical, if B offers P an amount in excess of the liquidated damages that P must pay to A, P may simply breach and pay the liquidated amount,²⁰⁸ which will fully compensate A for the ex ante intrinsic value he assigned to P's performance. And from society's perspective, here we can actually say that the breach was Pareto efficient in that the goods moved to a higher valued use without making any party worse off than before.²⁰⁹ If, on the other hand, B offered P an amount less than the amount provided for in the liquidated damages provision, P would not breach—nor would society want him to—because such a breach would fail to adequately compensate A for the intrinsic value he assigned to P's performance at the time of making the contract, and would therefore result in an inefficient allocation of resources.²¹⁰

Second, this hierarchy suggests awarding specific performance where the parties did not themselves provide for a liquidated damages provision, because, as discussed earlier, the promisee will get exactly what he or she bargained for ex ante, including any ex ante intrinsic value he or she attached to the promisor's performance, while at the same time shielding the promisee from damages that were unforeseeable or uncertain at the time of entering into the contract, but that are nonetheless real.²¹¹

208. Indeed, where the parties have contemplated and subsequently included a bargained-for liquidated damages provision, it may not even be proper to speak in terms of a breach at all. This is because, where such a clause exists, it must be said that the parties expressly took into account the possibilities of both performance and nonperformance (plus the payment of a liquidated amount), such that either action could be properly characterized as alternative performances pursuant to the terms of the contract.

209. This assumes, of course, that the utility the promisee attached to the promisor's performance ex ante did not substantially increase between the time he or she made the contract and the time of the promisor's breach. See *supra* note 205. However, even where this assumption does not hold, this is not problematic from a contract law perspective because the promisee should have already factored in the risk of breach when he or she was negotiating the liquidated damages provision ex ante, and should have received an appropriate premium to compensate him or her for this risk.

210. Professor Craswell acknowledged this when he wrote:

Indeed, sometimes an efficient result could be obtained by ex post adjustments that did not require the cooperation of the other party to the contract, and thus did not require any actual "renegotiation." For example, if a large damage award [such as could be found in a liquidated damages provision] would deter the seller from selling to a higher-valuing second buyer, efficiency might be achieved, not by the seller's buying a release from the first buyer, but by the first buyer taking delivery of the goods and reselling them to the second buyer. By definition, if the second buyer values the goods more highly than does the first buyer, the second buyer will be willing to pay a price sufficiently high to make the resale profitable for the first buyer, so long as the costs of resale are sufficiently low. Thus, in some situations low resale costs can achieve the same effect as low renegotiation costs since both are species of ex post transaction costs.

Craswell, *supra* note 185, at 635 (footnote omitted).

211. Once again, it must be emphasized that nothing stated here should suggest awarding specific performance where there are valid contractual defenses available to the promisor, such as impossibility,

And last, this hierarchy suggests awarding expectation damages only where, first, the parties have not themselves already provided for a liquidated damages provision,²¹² or second, where, on public policy grounds or otherwise,²¹³ a court is unable to award the remedy of specific performance.

To be clear, my proposal should not be read as suggesting that expectation damages are inappropriate and should never be awarded. Rather, my proposal should be read as advocating the replacement of the current default rule that, largely by historical accident,²¹⁴ currently prefers to award as the default remedy money damages (and, in particular, expectation damages) for the breach of contract, with a new default rule implementing a hierarchy of remedial enforcement that would, first, judicially enforce liquidated damages where the parties have provided for such a provision in their contract,²¹⁵ second, in the absence of such a provision, award specific performance,²¹⁶ and third, where neither the enforcement of liquidated damages or specific performance was possible (or practical),²¹⁷ to award expectation damages, while leaving the parties free to contract around these default rules as they see fit. Under this regime, the burden would be shifted to the promisor to show why the liquidated damages provision, where it existed, or specific performance, where it did not, should not be enforced, rather than placing the burden on the promisee to show, as he or she must do today, why the liquidated damages provision or specific performance should be enforced.

impracticability, or frustration of purpose. Indeed, as I noted earlier, I am assuming that the framework set forth above operates within, and not outside of, the traditional contract law defenses discussed earlier. See *supra* note 204.

212. Subject, of course, to the qualification discussed *supra* note 206.

213. See generally *supra* note 204.

214. The doctrine that stipulates that specific performance should not be available unless money damages are inadequate, for example, has its roots in legal history, rather than logic or theory. In the Anglo-American legal system, only courts of equity could act in personam, which meant that only they, and not law courts, could enter decrees requiring a promisor to specifically perform his or her contractual obligations to the promisee. However, in part to preserve the power of law courts vis-à-vis courts of equity, a plaintiff could not petition a court of equity for specific performance unless he or she could first show that legal relief was inadequate. In the case of specific performance, also as a result of historical accident, this meant that the promisee would have to show that the subject of the contract was unique. Although courts of law and equity have long since merged, the historical requirement for obtaining specific performance has essentially remained unchanged. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 359(1) (1979). Perhaps F.W. Maitland said it best when he noted that, though the forms of action have long been buried, “they still rule us from their graves.” F.W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 2 (1962). To this point, it is notable that many civil law countries allow a promisee to demand specific performance even where goods are not unique. See, e.g., Bürgerliches Gesetzbuch [BGB] [Civil Code] Aug. 18, 1896, §§ 241, 243.

215. This requirement is subject to the qualifications discussed *supra* note 206.

216. This requirement is subject to the qualifications discussed *supra* note 204.

217. See *supra* note 215.

In addition to the reasons discussed above, arranging the default rules in this order would best effectuate parties' ex ante intentions because, as an empirical matter, it is probably the case that, at the time of contract formation, most parties who include liquidated damages provisions (even those that, at first glance, appear high) expect them to be enforced, and in all probability paid a premium to the other party for the inclusion of the provision.²¹⁸ And second, in the absence of such a provision, most parties probably contemplate performance, rather than breach (plus a payment of money damages), and on this ground alone, if we are serious about effectuating parties' ex ante intentions, it makes sense from default-rule perspective to require specific performance unless the parties first contracted around this second default rule.

In sum then, while the measuring of utility is (and ought to be) of deep concern to philosophers, I hope I have shown that it need not concern judges, who, through the enforcement of liquidated damages provisions and, in the alternative, specific performance, have at their disposal what classical utilitarians such as Bentham and Mill could have only dreamt of—a mechanism capable of locking up the respective utilities of the parties via the consent-based mechanism of contract. By simply enforcing these contracts, it is submitted that judges will be able to maximize utility to a greater extent than either Bentham or Mill ever thought possible, even though they cannot (and need not) measure it.

C. The Renegade Wealth Maximization Theorist

Let us now consider the wealth maximization theorist who claims that he or she does not embrace WMT due to the problems inherent in utilitarianism, but rather embraces WMT because he or she believes it to be superior to utilitarianism.²¹⁹ This claim seems particularly odd when applied to contract

218. Notably, under the present regime that disfavors the enforcement of liquidated damages provisions where they appear “too high” or do not otherwise “reasonabl[y] estimate at the time of contracting . . . the likely damages from breach” [i.e., expectancy]. *Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284, 1289 (7th Cir. 1985) (emphasis added). I am not aware of a single case in which a court has returned to the promisee the premium he or she paid for the inclusion of an unenforceable liquidated damages provision, even though, it would seem, the promisor's retention of this premium would result in unjust enrichment.

219. See generally Posner, *supra* note 4, at 131–36 (arguing that wealth maximization avoids the “utility monster” problem which, for example, would allow a utilitarian to torture people if their utility exceeds their victim's disutility by forcing them to “buy [their] victims' consent, [which would] soon deplete the wealth of all but the wealthiest sadists”). Judge Posner further notes that: “[t]he great difference between utilitarian and economic morality, and the source I believe of the ‘monstrousness’ of the former, is that the utilitarian, despite his professed concern with *social* welfare, must logically

law, where we have already observed that parties enter into transactions to maximize utility, and not wealth, and often intentionally reduce their wealth to increase their utility.²²⁰ Nevertheless, let us take up this argument on its own terms. Suppose that wealth maximization—and not utility maximization—is our goal. Putting utility to the side, then, one must still necessarily ask: Does WMT do what it promises to do? In other words, does WMT maximize the wealth of the parties and of society? As I will argue below, even here, the answer is no in most cases.

To see why, let us return once again to our widget hypothetical, and recall what happened to the net wealth of society, as measured in dollars, both before and after the breach. Doing so, one will quickly note that, first, society's wealth was not maximized after P was allowed to breach his contract with A, and indeed, we cannot even say that the wealth of the parties to the contract was maximized. A's wealth, of course, was not maximized, and was probably minimized, because it would have been limited by judicial doctrines such as foreseeability and certainty²²¹ which were discussed earlier. And although P now has \$250 more than he did before, and is therefore richer by this amount, this \$250 came from B's pocket, and so B is now poorer by the same amount.²²² The combined wealth of P and B, and therefore of society, remains unchanged.

And what of the argument that the goods were transferred to a higher valued use? This claim, though it may be true, cannot be pressed by a renegade wealth maximization theorist, because a wealth maximization theorist who claims to have rejected utilitarianism cannot fall back on the quintessentially utilitarian argument that a breach is efficient on account of it allocating resources from parties who value them less, in a utilitarian sense, to those who value them more, in the same utilitarian sense. Further, there is no reason to believe that this argument, even were it pressed by a utilitarian, would be true, because there is no basis for concluding that B valued the widgets more than

ascribe value to all sorts of asocial behavior, such as envy and sadism, because these are common sources of personal satisfaction and hence of utility." *Id.* at 132. He then goes on to note that "[i]f Nazi Germany wanted to get rid of the Jews, in a system of wealth maximization it would have had to buy them out." *Id.* at 133. One should hope the Jews would be afforded more protection than this, however, and it is worth emphasizing that the public policy protections outlined in this Article would, at least with respect to this and similar concerns, prevent such moral atrocities from taking place regardless of the sadists' wealth, and would refuse, in this and similar cases, to allow even the wealthiest sadist from buying his victim's consent. See *supra* notes 204 and 206.

220. See, e.g., *supra* text accompanying notes 182–184.

221. See *supra* text accompanying notes 140–142.

222. Indeed, B need not have even paid the additional \$250 to P if he had been able to beat A to the punch and contract with P first for \$0.10 per widget.

A simply because he agreed to pay more for them.²²³ As discussed previously, this result could have been just as easily obtained via A's superior (and/or B's inferior) bargaining skills.²²⁴

Second, because wealth was not maximized but, at best, transferred from one party to another (and, at worst, minimized once A's undercompensatory damages are taken into account), the wealth of society would actually be reduced once we consider transaction costs.²²⁵ For example, A might be forced to spend additional sums vindicating his rights through the legal system, time and money finding a new supplier of widgets to meet customer demand, and, if he was successful in finding a new supplier, additional resources negotiating a new contract with him or her. And, it is worth noting, none of these costs would have been included in the award of monetary damages (that is, expectation damages) paid to A (\$1000), which would have merely reflected A's lost profits.

Third, wealth maximization theory does not take into account unforeseeable²²⁶ or uncertain²²⁷ damages that may have flowed as a result of the breach. For example, assume that, as a result of P's breach, A was unable to secure widgets elsewhere, which in turn caused him to breach contracts with several of his own customers, one of whom, in turn, went out of business as a result of A's breach. Let us further suppose that, as a result of going out of business, society also suffered damages, none of which could, of course, be calculated with any reasonable certainty at the time of P's breach. Further, let us assume that A also suffered unforeseen and incalculable (uncertain) damages to his reputation and goodwill as a result of P's breach. Of course, none of these costs could currently be recovered because they would have been unforeseeable at the time of entering into the contract, and, even if foreseeable, because they could not be calculated with reasonable certainty. However, just because these damages are limited in the legal sense does not make their wealth-minimizing impact any less real in the economic sense, and these unaccounted for losses would render the applicability of WMT to contract

223. A similar point was made by Professor Melvin Eisenberg, who noted that even though "the amount the overbidder offers to pay now is, by hypothesis, greater than the amount that the buyers agreed to pay earlier . . . this tells us little or nothing about the parties' respective valuations at the time of breach." Eisenberg, *supra* note 185, at 1004.

224. See *supra* Part III.A.

225. See, e.g., Friedmann, *supra* note 43, at 6 ("[T]he efficient breach rule is inefficient on its own terms . . . [It does not have] the desired effect of minimizing either the number of transactions or, more decisively, the total amount of transaction costs.").

226. See *supra* text accompanying note 140.

227. See *supra* text accompanying note 141.

law as an illusion in all but theory.²²⁸ To be sure, society would have suffered a very real loss, and if the voting public subsequently determined that these costs needed to be remedied ex post by redistributing public funds, then, in addition to what has already been said, these redistributive transfers would entail additional transaction costs still, which would further increase the inefficient allocation of society's resources.²²⁹ In short, then, just because a judge is allowed to ignore these damages as a practical matter does not give license to a wealth maximization theorist to ignore them as a theoretical matter in objectively determining whether the wealth of society (or even the wealth of the parties to the contract) was maximized. While the law itself may deal in relatives, a theory justifying those rules must deal in absolutes.

But what about the other criticisms identified in Part II.B above? Do these criticisms not render utilitarianism unworkable, and, even if workable, undesirable? No. Although these criticisms are meritorious when applied to utilitarianism broadly defined, they are not valid when applied to utilitarianism within the realm of contract law. Let us revisit some of these criticisms here to see how the basis of mutual assent upon which much of contract law is founded renders most of them inapplicable. One of the first criticisms we identified was the decision utilitarians were confronted with regarding the type of utilitarianism he or she wished to advocate, and we concluded that there was very little consensus regarding which brand of utilitarianism should govern. But a judge enforcing a contract need not be concerned with this inquiry at all. It may be the case, for example, that, at the time of entering into a contract, Party A operated from a rule-utilitarian perspective, whereas Party B operated according to act-utilitarianism. Nevertheless, the two parties were able to enter into a contract with one another, and this is because each party maximized his or her own ex ante utility as he or she best understood it at the time of entering into the contract (that is, according to his or her own ex ante utilitarian approach), which may (or may not) be reflected in a liquidated damages provision specifically revealing each party's ex ante intrinsic value according to each party's own understanding of that value.²³⁰ If a promisor then breached, a judge deciding the remedial question need not inquire into

228. Moreover, the analysis up to this point has not even taken into account transaction costs, see *supra* note 43, or judicial error rates (that is, the rate of false positives and/or false negatives that inevitably occur when judges attempt to calculate the expectancy)—either factor of which would, by itself, suggest a remedy resulting in either over- or undercompensation, even by a competent judge.

229. See, e.g., Veljanovski, *supra* note 5, at 557; see also the discussion of transaction costs at *supra* note 43.

230. A, of course, would only enter into such a contract if, as a rule, those types of contracts tended to maximize her utility over the long run, whereas B might only enter into such a contract if she thought that this particular transaction would increase her utility.

(or even be concerned with) the utilitarian framework from which the nonbreaching party was operating. Rather, the judge need only simply enforce the contract,²³¹ which would by itself ensure that the ex ante utilities assigned by each party to the other party's performance (however assigned and according to whichever type of utilitarianism by which each party operated) is maximized.

Additionally, a judge need not be concerned with attempting to ascertain the particular maximand each party sought to employ (for example, eudaimonia, hedonism, or virtue²³²) in operating under their own version of utilitarianism. Once again, by simply enforcing the parties' contract, a court would ensure that each party's maximand, however conceived ex ante, would be brought to fruition ex post, even though the court is not (and need not be) able to ascertain (or even be aware of the problem of ascertaining) the maximand(s). Nor would it be necessary for a judge to be concerned with distinguishing between the various qualities of the maximand—even to prevent the moral monstrosity of a utility monster—for at least two reasons. First, although the systemic application of utilitarianism to all areas of law might give one good reason to fear a "utility monster"²³³ as a general matter, one need not harbor such a fear within contract law itself because of its own built-in protections, such as the prohibition against illegal contracts, contracts contravening public policy, or contracts where one or both of the parties are mentally incapacitated parties.²³⁴ Second, even if these protections were removed, one still need not fear the utility monster for the same reason that the wealth maximization theorist does not fear him: In contract law, the utility monster would have to contract with the other party and "buy [his] victims' consent," which "would soon deplete the wealth of all but the wealthiest sadists."²³⁵

Determining the horizontal and vertical scope of the maximand is also a simple matter once we confine utilitarianism to the law of contracts: Those people who are able to contract count, whereas those who are not able to contract do not count. In other words, the scope of the maximand may be expanded or narrowed depending on the contract itself, which may exist, for example, between two or more persons, or between a person and a corporation,

231. Looking, first, to any liquidated damages provision the parties may have negotiated, second, to specific performance in the absence of such a provision, and third, to expectancy where specific performance cannot be awarded on grounds of public policy or otherwise (for example, the goods have been unintentionally destroyed). See *supra* Part III.B.

232. See discussion *supra* Part II.B.2.

233. See *supra* text accompanying note 114.

234. See *supra* text accompanying notes 204 and 206.

235. See, e.g., Posner, *supra* note 4, at 131; see also *supra* note 219 (showing that there is even less reason to fear a utility monster in contract law than there is in utilitarianism generally due to the built-in protections of contract law).

or between a corporation and a government, but never among minors or among the mentally incapacitated. And, for the reasons that have already been discussed in Part III.B above, courts themselves need not be concerned with observing, measuring, calculating, or intersubjectively comparing *ex ante* utilities among the contracting parties because this has already been done for them by the parties and conveniently locked up into their contract, which a judge may unlock by simply enforcing the contract. In other words, many of the criticisms that plague utilitarianism as applied to society at large disappear when utilitarianism is more narrowly confined to contract law.

Additionally, a number of wealth-maximizing (in addition to utility maximizing) consequences would likely result from a court's decision to adopt the utilitarian approach and routinely enforce liquidated damages clauses and, in the alternative, award specific performance for the breach of contract.²³⁶ First, it would seem, contracts themselves would become more valuable. As Roscoe Pound famously noted in his *Introduction to the Philosophy of Law*, "[w]ealth, in a commercial age, is made up largely of promises."²³⁷ And this is undoubtedly truer today than when the words were first penned almost a century ago. One would therefore expect the dollar value attached to such promises to be maximized (both in utilitarian and wealth maximization terms) in a regime where promises were routinely enforced.²³⁸ This is because the value of the promisor's future performance, "X," could be thought of as the value the promisee assigned to this performance,²³⁹ multiplied by the probability that a court would force the promisor to perform "X,"²⁴⁰ plus the intrinsic value the

236. But see Eisenberg, *supra* note 185, at 978 (arguing against both the theory of efficient breach, which "does nothing to promote efficiency," and routine specific performance, in favor of what he calls "virtual specific performance," which entails awarding specific performance unless there are "moral, policy, or experiential" reasons for not doing so, or unless the market solution of cover is available). Later in his article, Professor Eisenberg also suggest that the promisee not be allowed to "put the seller in [a] fork" by bringing a suit for damages (which are "measured by the market price at the time of the breach") while simultaneously bringing a suit for specific performance, because this would allow the promisee to act opportunistically in that he could drop his suit for damages if the price subsequently rose, or instead drop his suit for specific performance if the price subsequently fell. *Id.* at 1025–26 (emphasis omitted). There is much merit to this claim, and one solution may well be to force the promisee to choose either specific performance or monetary damages at the time of bringing her suit, or to allow her to maintain her election but to measure the market price of the good or service at the time the suit is resolved, rather than at the time of breach.

237. ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 236 (1922).

238. By "routinely enforced," I mean to suggest a regime in which courts would first look to enforce liquidated damages provisions where the parties have explicitly provided for them, and in which specific performance would be awarded otherwise, subject to the qualifications articulated in *supra* notes 204 and 206, and *supra* text accompanying notes 214–217.

239. This value should be discounted to the present. See *infra* note 242.

240. Performance here means forcing the promisor to pay the liquidated damages provision, where applicable, or enforcing the remedy of specific performance otherwise.

promisee assigned to the promisor's nonperformance²⁴¹ (that is, the judicial remedy, or expectancy) discounted to the present, multiplied by the probability of the promisor's nonperformance. Thus, for example, if A promised performance "X" to B, which B intrinsically valued at \$100, but thought that A was only 50 percent likely to perform (and further thought that a court would not require A to perform), and if B further valued the legal remedy (that is, expectation damages) at \$85, which would be awarded 50 percent of the time (when the promisor did not perform his promise), then B would intrinsically value the entire promise, "X," at $(\$100 \times .50) + (\$85 \times .50) = \$50 + 42.50 = \92.50 , discounted to the present.²⁴² From this, one can readily see that a court can instantly increase the collective wealth of society by simply enforcing promises, because doing so would increase the probability that the promised performance would ultimately be rendered.²⁴³ Thus, to illustrate, if courts followed the suggestions made in this Article and sought to implement a hierarchy of remedies that sought first to enforce liquidated damages provisions, where applicable, then award specific performance, and then expectation damages,²⁴⁴ thereby increasing the probability of the promisor rendering the promised performance to the promisee to, say, 95 percent,²⁴⁵ then the value of the promisor's performance to the promisee would jump immediately to $(\$100 \times .95) + (\$85 \times .05) = \$95 + 4.25$, or \$99.25, creating an instant \$6.75²⁴⁶ in wealth to this particular promisee by simply changing the default rule. Imagine spreading this gain across billions of promisees making about \$1 trillion dollars worth of transactions per day in today's global economy,²⁴⁷ and we can begin to understand the power of Pound's insight.²⁴⁸

241. This value should also be discounted to the present. See *infra* note 242.

242. The present value can be calculated by dividing this value, "X" (here, \$92.50) by $(1 + r)t$, where r is the interest rate and t is the unit of time remaining until A's performance comes due.

243. Interestingly, Posner seems to recognize (without further developing) this point, and writes that "most of the conventional pieties—keeping promises, telling the truth, and the like—can also be derived from the wealth maximization principle . . . by reducing the costs of policing markets through self-protection, detailed contracts, litigation, etc." Posner, *supra* note 4, at 123 (citing ALTRUISM, MORALITY, AND ECONOMIC THEORY (Edmund S. Phelps ed. 1975)). It is interesting to note, therefore, that Posner should associate keeping promises with wealth maximization, on the one hand, but also associate the efficient breaching of contracts with wealth maximization, on the other.

244. See *supra* text accompanying notes 206–213.

245. It is unlikely it would ever be desirable for this number to reach 100 percent for the reasons detailed *supra* notes 204 and 206.

246. Calculated by subtracting the value of the promisor's performance to the promisee under the current regime, or \$92.50, from the value of the promisor's performance to the promisee under the suggested regime, \$99.25, for a difference of $\$99.25 - \92.50 , or \$6.75.

247. Sarah van Gelder, *Rethinking Costs and Benefits*, ISSUES IN GLOBAL EDUC. (Am. Forum for Global Educ.), 1997–1998, <http://www.globaled.org/issues/146/a.html>.

248. See *supra* text accompanying note 237.

Second, but related to the first point, it may be the case that individuals will be more likely to make contracts under a regime that routinely enforces promises, which itself would thereby increase society's wealth by increasing the total amount of promises made.²⁴⁹ This result occurs because, under this new regime, by increasing the overall value of the promisor's promised performance to the promisee, or "X," many more contracts would be entered into than are entered into at present, which would make the total value of promised performances in society, or wealth, even larger than it has already been represented.²⁵⁰ This is because, by increasing the value of "X," promisees, and especially those who are good negotiators,²⁵¹ would now negotiate with promisors for performances that previously would not have been valuable enough to negotiate. Put another way, by increasing the probability of enforcement, promisees who previously did not value a given "X" enough to negotiate for it would now find the promisor's promised performance to be sufficiently valuable to negotiate over, which would, on the margin, increase the total number of contracts entered into across society by increasing the total number of mutually beneficial exchanges that could (and would) now be made.

Third, enforcing promises would likely reduce transaction costs between parties in a number of ways, including, for example, reducing litigation costs,²⁵² minimizing the costs of parties engaging in strategic behavior,²⁵³ reducing the costs parties would otherwise expend scrambling to find (and negotiate contracts with) other contracting parties upon a promisor's breach,²⁵⁴ and reducing the total number of subsequent transactions parties would have to engage in to effect cover²⁵⁵ in an attempt to obtain substitute goods or services.²⁵⁶

249. It could, of course, be the case that people attach greater value to promises that are less likely to be performed, and would therefore enter into fewer contracts if courts routinely awarded specific performance, but this seems unlikely.

250. See *supra* text accompanying notes 237–248.

251. See *supra* notes 161–166.

252. See, e.g., Schwartz, *supra* note 146 (“[M]aking specific performance widely available at the election of the promisee would . . . save the costs of litigating complex damage issues.”).

253. *Id.*

254. Cf. *Laclede Gas Co. v. Amoco Oil Co.*, 522 F.2d 33, 40 (8th Cir. 1975) (awarding specific performance in a long-term contract for propane because the promisee “probably could not find another supplier of propane willing to enter into a [similar] long-term contract” and noting that even if the promisee could secure another supplier, “it would still face considerable expense and trouble which cannot be estimated in advance”).

255. “Cover” is defined by section 2-712(1) of the Uniform Commercial Code as “any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.” U.C.C. § 2-712(1) (2004).

256. But see POSNER, *supra* note 2, at 119 (arguing that forcing the parties to negotiate with each other increases bilateral-monopoly negotiation costs).

We can press this matter even further, however, and consider how a utilitarian would respond to a wealth maximization theorist who proposed to justify the viability of the expectancy by overturning, for example, such a venerable case as *Hadley v. Baxendale*,²⁵⁷ which would expand the expectation remedy by allowing previously unrecoverable unforeseeable costs to now be recovered.²⁵⁸ Assume further that, in this *Hadley*-less regime, a party like P (in the widget hypothetical)²⁵⁹ was able to make so much money from his breach (for example, \$25,000), that, even after compensating A for all of his money damages, unforeseeable and otherwise, he was still able to pocket money for himself. Could one now say, in this instance, that the total wealth of society, as measured in dollars, has finally been maximized? Surprisingly, no. All one could say is that the breaching party, P, made out just fine. Remember, A is still no better off than he was before the breach (and, as discussed earlier, is probably worse off from a utility standpoint), nor can we say that the collective wealth of society, or even the combined wealth of P and B, is greater than it was before the breach. Wealth, as measured in terms of dollars, is exactly the same as it was before, because the wealth that accrued to P came out of B's pocket.

But, a wealth maximization theorist might argue, is it not true that society is better off, and not the same, because although B departed with a large sum of money (that is, over \$25,000) he now has over \$25,000 worth of widgets? No. Again, this argument can only be made by relying on the utilitarian notion of value, as shown by the use of the word worth, and not the wealth maximization notion of value, as measured in terms of dollars or dollar equivalents.²⁶⁰ Although it is likely true that society's wealth as measured in terms of utility did increase, a renegade wealth maximization theorist, once again, is not entitled to press this argument. Indeed, by pushing WMT to its extremes, as we have done here, it becomes clear that it can only be justified, if it can be justified at all, as a derivative of utilitarianism, which, I would suggest, implies that it should only extend to those areas of the law that

257. (1854) 156 Eng. Rep. 145 (Ex.).

258. Although it might seem strange to see a wealth maximization theorist take such a position because limiting the promisee's losses to those that are reasonably foreseeable is usually defended on efficiency grounds, such a position is not necessarily incompatible with the wealth maximization approach. In addition to the reasons discussed above, Ulen suggests that even if unforeseeable losses were frequently captured in specific performance awards, it would not necessarily result in overcompensation because "a limitation would likely become a part of the contract itself, either in the form of a waiver of liability for consequential damages or as specified in a liquidated damages clause." He goes on to note that "[b]argaining at contract formation time about either of those alternatives would lead to an efficient assignment of liability." Ulen, *supra* note 160, at 395.

259. See *supra* text accompanying note 144.

260. See *supra* note 125.

utilitarian analysis is unable to reach. Contract law, however, is not one of those areas, because here parties are able to measure and quantify their own utilities *ex ante*, intersubjectively compare them with one another through the processes of bargain and consent-based exchange, and then preserve these values in a contract, the value of which can subsequently be unlocked by a court that is willing to simply enforce them.²⁶¹ To be sure, there are many other areas of the law where applying utilitarian analysis would be much more difficult, if not impossible, and a wealth maximization theorist might well be justified in plying her trade within those areas.²⁶² If, however, as this Article has argued, both utilitarianism and WMT are, at their core, really concerned with maximizing utility, and if the latter is only useful to the extent that it serves as a crude proxy for the former, then, as this Article suggests, we should abandon the wealth maximization enterprise altogether within contract law and instead maximize utility directly through the judicial enforcement of contracts.²⁶³

CONCLUSION

This Article shows that, within contract law itself, utilitarian analysis—and not wealth maximization theory—ought to be the coin of the consequentialist realm. This is because wealth maximization theory's dependence on the utilitarian concept of value renders it unable to stand on its own terms, and makes it intelligible only as a utilitarian substitute. Such a substitute, however, is not needed within contract law, where the parties, through the processes of consent-based bargain and exchange, are able to capture (via contract) and reflect (to a court and to each other) their respective *ex ante* utilities. Further, and notwithstanding the moralistic concerns articulated by the nonconsequentialists against wealth maximization theory, the conclusions reached by utilitarianism within contract law is remarkably consistent with those reached by both the nonconsequentialist (promise-keeping) and the wealth maximization theorist (efficiency), although through entirely

261. See *supra* Part III.C.

262. Which is why this Article has not, for example, taken the position of Cento G. Veljanovski, who has argued that “[a]s a normative theory of law the wealth maximization principle must be judged a failure” because “[i]t does not, as claimed, provide the basis for a comprehensive theory of basic legal rights or corrective justice.” Veljanovski, *supra* note 5, at 550. Indeed, this Article has taken great strides to avoid this normative discussion altogether by restricting its inquiry to whether, as it exists, wealth maximization theory is able to maximize wealth within contract law at all. In doing so, I hope this Article has been able to show that, due to the unique, consent-based nature of contract law, the utilitarian problems of measuring and intersubjectively comparing utility within the realm of contract law, dissipate because the parties are able to lock up their respective utilities in the bargain, leaving a utility-maximizing judge with little to do but enforce these bargains (i.e., contracts).

263. See *supra* text accompanying notes 214–217.

different means (the judicial enforcement of contracts). Thus, the utilitarian approach helps reconcile consequentialism and nonconsequentialism within contract law by maximizing efficiency through the mechanism of promise keeping.²⁶⁴ It is left to others to determine whether, and to what extent, these conclusions reach beyond contract law, but it is suggested that they probably extend to other areas of the law based on mutual consent and advantage.

264. This idea, which operates at the level of a subtle leitmotif throughout this work, remains to be more fully developed in a future Article.