

Restitutionary Damages for Breach of Contract: An Exercise in Private Law Theory

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This article focuses on cases of restitution within contract, investigating the normative desirability of enabling a promisee to pursue the profits derived by the promisor through a breach of contract as an alternative pecuniary remedy of wide applicability. Situated at the frontier of both contractual and restitutionary liability, the question of whether restitutionary damages for breach of contract should be available has received a considerable amount of attention. This article makes a critical examination of the normative groundings that have been proposed for and against awarding this pecuniary remedy.

This article arrives at two significant conclusions. The first is deconstructive. Parts I and II critique two conventional arguments often raised in the debate over restitutionary damages. These Parts raise doubts as to the ability of these arguments to substantiate the doctrinal conclusions they purport to support. I claim that both promise-keeping and unjust enrichment are neutral between rules offering restitutionary damages and denying such awards. The significance of the results of this analysis extends beyond the specific questions at hand, since these arguments dominate many of the debates surrounding private law theory.

The second conclusion reached is reconstructive. Parts III, IV and V present three normative considerations that are more helpful: protection of proprietary rights, enhancement of efficiency, and good

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faith. Here an attempt is made to reconceptualize the conventional arguments for the derivation of legal rules from these normative prescriptions. From this reconceptualization, we realize that in order to settle the debate over restitutionary damages for breach of contract, a choice must be made between the instrumental conception of contract and its more cooperative alternative. Thus, it emerges that here, too, just as in the case of many other legal issues, the persistent need to choose between two conflicting social visions cannot be avoided.

INTRODUCTION

In recent years, the law of restitution has become the focus of much attention and excitement amongst Anglo-American academics, as well as within the judiciary. An issue currently under debate is the important question of whether restitutionary damages can supplement traditional contract remedies in cases of breach of contract for sale. In the celebrated case of *Surrey County Council v. Bredero Homes*,¹ the English Court of Appeal rejected a claim for recovery of the profits gained from a breach of contract for sale. By contrast, in 1989 the Israeli Supreme Court for the first time allowed this remedy in *Adras Building Material v. Harlow & Jones GmbH*,² considered to be an important landmark in the jurisprudence of the law of restitution.³

The *Surrey* rule reflects the traditional — and still prevailing — common law approach to the issue.⁴ The traditional doctrine does not generally

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- 1 [1993] 3 All E.R. 705. For a survey of previous case-law and the intricate attempts at reconciling it with *Surrey* (in aspects that are beyond the scope of this essay), see Guenter H. Treitel, *The Law of Contract* 840-42 (9th ed. 1995).
 - 2 C.A 20/82, *Adras Building Material v. Harlow & Jones GmbH*, 42(1) P.D. 221. The *Adras* case has been translated and published in English: 3 *Restitution L. Rev.* 235 (1995). All references below are to this translation.
 - 3 See, e.g., Daniel Friedmann, *Restitution of Profits Gained by Party in Breach of Contract*, 104 *L.Q. Rev.* 383 (1989).
 - 4 *Coca-Cola Bottling v. Coca-Cola*, 988 F.2d 386, 409 (3d Cir. 1993); *Hospital Products v. U.S. Surgical* (1984) 156 C.L.R. 41, 67-76, 118-19, 136-50; *Aggravated, Exemplary and Restitutionary Damages*, Law Commission Consultation Paper No. 132, 1993, at 159; *Aggravated, Exemplary and Restitutionary Damages*, Law Commission Report No. 247, 1997, at 38-42; Andrew Burrows, *Remedies for Torts and Breach of Contract* 308-10 (2d ed. 1994); 1 *Chitty on Contracts* 1206-08 (A. G. Guest et al. eds., 27th ed. 1994); Hugh Collins, *The Law of Contract* 307 (2d ed. 1993); Michael P. Furmston, Chesire, Fifoot and Furmston's *Law of Contract* 608 (13th ed. 1996); Peter D. Maddaugh & John D. McCamus, *The Law of Restitution* 436 (1990); Keith Mason & John W. Carter, *Restitution Law in Australia* 710-11

allow recovery of the promisor's profits from breach of contract, unless such a breach also constitutes a concurrent cause of action, such as breach of fiduciary duty. Only in exceptional cases (where either the profits can be said to approximate the promisee's lost profits⁵ or where the contract at issue is for the sale of "unique goods", most notably land⁶) does the traditional common law doctrine recognize this measure of recovery.⁷ The *Adras* rule, however, accepts restitutionary damages as a general pecuniary remedy for breach of contract for sale. This innovative rule challenges the traditional common law doctrine in this field.⁸

Several arguments, some doctrinal and others normative, dominate the debate over the desirability of providing restitutionary damages for breach of contract for sale. This article explores the normative justifications offered for making such a remedy available, as well as those for rejecting such an option. I focus exclusively on the commercial context common to both *Surrey* and *Adras* and will present five relevant normative considerations: enforcement of promise-keeping; prevention of unjust enrichment; protection of proprietary rights; enhancement of efficiency; and performance of contractual obligations in good faith.

My contention is that the first two considerations — promise-keeping

(1995); George E. Palmer, *The Law of Restitution* 437-52 (1978 & Supp., 1997); Andrew M. Tettenborn, *Law of Restitution in England and Ireland* 223 (2d ed. 1996); Treitel, *supra* note 1, at 839, 842. For Scottish law, see Laura J. Macgregor, *The Expectation, Reliance and Restitution Interest in Contract Damages*, 1996 *Jur. Rev.* 227, 243.

- 5 See Sidney W. DeLong, *The Efficiency of a Disgorgement as a Remedy for the Breach of Contract*, 22 *Ind. L. Rev.* 737, 747-48 (1989); Samuel J. Stoljar, *Restitutory Relief for Breach of Contract*, 2 *J. Cont. L.* 1 (1989).
- 6 See Law Commission Consultation Paper, *supra* note 4, at 159; Maddaugh & McCamus, *supra* note 4, at 434-35; Palmer, *supra* note 4, at 438-41. See also Stephen W. Waddams, *Profits Derived from Breach of Contract: Damages or Restitution*, 11 *J. Cont. L.* 115, 121 (1997).
- 7 Both in the United States and in England there is a recent willingness to expand the range of cases in which restitutionary damages for breach of contract will be allowed. *Earthinfo v. Hydrosphere Resource*, 900 P.2d 113 (Colo. 1995); *Attorney General v. Blake* [1998] 1 All E.R. 833, 844-46. In both jurisdictions, however, it still is emphasized that the mere breach of contract is not sufficient to make the defendant accountable for benefits thereby obtained. Furthermore, *Earthinfo* is a case of restoring benefits conferred by plaintiff, rather than benefits derived from the breach. Hence, the rule it announces respecting the latter issue is not binding.
- 8 Some commentators have argued that the *Adras* rule should replace the traditional doctrine. See, e.g., William Goodhart, *Restitutory Damages for Breach of Contract*, 3 *Restitution L. Rev.* 3 (1995).

and unjust enrichment — can in no way inform our discussion. I also will attempt to raise doubts regarding the validity of the analogy that is made between contractual rights and property rights (especially in land), which currently is so popular amongst restitutionary scholars. The normative value of protecting proprietary interests, then, would support the *Surrey* rule, rather than the restitutionary award granted in *Adras*. The argument based on efficiency similarly points to the *Surrey* rule, albeit based on a different analysis than the one usually offered for this conclusion. Finally, I will consider the principle of good faith, which may be interpreted as pointing to a third possible rule respecting the allocation of the profits from breach.

My hypothesis is that the *Adras* rule, which allows the plaintiff to recover all profits gained from the breach of contract, cannot be substantiated on the basis of any one of the normative viewpoints that will be canvassed in this article. This, however, does not necessarily vindicate the position taken in *Surrey*. While the *Surrey* rule can be supported by considerations of cost-efficiency and proprietary rights, I find that good faith considerations support a third possible rule, namely, one which divides the profits between the parties. Hence, the analysis of the competing considerations that will be offered below cannot possibly yield one, determinative and analytically necessary solution. Rather, a value-choice still remains to be made. As should become evident from the following analysis, this choice is fundamental to law. It is the choice between two conflicting visions of the relationship between (commercial) contractual parties.

I. PROMISE-KEEPING

A contracts to purchase from *B* identifiable goods for a sum of \$100,000, which is the fair market value of the goods at all relevant times. *B*'s cost of production is \$90,000; hence, her expected profit is \$10,000; *A*'s expected profit from the transaction is \$5,000. *B* breaches the contract and does not supply the goods to *A* but, rather, to *C*, who desperately needs the promissory resource and therefore is willing to pay \$125,000. Although this resource is not a unique good, *A* is not able to cover at the market. *A* files a claim for monetary recovery, insisting that the recovery should not be limited to \$5,000, which is merely his "expectation interest". Instead, *A* demands the extra profit *B* procured due to the breach (\$25,000), since if not for said breach, *B* could not have sold the goods in question to *C* and could not have gained the extra profit. Should, as prescribed by *Adras*, *A* be entitled to the promisor's actual gain, or should *A* be allowed to recover only for his expectation interest, as held in *Surrey*?

One of the central justifications given for the *Adras* approach concerns the value of promise-keeping. It has been maintained that this rule "is meant to act as a deterrent to breach" and, therefore, is entailed by the moral prescription "according to which wrongdoing does not pay."⁹ Assigning the reallocation profits¹⁰ to the promisee prevents "leav[ing] the breaching party with the feeling that the breach was worthwhile" and, even worse, allowing the rest of society to arrive at the conclusion that "breaching agreements is beneficial."¹¹ The *Adras* Court wrote:

The law of contract is not only meant to increase economic efficiency but also to enable society to lead a proper life. Contracts are there to be performed, whether or not damages will be payable on breach, an approach by which we encourage people to keep their promises. Promise keeping is a basis of our life, as a society and a nation.¹²

I recognize the moral validity and normative importance of promise-keeping. However, the value of promise-keeping cannot mediate the controversy surrounding the issue of the entitlement to reallocation profits, at least with respect to informed and sophisticated commercial parties. As this Part will show, the value of promise-keeping is neutral as to the allocative choices made in *Surrey* and *Adras*.

A. *The Value of Promise-Keeping*

In order to clarify this claim, consider Charles Fried's theory of Contract as Promise, the most prominent of the theoretical accounts of promise-keeping as the essence of contractual obligation.¹³ According to Fried, "[p]romising is more than just truthfully reporting my present intentions, for I may be free

9 *Adras* (trans.), *supra* note 2, at 241.

10 In the example with which this Part began, the reallocation profits are the \$25,000 extra profits procured by *B* due to her efficient breach.

11 *Adras* (trans.), *supra* note 2, at 276.

12 *Id.* at 279. Similar considerations have been raised by several commentators. See Peter Birks, *Profits of Breach of Contract*, 109 L.Q. Rev. 518, 519 (1993); Daniel Friedmann, *Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong*, 80 Colum. L. Rev. 504, 515 (1980); Gareth Jones, *The Recovery of Benefits Gained from a Breach of Contract*, 99 L.Q. Rev. 443, 454 (1983).

13 Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* 7-17 (1981). Other theories of promising are also subjected to the criticism elaborated below. See Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 Mich. L. Rev. 489, 495-503 (1989).

to change my mind, as I am not free to break my promise."¹⁴ Hence, the commitment to keeping promises is not premised on the mere prescription against lying. Instead, it is rooted in the trust that a promise invokes regarding the future actions of the promisor.

This trust, in turn, can only be justified by reference to the convention of promising. Fried explains that this device increases our autonomy by expanding our options in the long-run; promising enables us to achieve objectives that we can succeed only in accomplishing with the cooperation of others. Certainly, Fried notes, the utility of promising in general still does not "show why I should not take advantage of it in a particular case and yet fail to keep my promise."¹⁵ Nonetheless, the individual obligation of promise-keeping is grounded "in respect for individual autonomy and in trust":¹⁶ the promisor intentionally invokes a convention whose function is, as we have just seen, "to give grounds — moral grounds — for another to expect the promised performance."¹⁷ To renege on a promise is, therefore, to abuse the trust and thus the vulnerability of the promisee, both of which the promisor freely invited; it amounts to wrongful exploitation of another individual.

In short, contracts — which are a genus of promises — must be kept because promises must be kept; and promises must be kept because promising is "a device that free, moral individuals have fashioned on the premise of mutual trust, and which gathers its moral force from that premise."¹⁸

While Fried's account of the moral value of promise-keeping is an attractive one, it cannot generate concrete normative guidelines regarding issues such as the content and scope of contractual obligations and the proper remedies for breach.

B. The Content-Neutrality of Promise-Keeping

As Richard Craswell explains, promise-keeping dictates that the promisor fulfill the obligations prescribed by the combination of the express language she used and the legal background rules that "fill out the details of what it is [she] has to remain faithful to, or what [her] prior commitment is deemed to be."¹⁹ Hence, the value of promise-keeping "cannot guide the legal system in

14 Fried, *supra* note 13, at 9.

15 *Id.* at 14.

16 *Id.* at 16.

17 *Id.*

18 *Id.* at 17.

19 Craswell, *supra* note 13, at 490.

deciding which background rules to adopt in the first place."²⁰ Unless the scope of the promisor's obligation or the consequences of non-performance are explicitly defined by the promise itself, the law must resolve these issues. With the exception of a "background rule" that would render performance totally optional,²¹ the value of promise-keeping is completely neutral in relation to any possible set of background rules.²² This content-neutrality is hardly accidental. It is rooted in the reluctance of any normative system premised on autonomy to instruct individuals as to how they ought to exercise their freedom, and in the contractual context, as to the types of promises they ought to make.²³

Thus, although the value of promise-keeping indeed requires that some sort of sanction be imposed in cases of non-performance, so that the promised course of conduct is made "non-optional to some degree", there is nothing inherent to this value that dictates any particular degree of non-optionality. Promise-keeping does not entail any preference of one remedy over another. Therefore, it cannot offer any guidance regarding the selection from amongst the various alternative remedies, namely: reliance damages, expectation damages, specific performance, restitutory damages and punitive damages.²⁴

Several objections may be raised to the claim that the value of promise-keeping does not entail any specific recommendation regarding remedies and, thus, cannot arbitrate between *Surrey* and *Adras*. The claim probably can come under attack from three primary positions, each one an attempt at demonstrating why the value of promise-keeping requires the *Adras* rule. I believe that at least in the commercial context, none of these counter-claims is persuasive.

C. Promises as Literal Commitments?

The first counter-claim is rather straightforward: "[T]he interest of a person who made a payment in order to get a house, a car or even a pizza is to get the house, the car or even the pizza" and not any pecuniary remedy

20 *Id.* See also *id.* at 504, 515.

21 That is, a rule that excuses non-performance whenever the promisor no longer wishes to perform.

22 For a similar, albeit less detailed argument, see Patrick S. Atiyah, Promises, Morals, and Law 127-29 (1981); David Charney, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 Mich. L. Rev. 1815, 1818 (1991).

23 Craswell, *supra* note 13, at 516.

24 *Id.* at 518.

in their stead.²⁵ In other words, as long as the parties did not include any explicit exemption in their contract, the value of promise-keeping requires that the promisor perform the obligations to which she explicitly committed herself. Therefore, this value supports any remedy — such as restitutionary damages — that removes the temptation to breach and increases the likelihood of performance of the contract.²⁶

This argument infers from the explicit words of the contractual parties that performance — unless otherwise indicated — is unqualified and unconditional. Hence, the implication is that we easily can identify the content of a contract merely by referring to the plain language of the respective promises of the parties. However, is a literal interpretation of a contract's language ever sufficient for inferring meaning? I would argue that utterances (in our context, promises) cannot be interpreted without regard for the external circumstances surrounding them.²⁷ Language, in and of itself, does not require that we continue the phrase "I will supply X at date Y" with "upon any event", rather than with "unless contingencies A, B or C occur, in which case I will compensate you (for example) for your expectation interest."²⁸

Indeed, the content of the contractual promise cannot be determined purely by such literal interpretation of the contract. No statement can be deemed explicit, in the sense of demarcating the field of reference, independent of interpretation. There is no pre-interpreted text with one a-contextual meaning; even a claim of "plain language" is in itself the product of an interpretive — at times instinctive — process.²⁹ The explicit language of the parties per se can never indicate the meaning of a contractual text. Rather, only consideration of the setting in which these words were used and the context of their interpretation can make them "readable."³⁰

25 Daniel Friedmann, *The Performance Interest in Contract Damages*, 111 L.Q. Rev. 628, 632 (1995).

26 See Adras (trans.), *supra* note 2, at 271, 276.

27 Even proponents of textual interpretation do not claim for a-contextual interpretation (although they are, at times, mistakenly taken to be so claiming). See Andrei Marmor, *Interpretation and Legal Theory* 130-31 (1992); William N. Eskridge, *The New Textualism*, 37 UCLA L. Rev. 621, 655 (1990).

28 See Atiyah, *supra* note 22, at 89.

29 See Felix S. Cohen, *Field Theory and Judicial Logic*, in *The Legal Conscience* 121, 122-28 (Lucy Kramer Cohen ed., 1960); Ronald Dworkin, *Law's Empire* 350-54 (1986); Stanley Fish, *Fish v. Fiss*, in *Doing What Comes Naturally* 120-25 (1989); Owen M. Fiss, *Conventionalism*, 58 S. Cal. L. Rev. 177, 186 (1985). The validity of this view cannot fully be explicated or defended here.

30 Thus, it may be the case that in commercial settings, parties are typically assuming a close textual interpretation of their carefully drafted contract. It is our knowledge

D. Promises Reflecting Convention?

This leads us to the second counter-claim I wish to refute, which contends that contractual obligations are unqualified not through reference to the literal meaning of the words used, but, rather, by referring to the conventional (or common-sense) expectations or understandings within the relevant community of discourse,³¹ namely that most contractual parties assume that the promisor's performance is unconditional and unqualified, subject only to events of frustration.³² Therefore, where the contract does not explicitly provide otherwise, failing to perform amounts to a failure to fulfill one's promise, which should entail — if we adhere to the value of promise-keeping — a severe legal response, such as the imposition of restitutory damages.

Even if this assumption regarding the conventional expectations of contractual parties is accurate, however, it still is doubtful whether it can call into question the content-neutrality of promise-keeping insofar as sophisticated and legally well-informed parties are concerned. For such parties, the expectations and understandings that make up the background for the contract involve both conventional expectations as to promise-keeping as well as the law's background rules as to contract enforcement and recovery of damages. The conventional expectations within the sophisticated and legally well-informed commercial community do not predate the law's prescriptions; rather, they are — at least to a certain extent — the result of these same prescriptions.

Hence, what is promised and the expectations generated by what is promised are both, to an extent, endogenous to the law of contracts and therefore cannot be regarded as an external, pre-existing premise that guides contractual background rules.³³ Indeed, any reference to conventional expectations is circular³⁴ and is, thus, an artificial reinforcement of the normative weight of the existing legal prescriptions.

of the typical circumstances that surround such contracts — tough negotiations between the legal representatives of the parties with respect to each and every word — that may entail such a conclusion.

31 Cf. Randy Barnett's general theory of contracts, according to which loyalty to the parties' consensual understanding requires the law to supply default rules that reflect such conventional expectations. Randy E. Barnett, *The Sounds of Silence: Default Rules and Contractual Consent*, 78 Va. L. Rev. 821, 874-97 (1992).

32 See Friedmann, *supra* note 25, at 629, 637-38.

33 See Jay M. Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. Rev. 829, 835 (1983); Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 Fla. St. U.L. Rev. 195, 212-14 (1987).

34 See Alan Schwartz, Karl Llewellyn and the Origins of Contract Theory

To be sure, it is not my intention to dispute that taking into account the parties' existing expectations entails a conservative bias with respect to the legal default rules that should apply to contracts that have already been agreed upon. Even this narrow and restricted implication of the existing expectations story cannot, however, support favoring the revolutionary *Adras* approach over the *Surrey* rule, because *Surrey* is clearly a restatement of the status quo in most Common law systems.³⁵

E. Unqualified Performance as a Public Good?

Finally, a third possible counter-claim takes a different line of reasoning, focusing not on the bilateral parties and their promises, but, rather, on the general public and the moral guidance provided thereto. The *Adras* rule in effect encourages performance of contracts; thus, so the argument goes, even if performance is not necessarily what the parties would have wanted, it is still the desirable outcome inasmuch as it manifests the importance of promise-keeping and thereby (supposedly) inculcates this value amongst third parties.

This counter-claim, too, appears to be faulty. It assumes that third parties focus only on the "primary" obligation of a contract when deciding whether the contract has been performed or breached, and that they do not appreciate the possibility of the existence of any conditions or qualifications, whether explicit or implied in fact or in law. It is doubtful whether this simplistic conception of contract indeed reflects the popular understanding of the nature of contract.³⁶

To be sure, where a contract is for the supply of a unique good, non-performance of this primary obligation is probably perceived — by both the contractual parties and the general public — as a breach of the contract.³⁷ However, as mentioned above,³⁸ in cases involving this type of contract, traditional common law doctrine treats the primary obligation as unqualified

55 (unpublished manuscript); Jeffrey Standen, *The Fallacy of Full Compensation*, 73 Wash. U.L.Q. 145, 165 (1995).

35 See Standen, *supra* note 34, at 164-65.

36 Patrick Atiyah sharply criticizes the conception of promising that prevails amongst philosophers for ignoring the subtleties and complexities of this practice as it is shaped by law. See Atiyah, *supra* note 22, at 108, 137-38, 142.

37 See Jeff Sovern, *Toward a Theory of Warranties in the Sales of Homes: Housing the Implied Warranties Advocates, Law and Economics Mavens, and Consumer Psychologists Under One Roof* [1993] Wis. L. Rev. 13, 36-37.

38 See *supra* note 6 and accompanying text.

and thereby allows the promisee restitution of the promisor's profits (and specific performance³⁹). The question raised by the *Surrey-Adras* quandary relates to contracts that do not involve unique goods. It is in the context of the latter type of contract — more particularly, complicated commercial transactions — that I wish to challenge the claim of the existence of a simplistic popular conception that does not appreciate the complexities of the practice of contract and that perceives any non-performance of a primary obligation as disrespect for promise-keeping and a devaluation of its importance.

Moreover, even if the above is, indeed, an accurate depiction of the common-sense public understanding of contract, it does not merit the normative weight that the third counter-claim ascribes to it. This is because submitting to such a conception of contract undermines the role of promises in expanding our options, thus increasing our autonomy. Such a conception of contract, in other words, undermines the very value of promise-keeping.

To understand why, we must realize that if the law were to respond to the misunderstandings of third parties regarding the contractual relationship, it would harm contractual parties by restricting their range of effective options: the law would facilitate only contracts of unqualified and unconditional obligations, which are not necessarily favorable to the parties, and would impose on the parties extra-costs if they wish to craft a more complex and nuanced framework of mutual obligation which may be more to their liking.

Furthermore, even if we concentrate solely on the interests of those who understand the contract only in dichotomous terms, this misunderstanding should not be accorded substantial weight. On the contrary, it would be more appropriate for the law to repudiate such an inadequate conception of contract in order to encourage people to develop a more comprehensive appreciation of the potential complexity of contracts in allocating risks and opportunities,⁴⁰ and thereby increase their personal autonomy.

In conclusion, none of the attempts to extract specific background rules (in particular, rules that specify the degree of non-optionality of the parties' obligations) from the value of promise-keeping is successful. The value of promise-keeping — which may, indeed, be one of the bases of collective living — is simply indifferent to such doctrinal details.

39 *See infra* note 104.

40 The more complex understanding of contracts is in no way less "natural" than the dichotomous one, so that there is no special difficulty in inculcating it. *See Atiyah, supra* note 22, at 27.

II. UNJUST ENRICHMENT

Another value, which the *Adras* rule has been said to sustain and inculcate, is the prevention of unjust enrichment. However, as I will show below, identifying cases of unjust enrichment is a conclusion that must be grounded in normative considerations rather than a normative value in and of itself, upon which conclusions may be drawn as to allocative rules. Like the value of promise-keeping, then, the prevention of unjust enrichment is neutral to the choice between the rules set forth in *Adras* and *Surrey*.

A. The Dangers of Circularity

In the *Adras* judgment, the Court wrote that the "aim" or "principal purpose" of the law of restitution "is to prevent unjust enrichment" at someone else's expense, and that this principle "comes into operation where *ex aequo et bono* restitution is required."⁴¹ Furthermore, the Court stressed that the applicability of this "general principle of preventing unjust enrichment" should not be confined to an exhaustive list of situations, since "the categories of unjust enrichment are never closed and can never be closed." The general principle can be applied to new situations in which there is unjust enrichment," in an attempt to strive always to "achieve justice among people."⁴² In particular, this "general principle" should apply "whenever it is necessary to prevent the unjust enrichment of the party who breached the contract[;] ... by virtue of this general principle, the innocent party is entitled to claim the benefit which the breaching party obtained from the breach," whether or not the promissory resource was a specific good and regardless of whether the promisee had a proprietary right of some kind.⁴³

Unfortunately, *Adras* fails to identify when the promisor's enrichment — i.e., the profits she gained in breaching the contract — ought be considered unjust (assuming that the promisee has been compensated for the breach in the usual fashion).⁴⁴ Nor is a "general principle of preventing unjust enrichment" helpful for deriving the *Adras* rule.

The claim that the *Adras* rule derives from the general principle of preventing unjust enrichment necessarily assumes that the promisee is

41 *Adras* (trans.), *supra* note 2, at 263.

42 *Id.* at 267-68.

43 *Id.* at 274.

44 See Stephen A. Smith, *Contract*, 47 *Cur. Legal Probs.* 5, 17 (1994).

entitled to the reallocation profits:⁴⁵ To be sure, if we justify assigning the reallocation profits to the promisee, then the gaining thereof by the promisor amounts to unjust enrichment. This is a rather self-evident, almost trivial conclusion, however, since had there been more convincing reasons to assign the profits to the promisor, the opposite conclusion would have been arrived at, namely, that the enrichment had not been unjust. Hence, an argument for restitutionary damages based on a principle of unjust enrichment is hopelessly circular.

My complaint against the use of the concept of unjust enrichment is different from the conventional complaint against its vagueness.⁴⁶ It is not merely that the concept of unjust enrichment is ambiguous and indeterminate. Rather, my complaint is that this concept must presuppose a just baseline of entitlements, and that, therefore, this baseline must be normatively justified.⁴⁷

Nor is enrichment necessarily unjust simply by virtue of being the consequence of an unjust act. Thus, even if the promisor's non-performance is wrongful, the resulting enrichment cannot necessarily be deemed unjust enrichment. If we have a good justification for concluding that the promisor, and not the promisee, is entitled to the reallocation profits, then even if breach of contract is wrongful, the promisor's retention of the profits is not unjust enrichment.

Hence, the principle of preventing unjust enrichment cannot serve as an argument in favor of either position, *Adras* or *Surrey*. Difficulties arise when this concept is regarded as a (at times, the) basis for the resolution of difficult allocative questions, i.e., when it is assumed to entail inevitable and, thus, objective conclusions⁴⁸ as to when enrichments can be deemed

45 Cf. John P. Dawson, *The Self-Serving Intermeddler*, 87 Harv. L. Rev. 1409, 1415 (1974); I. M. Jackman, *Restitution for Wrongs*, 48 Cambridge L.J. 302 (1989).

46 See, e.g., Palmer, *supra* note 4, at 5.

47 An interesting example of the circularity of the concept of preventing unjust enrichment arises in the debate over standards of compensation for the nationalization of foreign-owned property, where international lawyers use the notion of unjust enrichment in diametrically opposed ways. Thus, on the one hand, this concept is said to provide a basis for the claim of full compensation by highlighting the unjustness of the plaintiff's wealth deprivation, while on the other hand, the equitable foundations of this concept are underscored and, accordingly, a rule of less than full compensation that takes account of all the basic equities of the situation is advocated. See Hanoch Dagan, *Unjust Enrichment: A Study of Private Law and Public Values* 155-56 (1997).

48 This seems to be the way in which the prevention of unjust enrichment is perceived by John Finnis in his attempt to delineate a "minimalist" — and thus uncontroversial — natural law. See John Finnis, *Natural Law and Natural Rights* 288 (1980). Indeed, Finnis' premises are uncontroversial only insofar as they are indeterminate and thus

unjust and precisely how the injustice should be reversed.⁴⁹ The fundamental questions that need to be addressed by the law of restitution — what makes an enrichment unjust and what is the appropriate legal response — cannot be resolved by reference to the general principle of preventing unjust enrichment. Instead, these questions require deliberate, normative discussion to identify the values that shape, or can be used to shape, the pertinent rules and to guide value-choices where there is a clash.⁵⁰ Using the concept of preventing unjust enrichment as the rationale only serves to obscure these choices and to inhibit the normative discourse that is required for making such choices.⁵¹

B. Unjust Enrichment When Appropriating Property?

Some scholars have attempted to rescue the justificatory power of the concept of unjust enrichment by limiting the circularity claim outlined above to the contractual context and suggesting that in non-contractual arenas the general principle of preventing unjust enrichment provides genuine normative guidelines.⁵² The argument that is typically proffered in support of this position is that in non-contractual cases, restitutionary duties arise

not helpful to the solution of moral issues. See Lloyd L. Weinreb, *Natural Law and Justice* 111-15 (1987).

49 See Steve Hedley, *Unjust Enrichment*, 54 Cambridge L.J. 578, 580, 592-93 (1995); Stewart Macaulay, *Restitution in Context*, 107 U. Pa. L. Rev. 1133, 1139-40 (1959); Christopher T. Wonnell, *Replacing the Unitary Principle of Unjust Enrichment*, 45 Emory L.J. 153, 159-60 (1996). For early warnings against the dangers of conceptualism (that the text above applies to the concept of unjust enrichment), see Oliver W. Holmes, *Law in Science and Science in Law*, in *Collected Legal Papers* 210, 230, 232, 238-39 (1920); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809, 812, 820 (1935).

50 See Kit Barker, *Unjust Enrichment: Containing the Beast*, 15 Ox. J. Legal Stud. 457, 463 (1995). The same criticism can be leveled against the normative power of the concept of corrective justice, which is sometimes said to explain the law of restitution. See, e.g., *id.* at 468-74; Ernest J. Weinrib, *Restitutionary Damages as Corrective Justice*, 1 *Theoretical Inquiries in Law* 1 (1999). I discuss elsewhere, in some detail, the difficulties with grounding unjust enrichment on corrective justice. See Hanoch Dagan, *The Distributive Foundation of Corrective Justice*, 99 Mich. L. Rev. 138 (1999).

51 See Robert W. Gordon, *New Developments in Legal Theory*, in *The Politics of Law: A Progressive Critique* 413, 418-21 (David Kairys ed., rev. ed. 1990); Hedley, *supra* note 49, at 592; Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 Buff. L. Rev. 209, 211-21 (1979).

52 See Andrew Kull, *Rationalizing Restitution*, 83 Cal. L. Rev. 1196-97, 1200, 1209 & n.54 (1995). Cf. John Carter, *Restitution and Contract Risk*, in *Restitution: Developments in Unjust Enrichment* 137 (Mitchell McInnes ed., 1996).

whenever there is enrichment as a result of employing another's property without her consent.⁵³ This claim does not, however, provide a satisfactory model for identifying cases of unjust enrichment.

First, a property-based approach to unjust enrichment is inadequate in that it fails to include in its scope — with no apparent justification — many of the resources that are dealt with by the law of restitution.⁵⁴ Although many of the protected interests under the law of restitution indeed fall within the scope of interests in (tangible or intangible) "property" as defined in other branches of law, many of the protected interests are conventionally treated as non-proprietary interests, such as trade secrets, and a variety of interests in the self or in certain attributes thereof such as one's reputation or one's name, picture, personal characteristics, voice, etc., as well as contractual relations (or even expectations and opportunities).⁵⁵ Hence, a property-based approach to restitution leads to one of two undesirable results:⁵⁶ either a narrow approach to restitution as a vindication of rights to property *stricto-sensu*,⁵⁷ which may account for only a fragment of the existing doctrine, or a more expansive notion of property (at times utilizing terms such as quasi-property),⁵⁸ which detaches the concept of property from its conventional usage, and thus detracts from the normative appeal this concept is supposed to provide to the notion of preventing unjust enrichment.⁵⁹

Moreover, the concept of property cannot serve as a source of justification

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- 53 See Nicholas J. McBride & Paul McGrath, *The Nature of Restitution*, 15 *Ox. J. Legal Stud.* 33, 38, 43 (1995).
- 54 See Jack Beatson, *The Nature of Waiver of Tort*, in *The Use and Abuse of Unjust Enrichment* 206, 208 (1991). The term "resource" denotes any means or capability of raising wealth, meeting needs or supplying wants. Black's Law Dictionary 1311 (6th ed. 1990). A resource should be distinguished from mere wealth (*cf.* Jack Beatson, *Benefit, Reliance, and the Structure of Unjust Enrichment*, in *The Use and Abuse of Unjust Enrichment* 21, 29-31 (1991)). It is a wealth-yielding interest of a certain kind, with certain qualities that — as elaborated below (Part III) — may distinguish it and the way in which it is treated by the law from other resources.
- 55 See Dagan, *supra* note 47, at 71-108.
- 56 *Cf.* Lusina Ho, *The Nature of Restitution — A Reply*, 16 *Ox. J. Legal Stud.* 519, 524 (1996).
- 57 This seems to be Stoljar's approach. See Samuel J. Stoljar, *The Law of Quasi Contracts* 5-7, 93, 100 (2d ed. 1989). The critique of this approach is summarized in G.H.L. Fridman & James G. McLeod, *Restitution* 32-34 (1982).
- 58 See Friedmann, *supra* note 12 at 506, 509.
- 59 In other words, it is circular to base a right of restitution on the ground that the invaded resource is a property interest, where the basis for regarding the resource as property is that otherwise unjust enrichment would be permitted. See Friedmann, *supra* note 12, at 511 n.36.

for the concept of unjust enrichment since — just like the latter — it is a human creation that can be, and has been, modified in accordance with human needs and values.⁶⁰ As such, property is an essentially-contested concept⁶¹ that is open to competing interpretations and permutations.⁶² There is neither an exhaustive list of resources that enjoy the status of property⁶³ nor an a priori list of entitlements that the owner of a given resource inevitably enjoys.⁶⁴ In particular, there is no reason to presuppose that any gains that may be derived from one's property are necessarily within the entitlement of its owner.⁶⁵ Hence, shifting from the concept of unjust enrichment to the concept of property cannot possibly provide answers to the questions we seek to resolve;⁶⁶ it only further postpones the inevitable normative inquiry.⁶⁷

C. Unjust Enrichment as a Loose Framework for Divergent Doctrines

Presenting the general principle against unjust enrichment as the unifying justification for the law of restitution would further constitute an unwarranted simplification of this complex and diversified segment of law. The law of restitution encompasses a plethora of remedies that emanate from many sources.⁶⁸ More significantly, the law of restitution covers a wide diversity of social relations (hereinafter, "paradigms") that are governed by a multitude of specific rules. Such heterogeneity raises the suspicion that the applicable rules are not necessarily guided by the same considerations in each category,

60 See Jeremy Bentham, *The Theory of Legislation* 111-13 (R. Hildreth trans, C. K. Ogden ed., 1931); Frederick G. Whelan, *Property as Artifice: Hume and Blackstone*, *NOMOS XXII* 101 (1980).

61 See W. B. Gallie, *Essentially Contested Concepts*, 56 *Proceedings of the Aristotelian Society (New Series)* 167 (1956).

62 See Roberto M. Unger, *The Critical Legal Studies Movement*, 96 *Harv. L. Rev.* 561, 578 (1983).

63 See Charles A. Reich, *The New Property*, 73 *Yale L.J.* 733 (1964); Joseph W. Singer, *The Reliance Interest in Property*, 40 *Stan. L. Rev.* 614 (1988).

64 See Bruce A. Ackerman, *Private Property and the Constitution* 9-15, 26-29, 97-100 (1977).

65 See John Christman, *The Myth of Property: Toward an Egalitarian Theory of Ownership* (1994); Barbara Fried, *The Progressive Assault on Laissez Faire: Robert Hale and the First Law and Economics Movement* 71-102 (1998).

66 See Joseph W. Singer, *Legal Realism Now*, 67 *Cal. L. Rev.* 467, 491 (1988); Kenneth J. Vandavelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 *Buff. L. Rev.* 325 (1980).

67 Cf. Craig Rotherham, *Proprietary Relief for Enrichment by Wrongs: Some Realism about Property Talk*, 19 *U. New S. Wales L.J.* 378 (1996).

68 See John P. Dawson, *Unjust Enrichment — A Comparative Analysis* 38-39 (1951).

nor do they necessarily enhance the same principles and policies.⁶⁹ Where unjust enrichment is presented as the rationale at the foundation of every restitutionary rule, this diversity unfortunately disappears.

This danger can be avoided by seeing the general principle against unjust enrichment as only a theme of the law of restitution — a framework for arranging and classifying norms that reflect divergent social values. The explicit normative discussion that the principle of unjust enrichment must invoke emphasizes, rather than underplays, the significant diversity apparent in the various paradigms that are governed by the law of restitution, and stresses the important normative — and thus doctrinal — implications of that diversity.

It would appear that there is no need to delve into a full-blown taxonomy of the law of restitution and the normative underpinnings of its various paradigms in order to establish this claim of diversity and the implications thereof. Instead, the validity of this claim can be sufficiently demonstrated by pointing to the different considerations that explain, shape and guide the rules of two familiar paradigms regulated by the law of restitution.

Compare the case of mistaken payments with the case of benefits conferred to protect another person's interest (known as necessitous intervention). An analysis of the former case must take into account the character of mistaken payments as both non-voluntary transfers and a source of waste. Hence, there is a need to design a legal regime that vindicates voluntariness but also induces the relevant parties to make the most efficient expenditures on precautions against mistakes, while taking into consideration the adjudication costs each possible regime would entail.⁷⁰ On the other hand, the case of necessitous intervention seems very different. This particular portion of the law of restitution can serve people's (hypothetical) objectives; but it can also enhance and inculcate altruistic conduct (and altruistic motives)

69 See Hedley, *supra* note 49, at 589, 594, 599; Macaulay, *supra* note 49, at 1138, 1145-46. The need for narrower categories in law is one of the persistent themes of American legal realism. See Karl L. Llewellyn, *A Realistic Jurisprudence — The Next Step*, in *Jurisprudence: Realism in Theory and in Practice* 3, 27-28, 32 (1962); Karl L. Llewellyn, *Some Realism about Realism*, in *Jurisprudence: Realism in Theory and in Practice* 42, 56-57, 62, 73 (1962); Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A.J. 71 (1928).

70 Compare Peter Birks, *An Introduction to the Law of Restitution* 146-73 (1985) (mistaken payments as non-voluntary transfers) with Jack Beatson, *Mistaken Payments in the Law of Restitution*, in Beatson, *supra* note 54, at 137; and with Peter K. Huber, *Mistaken Transfers and Profitable Infringements of Property Rights: An Economic Analysis*, 49 La. L. Rev. 71, 78-90 (1988) (mistaken payments as waste).

and guard against damage to the most essential interests of its constituents (at times, even paternalistically).⁷¹

How then are we to determine whether an enrichment is just or unjust in instances of restitution within contract? Inasmuch as both promise-keeping and unjust enrichment are unsatisfactory as justificatory principles, we need to turn to the other considerations that frequently emerge in the relevant case-law and literature to examine their normative power as well as their doctrinal recommendations.

III. PROPRIETARY RIGHTS

Adras draws an analogy between breach of contract and the appropriation of other resources, notably land. The breaching promisor takes for herself the contractual right that is included amongst the promisee's assets, "and by doing so gain[s] a benefit which in law belonged to the buyer."⁷² Hence, any distinction between contractual rights and proprietary rights "is totally irrelevant" insofar as the promisee's right "to claim the benefit obtained by the breaching party" is concerned.⁷³

This reasoning suggests that our analysis should be detached from its contractual context, with cases of beneficial breach of contract classified with beneficial appropriations of resources. No distinction would then be made between the different types of protected interests, such as interests in contractual rights to commercial goods and proprietary interests in land. This reasoning, however, is faulty, so that if we focus on the normative underpinnings of the appropriation paradigm,⁷⁴ the *Surrey* rule must be favored.

71 See Hanoch Dagan, *In Defense of the Good Samaritan*, 97 Mich. L. Rev. 1152 (1999).

72 *Adras* (trans.), *supra* note 2, at 240.

73 *Id.*, 269-270. A similar point was made by a critic of the *Surrey* holding. Lionel D. Smith, *Disgorgement of the Profits of Breach of Contract: Property, Contract and "Efficient Breach"*, 24 Can. Bus. L.J. 121, 129-32 (1994-1995).

74 To be sure, classifying breach of contract as an instance of appropriation is troublesome because the contractual background, at least in the commercial setting, is too significant to be omitted from the analysis. In cases of breach of contract — unlike cases of nonconsensual appropriations — any extra-sanction that is imposed by the law on potential infringers of one's entitlement is translated into some additional price the promisee is, *ex ante*, required to pay. Hence, these cases require that we determine whether a typical promisee would, indeed, be interested in purchasing such extra-protection. For such a determination, see *infra* Part IV.

In other words, my claim is that the considerations that lie at the foundation of the appropriation paradigm require that important distinctions be made between the protected interests under the appropriation paradigm, and these distinctions, in turn, imply that contractual rights in "regular" resources — as distinct from "unique goods" — are entitled to only relatively limited protection.

A. Restitutory Claims for Beneficial Appropriations

The appropriation paradigm is typically described as a situation where *B* appropriates *A*'s interest with respect to a resource without *A*'s express or implied consent.⁷⁵ *A* seeks to recover the amount of *B*'s resulting benefit, which *A* deems to be wrongful gain.⁷⁶ *B* challenges *A*'s entitlement to her gain, claiming that *A*'s remedy should be limited to the loss *A* has suffered, which is considerably lower.⁷⁷

Elsewhere I examine in some detail the various measures of recovery available in such a case and offer an account of the underlying considerations that explain the choice made between these measures of recovery by legal decision-makers.⁷⁸ For the purposes of our present discussion, however, it will

75 As the text implies, the term "appropriation" should not be read with any physicalist overtone in mind. The appropriation can relate to incorporeal resources; it also can refer to one specific interest of the plaintiff in the resource she holds.

76 In Anglo-American law, this case is rooted in the archaic concept of waiver of tort which views restitution as a parasitic claim, an alternative to tort damages. As such, the main advantages of restitution were perceived to be procedural, with respect to issues such as the survival of actions and statute of limitations. Palmer, *supra* note 4, at 60-67. As these advantages were largely extinguished, and as courts have come to grasp the significance of the main difference between remedies under restitution and tort — i.e., the former's focus on gains derived from the wrongful invasion rather than on the harm inflicted by the invasion — the two claims have diverged and restitution has gained an independent status. Thus, claims in restitution arise in many situations where no tort occurs. Furthermore, defenses from tort liability do not necessarily apply to the restitutionary counterpart. See Beatson, *supra* note 54, at 210-24, 242-43; Friedmann, *supra* note 12, at 510, 538; 1 Restatement (Second) of Restitution § 1 comment a (Tentative Draft, 1983-1984).

77 *A*'s gain exceeds *B*'s loss where the former is a more efficient producer (with regard to the appropriated resource) than the latter or sells in a different market, as well as in cases in which *B* does not lose anything. This contingency occurs where the value of *B*'s resource was not diminished by the invasion and *B* could not have made the gain or was unwilling to or simply not interested in making it.

78 See Dagan, *supra* note 47.

suffice to sketch the bare skeleton of this account, with a more detailed outline of one aspect of the issue.

The measures of recovery that are available in cases of appropriation range from requiring that *A* receive compensation for the *harm* he has suffered to awarding *A* the *profits* realized by *B* at *A*'s expense, and they also include several intermediate possibilities, most significantly the *fair market value* of the resource involved. My claim is that these measures represent the external expression of the legal system's profound commitment to preserving certain underlying values. The measure of *profits* deters non-consensual invasions, thereby vindicating the cherished libertarian value of control. The *fair market value* measure of recovery is aimed at securing the utility that is embodied in the appropriated resource, which corresponds with the utilitarian value of well-being. Finally, limiting recovery to compensation for the *harm* suffered responds to the claim of *B* (the appropriator) to a share of the entitlement of *A* (the resource-holder), as long as *B* does not actually diminish *A*'s estate, thereby vindicating the communitarian value of sharing.

I propose that in developing a set of rules for dealing with cases of appropriation, different legal systems embrace different foundational values or sets of values. I further contend that the decision of which values a particular system adopts as its most basic ones depends on the larger normative ethos in which that system is set. Hence, the socio-economic ethos of the legal community must be considered in any theoretical account of the appropriation paradigm.

An additional consideration that must be taken into account is the nature of the resource that has been appropriated. This consideration lies at the heart of the rationale for the different types of protection accorded by the law to holders of different types of resources. In particular, it supports the distinction the law makes when responding to the appropriation of proprietary rights in land, on the one hand, as opposed to its response to breaches of "regular" commercial transactions, on the other.

B. The Nature of the Appropriated Resource

Consider the subjective dimension of our relationships with the resources in our possession. At times, we feel that a resource is so intimately connected with our self that we perceive it as constituting an intrinsic part of the self. Deprivation of such a resource transcends the financial set-back involved: We experience a sense of violation and of a diminishing of the self.⁷⁹

Perceiving resources as an extension of the self is not necessarily a

⁷⁹ See Karl Olivecrona, *Locke's Theory on Appropriation*, 24 *Phil. Q.* 220, 224

manifestation of object-fetishism;⁸⁰ rather, it may have significant moral implications. Jeremy Waldron explains that when an individual acts to bring about a change in a tangible possession, his effort precipitates a state of mutuality between the will and the object. On the one hand, the will has transformed the object: There is something in the object that may now be explained only in terms of the working of the individual's will. On the other hand, and more significantly, the object which has been thus affected by the will in turn affects the individual: His "willing" at a certain point in time can only be explained by reference to the external object of his labor. Thus, when an individual modifies one of his possessions, he is demonstrating a sense of responsibility for his actions, because the product of his will is thereby registered.⁸¹ In other words, the will is reflected in the object to the extent that a mutual line of affect and effect exists between the object and the will. Hence, laboring on tangible materials imposes consistency, permanence and stability upon the resolutions, plans and projects of the will. This process fosters an individual's moral development; the will becomes more self-disciplined and mature, and the abilities and self-conceptions of the individual are sustained and developed.

Waldron limits his account of holdings as reflections of the self to cases in which the individual makes a physical change to an object.⁸² This, however, is an unnecessarily restrictive view. Even those resources in our possession that we do not choose to change may be affected by our wills — and, thus, still be an expression of our personalities — in a myriad of ways. These resources may be integrated into our lives insofar as they are shaped or organized in a way that corresponds with our conception of self and with our private needs, inclinations and desires, our life-plans. Thus, an individual may become attached to a certain object merely by virtue of living with it over a period of time, or develop a bond to the home where he has dwelt for a period

(1974). This account has been empirically verified. See Helga Dittmar, *The Social Psychology of Material Possessions: To Have Is to Be* 41-121 (1992).

80 See Margaret J. Radin, *Property and Personhood*, 34 *Stan. L. Rev.* 957, 985-87 (1982).

81 See Jeremy Waldron, *The Right to Private Property* 353, 364-65, 369-70, 372-73, 378, 385 (1988). See also Peter G. Stillman, *Property, Freedom, and Individuality in Hegel's and Marx's Political Thought*, *NOMOS XXII* 130, 135 (1980).

82 See Waldron, *supra* note 81, at 374.

of time. Indeed, all of these are media through which the individual identifies himself, essential elements of the self-consciousness.⁸³

This sense of attachment to our possessions is at the heart of Margaret Radin's contribution to property theory. Radin posits that personhood requires "a continuity of memory and anticipation,"⁸⁴ and that our relations with possessions may be important to maintaining this sense of continuity. Because they often represent our past experiences, possessions can be reminders and confirmers of our identity.⁸⁵ Hence, external objects play a profound role in the process of self-constitution: "individuality and selfhood become intertwined with a particular object."⁸⁶

Indeed, our attachment to the resources we hold is explicated and justified to the extent that those resources reflect our identity. Our resources can be reflections of our past and present, external projections of the personality,⁸⁷ symbols of the unique place we have established for ourselves in our communities.⁸⁸ We therefore experience a sense of personal violation when these resources are taken from us.⁸⁹

Conceiving the relationship to our resources in such terms suggests that resources may be classified along a continuum. Investment of the self in external things tends to be a matter of degree, rather than an either/or question: Not every resource is necessarily an expression of the self to the same degree. One's attachment to a resource and the corresponding sense of personal loss one experiences in the case of invasion or deprivation thereof are also not uniform in intensity, but vary with each resource, according to the circumstances, most notably in accordance with the nature of the relationship between the holder and the particular resource. There is a wide spectrum of types of resources in terms of their relationship to the self, ranging from resources that are constitutive of a person's identity to those that are held merely instrumentally and are, thus, entirely fungible.⁹⁰

83 See C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. Pa. L. Rev. 741, 746-47 (1986); Dudley Knowles, *Hegel on Property and Personality*, 33 Phil. Q. 45, 52, 56-57 (1983).

84 Radin, *supra* note 80, at 959.

85 See also Russell W. Belk, *Possessions and the Extended Self*, 15 J. of Consumer Research 139, 148, 160 (1988); E. Doyle McCarthy, *Toward a Sociology of the Physical World: George Herbert Mead on Physical Objects*, 5 Stud. in Symbolic Interaction 105, 116-17 (1984).

86 Radin, *supra* note 80, at 977; see also Margaret J. Radin, *Residential Rent Control*, 15 Phil. & Pub. Aff. 350, 362- 63 (1986).

87 See Stephen R. Munzer, *A Theory of Property* 67-70 (1990).

88 See Waldron, *supra* note 81, at 378.

89 See Andrew Reeve, *Property* 142 (1986).

90 See Olivecrona, *supra* note 79, at 224; Justin Hughes, *The Philosophy of Intellectual*

C. Appropriation of Contractual Rights in Commercial Goods and Appropriation of Proprietary Rights in Land Distinguished

This account of the relationship of the self to possessions may explain why certain interests that individuals have in their resources may give rise to stronger moral claims than other interests do.⁹¹ The more a resource is considered in a given society to be constitutive of the identity of its holder, the more important (and justified) it is to the holder to control that resource. In contrast, the more a resource is viewed as a merely fungible — albeit valuable — asset with no direct bearing on the identity of its holder, the more likely the holder will be willing (or less reluctant) to share it with others, at least as long as his well-being is preserved (through compensation). A legal regime that is responsive to the dispositions of its constituents affords to intrinsically divergent holdings correspondingly divergent degrees of protection.⁹² Hence, we can expect to find that the doctrinal rules of the appropriation paradigm correspond with the possible variations in the relationship of reflection-and-attachment between a specific resource and its holder.⁹³

A close examination of the doctrine that governs measures of recovery available pursuant to the appropriation of various types of resources confirms

Property, 77 Geo. L.J. 287, 339 (1988); Radin, *supra* note 80, at 959, 985-87; Radin, *supra* note 86, at 362-64. This continuum, while not universally-defined, is also not purely subjective in nature; rather, it is primarily socially-constituted. The social meaning of a particular resource in a given society determines whether or not the individual in that society is expected to invest his self in a said resource; this social meaning also regulates, therefore, to a significant extent, the attachment an individual develops to the various resources he holds. See Margaret J. Radin, *Reinterpreting Property* 18 (1993). This conclusion is also empirically supported; see Dittmar, *supra* note 79, at 1-94.

91 One may, nonetheless, challenge the propriety of the reference to prevailing social meanings. See Stephen J. Schnably, *Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood*, 45 Stan. L. Rev. 347 (1993). For a persuasive response, see Margaret J. Radin, *Lacking a Transformative Social Theory: A Response*, 45 Stan. L. Rev. 409 (1993).

92 See Radin, *supra* note 80, at 960.

93 Compare this concern with one of the considerations that weighed heavily against restitutionary damages in the Law Commission's consultation paper, namely that equalization of the protected interests could blur the distinction between property rights and other rights. See Law Commission Consultation Paper No. 132, *supra* note 4. In light of the essentially open-ended nature of property, as asserted in Section III.B above, this conceptualist trepidation is an inadequate basis for rejecting the *Adras* approach. In contrast, the normative consideration elaborated herein is a more reliable premise for the same conclusion.

this expectation.⁹⁴ Insofar as the account of the relationship between self and possessions also is found normatively appealing, it raises doubts as to the validity of the equation — or even analogy — between breaches of commercial transactions and the appropriation of proprietary rights in, for example, land.

First, an important distinction needs to be made between commercial goods and land, insofar as the former resource is held for instrumental purposes,⁹⁵ and is thus by definition a fungible resource that is not constitutive of its holder's identity.⁹⁶ The nature of land is extremely different. Land traditionally has been one of the most prominent objects of property rights in Western culture,⁹⁷ accorded a unique status as a symbol of the self and as a resource closely linked to personal freedom, rank and power.⁹⁸ One may justifiably insist on a distinction between "personal land" — e.g., the family home or farm — and "fungible land" used solely for commercial purposes, and claim that the way in which the law treats the latter should not be influenced by the social meaning of the former.⁹⁹ However, personal land lies at the core of the social meaning of land, at least in Western culture.

In addition, drawing an analogy between contractual rights and property rights is problematic. There is no doubt that contracts are significant forms of wealth — and hence are primary economic commodities — in modern industrialized societies. But contracts are also the consummate example of a characterless good. Contractual rights are promises made by promisors to promisees. Hence, if they can be said to have any connection to someone's

94 See Dagan, *supra* note 47, at 71-108.

95 There may be commercial goods held close at heart by their creator; the term "commercial goods" is used here, however, to refer to goods held for purely commercial, and instrumental, reasons.

96 See Menachem Mautner, *"The Eternal Triangles of the Law": Toward a Theory of Priorities in Conflicts Involving Remote Parties*, 90 Mich. L. Rev. 95, 123-24 (1991).

97 See Donald W. Large, *This Land Is Whose Land? Changing Concepts of Land as Property*, Wis. L. Rev. 1039, 1040 (1973).

98 See Herbert McClosky & John Zaller, *The American Ethos: Public Attitudes toward Capitalism and Democracy* 138 (1984); Belk, *supra* note 85, at 153; Lynton K. Caldwell, *Land and the Law: Problems in Legal Philosophy*, U. Ill. L. Rev. 319, 320 (1986); Clare Cooper, *The House as Symbol of the Self*, in *Environmental Psychology: People and Their Physical Settings* 435, 437-38 (Harold M. Proshansky et al. eds., 2d ed. 1976); McCarthy, *supra* note 85, at 116-17; Radin, *supra* note 80 at, 992, 1013.

99 First clues to such a distinction can be found in *Hawkes Estate v. Silver Campsites* [1994] 7 W.W.R 709, 721 [B.C.]; see also *Centex Homes Corp. v. Boag*, 820 A.2d 194 (Sup. Ct. N.J. 1974).

identity, the link is to the promisor's, rather than to the promisee's, identity.¹⁰⁰ At most, one can speak of an expectation on the part of the promisee that he will develop a personal connection to the promissory resource, but such an expectation — and even the justified reliance it may entail — cannot be equated to an *existing* connection of reflection-and-attachment.¹⁰¹

These two distinctions — between commercial goods and land and between contractual rights and property rights — seem to vindicate the traditional rules that were upheld in the *Surrey* judgment. These rules give special weight to the protection of landowners' control and, thus, tend to award landowners a measure of recovery that may indeed deter any attempt at non-consensual transfer.¹⁰² On the other hand, where the degree of reflection-and-attachment to a resource is relatively weak, Anglo-American law is more lax in terms of the measure of recovery it will award. Thus, in tortious interference cases, a non-consensual appropriation of contractual rights only requires, as a rule, preservation of the plaintiff's economic position, and any claim for the actual gain made by the defendant as a result of the appropriation is rejected.¹⁰³

It is important to note, however, that this general rule of not allowing restitutionary damages in regard to contractual rights has an exception, namely, cases involving contracts for the sale of unique goods (notably land).¹⁰⁴ To the extent that this exception refers to (and only to) contractual rights in constitutive resources with regard to which the promisee creates (albeit in his mind) a connection of reflection-and-attachment, it conforms with the analysis presented in this part.

IV. EFFICIENCY

Consider next restitutionary award from the perspective of efficiency. In

100 It should be recalled that I focus on commercial contracts which do not involve any specific fiduciary relationships.

101 See Radin, *supra* note 86, at 360-62; Craig Rotherham, *The Recovery of Profits of Wrongdoing and Priority in Insolvency: When Is Proprietary Relief Justified*, 1 Company Fin. and Insolvency L. Rev. 43, 45 (1997).

102 See Dagan, *supra* note 47, at 73-78.

103 See *id.* at 102-05.

104 See *supra* note 5. In these cases, recovery includes also specific performance. See Gareth Jones & William Goodhart, *Specific Performance* 91-94, 112-16 (1986); Anthony T. Kronman, *Specific Performance*, 45 U. Chi. L. Rev. 351, 355-65, 369-76 (1978).

this part I will argue that efficiency considerations support the *Surrey* rule, although the conventional rationale offered for this justification is misguided.

A. The "Best Finder" Rationale and Its Critique

Economic analysis of contract law recommends that contractual duties and liabilities be ascribed to the party who can bear them most cheaply and that contractual rights and opportunities should be assigned to the party likely to utilize them most efficiently. Hence, the conventional economic justification proffered for the application of the *Surrey* rule is that the promisor is likely to derive more utility than the promisee from the entitlement to the profits of the breach. The reason given to support this claim is that the promisor is generally in a better position to exploit opportunities to redirect the promissory resource, since she is generally better informed regarding possible profitable reallocations and can actually sell the promissory resource to alternative users. Whereas the *Surrey* rule provides the promisor with an incentive to redirect resources efficiently, the *Adras* rule tends to diminish this incentive; under the latter rule, the promisor who recognizes such an opportunity is required to re-negotiate with the promisee in order to be released from her obligation. Moreover, by dissociating the opportunity for profitable reallocation from the legal entitlement to utilize it, the *Adras* rule structures the re-negotiation between promisor and promisee as a bilateral monopoly entailing heavy transaction costs that reduce the surplus from the reallocation and, thus, the promisor's expected gain (indeed, in extreme cases, the promisor may even forego the efficient reallocation altogether). The *Surrey* rule avoids such undesirable results. Hence, it is the more efficient rule and, consequently, more favorable to commercial parties.¹⁰⁵

The analysis presented above is premised upon the rationale that the incentive for (that is, the expected benefit from) attaining efficient resource-allocation, and hence for searching for alternative buyers, should be assigned to the party in the best position to find them. This conventional defense of the traditional doctrine further assumes that the promisor, presumed to be in

105 See Collins, *supra* note 4, at 369-70; DeLong, *supra* note 5, at 743-45; E. Allan Farnsworth, *Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 Yale L.J. 1339, 1381-82 (1985); Richard Posner, *Economic Analysis of Law* 119 (4th ed. 1992). But see William S. Dodge, *The Case for Punitive Damages in Contracts*, 48 Duke L.J. 629, 634 (1999) ("the transaction costs of negotiating a release are typically lower than the assessment costs of establishing damages at trial"; hence, "contractual entitlements should be protected with property rules, including punitive damages").

the business of selling this particular type of promissory resource, is such a "best finder".

However, this is not necessarily the case. While there are, of course, cases in which such an assumption is valid (where the promisor is a merchant and the promisee a consumer), nonetheless, there are also numerous instances in which the promisee in fact has access to the market, and this access is not inferior — and at times, may even be superior — to that of the promisor.¹⁰⁶ The more common example of such a case is where the promisor is a producer and the promisee a wholesaler or a retailer, such that it is at least questionable as to whether the promisor, rather than the promisee, is the best finder of efficient reallocations. Less frequent examples are those that involve a consumer who sells merchandise to a merchant dealing in second-hand goods; in such a case, it is quite obvious that the promisee, and not the promisor, is the best finder.

These difficulties with the conventional economic analysis may lead down several different paths, all of them rather unsatisfactory. One option would be to allow the promisee to include the promisor's profits from the breach in his claim for damages for his lost opportunities whenever he, rather than the promisor, is — in the specific circumstances under discussion — the best finder of alternative transactions. This option would require, in each individual case, an ad hoc analysis of the relative accessibility of each party to the market, which would entail *ex post* heavy litigation costs and, even more significant, *ex ante* uncertainty inhibiting the ability to plan, so vital in the commercial contractual context.

Alternatively, we could opt for the rule that most (commercial) parties would be expected to choose if they were comprehensively setting liabilities and rights for all eventualities; more precisely, we could prefer the rule that would be cheapest overall to bargain around by the relevant contracting parties. However, the implementation of this option also would be rather burdensome since it would require complex inquiries and comparisons (even if we are not perturbed by the resulting uneven distribution of benefits and costs amongst the transacting parties).¹⁰⁷

Finally, a third, intermediate option would be to divide cases into two categories: namely, those circumstances in which the promisor tends to

106 See George M. Cohen, *The Fault Line in Contract Damages*, 80 Va. L. Rev. 1225, 1292-1304 (1994); Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. Legal Stud. 1, 5 (1989); Alan Schwartz, *The Case for Specific Performance*, 89 Yale L.J. 255, 284-87 (1979).

107 A uniform rule facilitates nicely for some sub-groups of contracting parties and is inconvenient and thus costly to others. See Charney, *supra* note 22, at 1842, 1864-65, 1878.

be the best finder would be subject to the *Surrey* rule, and those where the promisee is usually in the better position to find efficient reallocations would fall within the scope of the *Adras* rule. Although it does minimize the difficulties of the preceding alternative approaches, this option, too, is problematic: First, it does not resolve cases in which the typically best finder is not easily identified.¹⁰⁸ Moreover, it entails a difficult delineation process which, in turn, entails litigation costs and commercial uncertainty.

B. An Alternative Rationale for the Inefficiency of Restitutionary Damages: Proof-Difficulties

While the economic argument with respect to which party is the best finder is therefore inconclusive and the practical method of determination it would require problematic, there is another economic argument that supports preferring the *Surrey* rule to the *Adras* rule: The difficulties involved in proving the scope of the promisor's profits entail high litigation costs and create uncertainty, which commercial parties dislike.

While the information that is required in order to establish entitlement to the traditional contract remedies (which are aimed at compensating a promisee for his loss) tends to be available to the promisee, the data required for establishing restitutionary damages is much less accessible to him. In order to recover the promisor's profits, the promisee is required to submit evidence regarding another's affairs. Furthermore, restitutionary damages require that difficult judgments be made regarding causation as well as attribution of specific profits (and, presumably, also costs) to one specific transaction out of the entire undertakings of the promisor.¹⁰⁹ Contractual rights that rely on information that can be verified only at prohibitively high costs are inefficient; indeed, the cost of implementing these rights exceeds the expected efficiency gains therefrom.¹¹⁰ Hence, even in cases where the

108 A possible solution for such cases may be, as George Cohen has suggested, to prescribe a rule that allows the first party who finds such a transaction (and notifies her counterpart) to receive its benefits. This rule would encourage both parties to search simultaneously for a profitable reallocation. See Cohen, *supra* note 106, at 1295-97. However, such competition over the alternative transaction may be inefficient insofar as there is some overlap between the markets that the parties approach.

109 See Law Commission Consultation Paper, *supra* note 4, at 170; DeLong, *supra* note 5, at 772-73; Farnsworth, *supra* note 105, at 1350; Standen, *supra* note 34, at 171; Waddams, *supra* note 6, at 120.

110 See Collins, *supra* note 4, at 367; Alan Schwartz, *Relational Contracts in the*

promisee is, in fact, the best finder of alternative transactions, the *Adras* rule cannot withstand economic scrutiny.

The conventional approach to the impact of proof difficulties in the context of the debate surrounding restitutory damages leads to the opposite conclusion, i.e., to preferring the *Adras* rule. That approach focuses on the difficulties that the promisee would encounter in proving certain items of his real loss and views these difficulties as good reason for adopting the *Adras* approach. The profits from breach which *Adras* supplies as an alternative remedy are perceived as a substitute for the losses for which traditional contract remedies fail to compensate.¹¹¹

The conventional approach is correct, I would argue, insofar as it warns against contingencies of under-compensation and also insists that there are cases (for example, where both parties operate in similar markets and with comparable skills) in which the profits that the promisor obtained from her breach can help in assessing the promisee's lost profits. In such instances, award of profits is an appropriate remedy for the difficulty of under-compensation. Indeed, as noted,¹¹² common law jurisprudence has expressed no hesitancy in granting such an award, without subscribing to an *Adras*-like rule.

Such a recovery, however, should not be available in any case where the promisor's profits are not a good — or even reasonable — proxy of the promisee's loss, and thus not a suitable solution for under-compensation. In such cases (such as where the promisor sells in a different market or where by the time the promisee covers in the market, the market price equals the contract price) liquidated damages are more appropriate than restitutory damages. Only liquidated damages can credibly solve in these circumstances the difficulties to the promisee of proving the promisor's profits, and thus the problem of potential undercompensation to the promisee: Liquidated damages would allow a promisee to assess (*ex ante*) the circumstances in

Courts: An Analysis of Incomplete Agreements and Judicial Strategies, 21 J. Legal Stud. 271, 279-80 (1992).

111 See *Adras* (trans.), *supra* note 2, at 272, 276; Law Commission Consultation Paper, *supra* note 4, at 168; Patrick S. Atiyah, *An Introduction to the Law of Contract* 454 (5th ed. 1995); Gareth Jones, Goff & Jones' *The Law of Restitution* 414 (4th ed. 1993); Richard O'Dair, *Restitutory Damages for Breach of Contract and the Theory of Efficient Breach: Some Reflections*, 46 Cur. Legal Probs. 113, 123-28 (1993).

112 See *supra* note 6.

which he may be undercompensated due to loss that can be verified *ex post* only at a prohibitively high cost.¹¹³

In sum, not only do we find that difficulties of proof cannot provide the rationale for awarding restitutionary damages as a substitute for uncompensated losses, but, as I argued earlier, the difficulties involved in proving the promisor's profits render restitutionary damages an inefficient pecuniary remedy. Hence, even if the "best finder test" is indeterminate from an economic point of view, as I claimed above, the *Surrey* rule is still generally more efficient — and, thus, more attractive — than the *Adras* rule.¹¹⁴

C. Efficiency and other Normative Considerations

The claim is often made that efficiency in assignment of contractual rights and duties is not only economically justified, but is also the only sensible consideration. The underlying rationale to this ambitious claim is that (at least insofar as the context is commercial and the rules at issue are default rules) any other rule would be rejected by the (commercial) parties, who prefer efficient rules that maximize their contractual surplus.¹¹⁵ Inefficient rules only serve to increase the transaction costs of the parties and, hence,

113 See Alan Schwartz, *The Myth that Promisees Prefer Supracompensatory Damages: An Analysis of Contracting for Damage Measures*, 100 Yale L.J. 369 (1990).

114 There may be types of cases in which restitutionary damages may be efficient. The literature offers two proposals for exceptions to the *Surrey* rule. Allan Farnsworth suggests that restitutionary damages should be available if as a result of the breach, the promisee is left with a defective performance and no opportunity to use his return performance to attempt to obtain a substitute. See Farnsworth, *supra* note 105, at 1382-92; see also *Samson & Samson v. Proctor* [1975] 1 N.Z.L.R. 655, 656; DeLong, *supra* note 5, at 748-50; cf. Ernest J. Weinrib, *The Juridical Classification of Obligations*, in *The Classification of Obligations* 37, 51 (Peter Birks ed., 1997). Richard Posner claims that the promisee should be entitled to restitutionary damages if the breach is opportunistic, that is, if the promisor took advantage of the promisee's vulnerability in a case of sequential performance. See Posner, *supra* note 105, at 117-18; see also *Hickey & Co v. Roches Stores (Dublin)* (No. 1) (1976) (1993) 1 R.L.R. 196, 208 (Ireland H.C.); Peter Birks, *Restitutionary Damages for Breach of Contract: Snep and the Fusion of Law and Equity*, *Lloyd's Maritime and Commercial L.Q.* 421, 440-42 (1987); Jackman, *supra* note 45, at 320-21.

115 In non-commercial contexts, to be sure, the parties' preferences may deviate from strict maximization of profits. See Elizabeth Anderson, *Value in Ethics and Economics* 144-46, 164, 219-20 (1993); James B. White, *Justice as Translation* 51-52, 57-59, 62 (1990).

impede their efforts at cooperation.¹¹⁶ It should be stressed that not only from the promisor's point of view are inefficient contractual liabilities undesirable. Inefficient default rules are also (*ex ante*) undesirable from the promisee's perspective, at least insofar as commercial parties are concerned, because the cost that the promisor is expected to incur — and, hence, the additional price she will charge the promisee — due to an inefficient sanction for non-performance (for example) is, by definition, greater than the expected benefit the promisee is likely to derive from such a remedy.¹¹⁷

Efficiency, however, should not be the exclusive consideration in shaping contract rules. The law is not merely a set of incentives. Rather, it also provides standards for conduct and for judgment of behavior.¹¹⁸ Furthermore, as one of the most important social institutions, the law also influences the preferences of those subject to it.¹¹⁹ The preference of contractual parties for one set of default rules over another, then, is not exogenous to contract law — it is not mere external input for the operation of contract law rules. The preferences of the contractual parties regarding the norms and values that will frame their relationship are, in fact, endogenous to the operation of the legal rules; i.e., the preferences of the parties will be shaped (to some extent) by the rules, and therefore the rules can be designed to the end of promoting certain values on the part of the contracting parties.¹²⁰

Indeed, the law's endorsement of a certain value, and construction of a rule on the basis thereof, lends symbolic power to that value. Moreover,

116 See Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 S. Cal. Interdisciplinary L.J. 389, 392, 399, 402-03, 416 (1994); Charney, *supra* note 22, at 1846-47, 1851, 1877-78.

117 See DeLong, *supra* note 5, at 740-45. The parties also should be allowed to opt out of many contract rules, especially those that govern the applicable remedies for breach. Setting such rules as immutable would amount to forcing promisees to purchase rights even in circumstances where they believe such a purchase would put them in a worse position. This can hardly be justified where neither external effects nor paternalistic concerns are involved. See Charney, *supra* note 22, at 1855.

118 See H.L.A. Hart, *The Concept of Law* 79-88 (1961).

119 See Duncan Kennedy, *A Critique of Adjudication* 63, 227-28 (1997); Cass Sunstein, *Preferences and Politics*, 20 Phil. & Pub. Aff. 3, 8-10 (1991).

120 See Collins, *supra* note 4, at 14; Feinman, *supra* note 33, at 837; Unger, *supra* note 62; William C. Whitford, *Ian Macneil's Contribution to Contract Scholarship*, Wis. L. Rev. 545, 559 (1985); Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 Colum. L.R. 1710, 1758-59 (1997). Here I refer to the influence of law in *shaping preferences*, rather than the less intrusive dependency of conventional expectations on legal prescriptions, discussed above with respect to promise-keeping, see *supra* text accompanying note 25.

value and norm preferences can be shaped by default contractual rules, even while the parties can reverse the rule at will through a contractual provision.¹²¹ Opting out of a default rule is costly, due, for example, to the potential discomfort involved in the mere discussion of the possibility of non-performance.¹²² Hence, where a specific default rule deviates from the parties' *ex ante* preferences only moderately, the parties may choose not to change it.¹²³ Such a default rule will remain intact and will play its role not only in regulating the parties' specific transaction, but also in shaping their future preferences regarding both values and default rules.¹²⁴ Thus, a sophisticated decision-maker can use default rules in order gradually to affect the value-system of his or her subjects.¹²⁵

In sum, neither the *Surrey* nor the *Adras* rule is more efficient in allocating profits to the best finder of alternative transactions, but the *Surrey* rule is more efficient — despite conventional analysis — in entailing fewer proof difficulties. Thus while considerations of promise-keeping and unjust enrichment are neutral between the two rules, protection of proprietary rights and efficiency both support the *Surrey* rule. At the same time, the search for a method of determining which rule is preferable is not satisfied upon considerations of efficiency and proprietary rights alone; hence my analysis will continue to explore another normative value that may lead in a different direction.

121 *But see* Schwartz, *supra* note 116, at 396, 413-15 (preference formation is irrelevant to default rules).

122 *See* Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 Md. L. Rev. 563, 595-96 (1982); Zamir, *supra* note 120, at 1755-58, 1760-65.

123 Indeed, in many circumstances, parties do not override default rules, regardless of their contents. Charney, *supra* note 22, at 1867-68.

124 *See* Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 Cornell L. Rev. 608 (1998).

125 Some are reluctant to acknowledge that contract law is a medium for adapting preferences, raising the concern of a slippery slope to tyranny. *See* Michael J. Trebilcock, *The Limits of Freedom of Contract* 251 (1993). I believe, however, that this view is overstated and misplaced. While the value-shaping power of default rules is rather limited, every contract law regime — from a highly regulated one to the most facilitative possible — serves, intentionally or inadvertently, either to reinforce or modify a certain perception of the pertinent contractual constituents and their relationships with one another.

V. GOOD FAITH

Good faith also has been invoked as an argument in support of allowing restitutionary damages for breach of contract for sale. The *Adras* court explicitly referred to the "general rule that a contract must be performed in good faith", emphasizing the requirement of "proper behavior by the parties to the contract who have to be able to trust each other."¹²⁶ Hence, where the promisor breaches her contractual obligation "with the sole motive of enriching [her]self", she commits "a genuine wrong" that justifies the restitutionary relief.¹²⁷

The following discussion will show, however, that good faith supports neither *Adras* nor *Surrey*. Rather, the principle of good faith supports the adoption of a third rule, according to which the reallocation profits would be shared between the parties.

A. Good Faith as Cooperation

John Adams and Roger Brownsword have presented a conceptualization of the requirement of good faith¹²⁸ as the imposition of "constraints on the pursuit of self-interest" in favor of respect for the legitimate interests of fellow contractors.¹²⁹ Good faith, they explain, "flows from a theory of co-operative dealing" and "co-operative responsibilities".¹³⁰ To be sure, "this does not mean that individuals may not pursue their own projects and purposes, nor that each contractor must altruistically endeavor to prioritize the interests of the other side."¹³¹ A regime of good faith, i.e., "co-operation in contract", "lies between

126 *Adras* (trans.), *supra* note 2, at 241.

127 *Id.* For similar considerations, see Mason & Carter, *supra* note 4, at 712-13.

128 In the terminology of Adams & Brownsword, I refer to good faith as a rule, as distinguished from good faith as an exception. See John N. Adams & Roger Brownsword, *Key Issues in Contract* 217 (1995). For another recent account that seems to refer to the latter — much more moderate — conception of good faith, see Daniel Friedmann, *Good Faith and Remedies for Breach of Contract*, in *Good Faith and Fault in Contract Law* 399, 400 (Jack Beatson & Daniel Friedmann eds., 1995).

129 Adams & Brownsword, *supra* note 128, at 215.

130 *Id.* at 202, 217.

131 *Id.* at 220. The limited obligations prescribed by good faith regimes should mitigate the concern that a good faith requirement would create resentment and thus impede, rather than enhance, its own normative ideal. For a similar concern (that legal intervention may be counter-productive), see Viola C. Brady, *The Duty to Rescue in Tort Law: Implications of Research on Altruism*, 55 *Ind. L.J.* 551,

the unreserved pursuit of self-interest and the unreserved subordination of self-interest."¹³² It sees the contractual parties as creating "a community of interest", a "joint venture" that entails "mutual dependency" and requires responsibility, restraint and mutual support.¹³³

Thus perceived, the obligation of good faith stands as the normative foundation to understanding the contractual relationship in completely different terms from the classic (adversarial) model of contract as a self-interested exchange,¹³⁴ which underlies for example the economic analysis discussed above in Part IV. According to this alternative conception, the contractual relationship, even in commercial settings, is seen not only as a *locus* of competition or an instrument for the allocation of risks and the production of wealth, but also as a community: a zone of mutual cooperation and confidence, and therefore also of dependence and vulnerability.¹³⁵

Insofar as good faith should dominate a contractual relationship, the parties have a duty to protect one another and share with each other. This duty arises primarily from the demands of trustworthy conduct and relative loyalty and solidarity towards contractual partners, and complements the obligations to which they explicitly committed themselves.¹³⁶ Perceiving such duties as part and parcel of the concept of contract — and not merely as ancillary obligations rooted in some other species of liability — constitutes the radical dimension of this alternative conception of the contractual relationship¹³⁷ and can explain

560 (1980). For a general discussion of the tension between normativity and coercion, mirrored in our conflicting attitudes towards authority, see Meir Dan Cohen, *In Defense of Defiance*, 23 Phil. & Pub. Aff. 24 (1994). For the need of decision-makers to bargain against people's preferences, see Owen M. Fiss, *The Supreme Court, 1978 Term — Foreword: The Forms of Justice*, 93 Harv. L. Rev. 1, 54-55 (1979).

132 Adams & Brownsword, *supra* note 128, at 301.

133 *Id.* at 223, 301-03.

134 See *id.* at 200-02, 217, 224-25.

135 In other words, the counterversion defies the commonplace distinction between competitive contracts and "selfless" communities. In so doing, it must develop a set of criteria to characterize situations along the spectrum between these two poles, such as the self-understanding of the parties involved, whether explicit or implicit, and the continuing character of their contractual relationships in terms of power, trust, and vulnerability.

136 See Hugh Collins, *The Transformation Thesis and the Ascription of Contractual Liability*, in *Perspectives of Critical Contract Law* 293, 306-07 (Thomas Wilhelmsson ed., 1993); Feinman, *supra* note 33, at 842-43; Gordon, *supra* note 33, at 206-08; Unger, *supra* note 62, at 632, 639, 641-42, 644.

137 See Collins, *supra* note 136, at 302.

the hostility exhibited towards such an understanding of good faith by those who perceive contracts in purely instrumental terms.¹³⁸

B. An Apparent Deadlock

The cooperative countervision of the contractual relationship dictates that the contractual parties share both unexpected misfortunes and difficulties as well as unexpected benefits that arise over the course of their contractual relationship. Hence the apparent affinity of this counter-vision to the *Adras* rule: when the opportunity to sell at a better price materializes, the proper thing for the promisor to do is to contact the promisee, make sure her expected profits are greater than the promisee's expected loss, and — if indeed it turns out that the alternative transaction is more efficient — share these profits with the promisee.¹³⁹

In other words, in order for the law to genuinely detach itself from the instrumental understanding of the contractual relationship in favor of the conception of this relationship as an area of trust, solidarity and hence sharing, it must repudiate the traditional rule, as restated in *Surrey*, that implicitly sanctions the promisor's unilateral pursuit of her own interests, irrespective of the existing relationship she has already established with her contractual partner. Rather, on this view the law should adopt the *Adras* rule, which solicits the appropriate contractual behavior: discouraging any unilateral repudiation by the promisor and requiring her to consult with the promisee and negotiate with him an agreed release that will supposedly satisfy both.

On the other hand, it can be shown from another perspective that this more cooperative conception of the contractual relationship in fact entails the rejection of the *Adras* rule. The *Adras* rule — just like a broad rule of specific performance — may be seen not to foster cooperation. On the

138 See, e.g., Mark Snyderman, *What's So Good About Good Faith? The Good Faith Performance Obligation in Commercial Lending*, 55 U. Chi. L. Rev. 1335 (1988). Hence, even where conservative writers resort to values of sharing and mutual care, they strictly limit applicability to cases where (and to the extent that) these values serve the self-interest of the relevant party. See, e.g., Clayton P. Gillette, *Commercial Relationships and the Selection of Default Rules for Remote Risks*, 19 J. Legal Stud. 535 (1990).

139 See Adams & Brownsword, *supra* note 128, at 228-31, 302; Trebilcock, *supra* note 125, at 142; Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685, 1734 (1976); Ian R. Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 Va. L. Rev. 947, 968-69 (1982);

contrary, compelling the parties to work together when their relationship is no longer mutually beneficial is bound to create a loss of confidence and even hostility between the parties.¹⁴⁰

More specifically, the *Adras* rule grants the promisee a position of threatening leverage that enables him to demand that the promisor purchase her release at a prohibitively high price¹⁴¹ and, at times (as we have seen), even impede efficient reallocation of the promissory resource altogether.¹⁴² A promisee who stubbornly insists on performance, where non-performance will not harm him in any way and performance would cause the promisor to lose a profitable opportunity, abuses his rights. His behavior is the antithesis to the duty to perform contractual obligations in good faith.¹⁴³ Is a rule that enables people to prevent others from improving their situation without detrimental effect on anyone else¹⁴⁴ really required by the values of trust, solidarity and sharing?¹⁴⁵

Since these two contradictory arguments are both convincing, a deadlock seems inevitable. Is the value of good faith performance, as it is understood herein, also too indeterminate (similar to the principles of promise-keeping and unjust enrichment) to yield any doctrinal conclusions?

140 See Stephen M. Waddams, *The Choice of Remedy for Breach of Contract*, in Beatson & Friedmann, *supra* note 128, at 471, 479; Stephen A. Smith, *Performance, Punishment and the Nature of Contractual Obligation*, 60 Mod. L. Rev. 360, 370, 372, 377 (1997).

141 See Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 Va. L. Rev. 967, 982 (1983); Waddams, *supra* note 140, at 474.

142 See *supra* note 107 and accompanying text.

143 Cf. Robert W. Gordon, *Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law*, [1985] Wis. L. Rev. 565, 569. See also Friedmann, *supra* note 12, at 525-26; Shmuel Shilo, "Kofin Al Midat Sdom": *Jewish Law's Concept of Abuse of Rights*, 15 Israel L. Rev. 49 (1980).

144 On the surface, the question of whether the promisee still has, in such a case, any legitimate complaint is dependent upon the legal allocation of entitlements, so that if the law adopts the *Adras* rule, insisting on performance cannot be considered an abuse of rights. However, allocating the entitlements in such a case is not a "zero-sum game": A promisor who knows that her promisee is entitled to any gains she may secure from an alternative sale might not bother to look for such beneficial transactions. Hence, adopting such a rule is tantamount to the law acquiescing to the practice of inordinary standing upon one's rights.

145 Cf. Aharon Kirschenbaum, *Equity in Jewish Law* 185-86 (1991); Anthony T. Kronman, *A New Champion for the Will Theory*, 91 Yale L.J. 404, 416 (1981).

C. Good Faith and Half Measures

I believe that a conclusion, nonetheless, can be drawn from good faith as the foundation of contractual obligations, but this will necessitate some deviation from the conventional law of remedies. It should not be surprising that the approaches of both *Adras* and *Surrey* are problematic from the perspective of a cooperative conception of contract: any rule of "all or nothing" seems antithetical to the prescriptions of sharing unexpected misfortunes and benefits.¹⁴⁶

Fortunately, the two dichotomous rules are not the only alternatives for allocating these gains. There is also the possibility of dividing, between the parties, the efficiency gain of the reallocation, i.e., the difference between the promisor's gain from the breach and the promisee's expectation interest.¹⁴⁷ This third possibility does not give the promisee the power to veto the beneficial alternative transaction and hence does not encourage him to take a threatening "hold-out" stance. At the same time, this alternative does not disregard the parties' special commitment towards one another as contractual partners, and thus, it requires that the promisor consider the interests of the promisee. In addition to compensating the promisee for his expectation interest, the promisor is required to share with him the unexpected benefits that arise over the course of their contractual relationship.

Implementing this approach can take two main forms: a precise rule that prescribes that in cases of this sort the parties should divide the reallocation profits into equal shares between them, or else a vague standard that would leave to the discretion of the court the decision as to how the reallocation profits are to be divided amongst the parties. The choice between these two types of norms requires difficult normative judgments.

A rule that defines *ex ante* the parties' rights — even if it requires them to share — may still be viewed as too strict according to the cooperative

146 For a general discussion of the connection between norms that divide responsibility between the contractual parties and values of cooperation and solidarity, see Ariel Porat, *Contributory Fault in the Law of Contract* 77-83 (1997) [Hebrew].

147 Other authors also have proposed such a division, without however developing a normative grounding for it. See Friedmann, *supra* note 128, at 411-12; Goodhart, *supra* note 8, at 12-13. On the other hand, Richard O'Dair has maintained that typical parties are not likely to prefer this rule (for reasons similar to those mentioned in Part IV). See O'Dair, *supra* note 111, at 132-33. This may well be true, but here I focus on a value that is external to the parties' initial preferences (although, as indicated below, I do try to make the deviation from these preferences as minimal as possible).

(good faith) conception of contract. A standard that allows ad hoc judicial determinations may thus seem preferable, as it enables courts to assess the parties' behavior from the time that the beneficial opportunity came to their attention, and perhaps also any specific contribution one party or the other made.¹⁴⁸

There are also drawbacks to vague standards, however.¹⁴⁹ In the commercial setting, the most significant drawback is the damaging effect such standards have on the ability of the contractual parties to predict, and thus upon the accordance of the cooperative-conception of contract with the preferences of these parties. Vagueness in the particular circumstances under discussion might also be detrimental to good faith itself: If an *ex post* judicial determination of the parties' obligations is required every time a case of beneficial alternative transaction arises, then in many cases, the economically stronger party — who can afford tedious and costly proceedings — will prevail. In contrast, the more precise rule mitigates the parties' conflict of interests when the beneficial opportunity arises and stabilizes their relationship at that delicate point in time.¹⁵⁰

In any event, the value of good faith performance is not neutral to the alternative doctrinal regimes with respect to the entitlement to profits gained from a breach. However, this value does seem to be as hostile towards the revolutionary *Adras* rule as it is antagonistic towards the traditional *Surrey* rule. If, indeed, the law seeks to endorse a more cooperative conception of contract, it should adopt a third legal regime, one that divides the reallocation profits between the contractual parties.

148 See Collins, *supra* note 4, at 38-39.

149 The literature on "rules versus standards" is vast. For some recent accounts, see Fredrick Schauer, *Playing by the Rules* (1991); Gillian K. Hadfield, *Weighing the Value of Vagueness: An Economic Perspective on Precision in the Law*, 82 Cal. L. Rev. 541 (1994); Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 Duke L.J. 557 (1992); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 Harv. L. Rev. 22 (1992); Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 Cal. L. Rev. 509 (1994).

150 For the value of precise rules (and rigid rights) in facilitating trust and cooperation, see Jeremy Waldron, *When Justice Replaces Affection: The Need for Rights in Liberal Rights* 370, 373-74, 376, 385, 387 (1993); Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. Pa. L. Rev. 1765, 1793-94 (1996); Carol M. Rose, *Trust in the Mirror of Betrayal*, 75 B.U. L. Rev. 531, 537-38, 540-41, 546, 550 (1995).

CONCLUSION

Situated at the frontier of contractual and restitutionary liability, the issue of recovery of profits gained from breach of contract for sale poses persistent and difficult obstacles to deriving legal rules from normative prescriptions. In this article, it has been my hope to make a modest contribution to the resolution of these challenges. I have assumed that both the traditional *Surrey* rule and the diametrically-opposed approach suggested by the Israeli Supreme Court in the *Adras* case can be justified from a purely doctrinal point of view. I therefore focused on the contending values that are raised as normative arguments in the debate over restitutionary damages, and critically examined the bearing these values have on this debate.

Two such values were found to be irrelevant to the question under discussion, despite their apparent normative appeal, namely, promise-keeping and prevention of unjust enrichment. The former value, important as it may be, is simply neutral regarding the alternative rules. For as long as performance is not rendered totally optional to the parties by the legal background rules, and insofar as informed and sophisticated commercial parties are concerned, promise-keeping is indifferent to this choice. Resort to the principle against unjust enrichment, increasingly popular in the jurisprudence of restitution, is an even less convincing argument. Identifying cases of unjust enrichment, I have maintained, is a conclusion that must be grounded in normative considerations. Therefore, prevention of unjust enrichment should not be regarded as a normative value, but rather as the organizing theme of the law of restitution. Such an alternative understanding is helpful in highlighting both the need for normative choice and the heterogeneity of this area of law.

The claim that restitutionary damages for breach of contract are required in order to protect proprietary rights is also a summons to partake in normative deliberation, rather than the resolution of such deliberation. Those values however insist on a distinction between proprietary interests in land and contractual interests in commercial goods, thus denying the analogy made in *Adras*. Appropriation cases require a choice of remedy that corresponds with the degree to which a typical holder is attached to the appropriated resource, which is, in turn, the result of the extent of his self-investment in that resource. Insofar as this is the (or even a) relevant consideration, it is difficult to justify the powerful protection the *Adras* approach offers to holders of contractual rights in commercial goods. The traditional doctrine, as restated in *Surrey*, more closely reflects this normative guideline.

The *Surrey* rule is also vindicated from the perspective of efficiency,

notwithstanding the difficulties of the traditional "best finder" argument. Contrary to conventional wisdom, proof difficulties do not support the availability of restitutionary damages, but, rather, render it an inefficient remedy and, thus, unattractive to commercial parties. Hence, insofar as the law of remedies is understood to be an instrument for facilitating the parties' preferences for efficiency, the *Surrey* rule must prevail.

But this is not the only possible conception of contract. The counter-vision of modern contract law, discussed in the last Part of this article, perceives the contractual relationship as a zone of trust, solidarity and sharing. On the assumption that private law has some value-shaping effect, it can help inculcate this view of contract. In order to do so, it needs to prescribe rules that require the parties to share unexpected harms and benefits. Therefore, if good faith is the value we wish to promote, neither *Surrey* nor *Adras* points to the correct doctrine. Rather, a third legal regime — one which divides the reallocation profits amongst the parties — is called for.

It emerges that just as in the context of so many other doctrinal dilemmas, we cannot ignore the task the law consistently has to shoulder, namely, to choose between two conflicting social visions.¹⁵¹ A choice must be made between the instrumental conception of contract (which supports the *Surrey* rule) and the more cooperative alternative (which endorses a norm of division) in order to ultimately settle the persistent debate over restitutionary damages for breach of contract for sale.

151 See, e.g., Unger, *supra* note 62, at 645.