

THE MISSING INTEREST: RESTORATION OF THE CONTRACTUAL EQUIVALENCE

*Eyal Zamir**

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* Augusto Levi Professor of Commercial Law, Hebrew University of Jerusalem; Senior Global Research Fellow, New York University School of Law (2005/2006). I am grateful to Barry Adler, Oren Bar-Gill, Omri Ben-Shahar, Hanoch Dagan, David Enoch, David Flatto, Hila Keren, Roy Kreitner, Daphna Lewinsohn-Zamir, Shahar Lifshitz, Barak Medina, Ariel Porat, Eric Posner, and Shahar Weller for invaluable comments on earlier drafts of this Article, and NYU School of Law for its generous hospitality.

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INTRODUCTION

CONCEPTUALIZATIONS and classifications are crucial for understanding and analyzing any phenomenon, including legal ones. Concepts and categories shape the way we think about anything, including legal doctrines and judicial decisions. Once a certain classification takes root in our minds, however, it can dominate our thinking and thus preclude us from seeing the entire complex picture.

For the past seventy years, the analysis of contract remedies has been dominated by Lon Fuller and William Perdue's classification of the "interests" protected by monetary (and other) remedies for breach of contract: expectation, reliance, and restitution.¹ In recent years, several scholars have sharply criticized this threefold classification,² pointed to its incomplete-

¹ L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages* (pts. 1-2), 46 *Yale L.J.* 52, 373 (1936-37).

² The critiques challenge the conceptual classification itself, the descriptive claim that courts regularly award damages that are aimed at protecting the reliance interest, and the normative claim that the reliance interest is more worthy of protection than the expectation interest. See, e.g., David W. Barnes, *The Net Expectation Interest in*

ness,³ and even suggested abandoning it altogether and replacing it with alternative classifications.⁴ Despite all the criticism and new proposals, Fuller and Perdue's analytical framework has maintained its dominance in contract law doctrine and theory, and continues to provide us with a common vocabulary for discussing the goals of contract remedies.

Fuller and Perdue's ingenious conceptualization has clarified the complex picture of contract remedies, yet it has concomitantly obstructed our view of some of the picture's elements. Consider, for example, the following scholarly responses to some remedy rules and rulings. In *Fast v. Southern Offshore Yachts*, a buyer was granted specific performance of a seller's obligation to deliver the sale object and, as an ancillary monetary relief, recovered interest on the part of the purchase price that he had already paid.⁵ In assessing this monetary award, Edward Yorio notes that it "seems to violate the underlying principles of an equitable accounting," (that is, duplicating as nearly as possible the situation that would exist

Contract Damages, 48 Emory L. Rev. 1137 (1999) (arguing that courts should and do ensure that the injured party obtains the profits she would have earned had the contract been fully performed, rather than protecting any of the interests described by Fuller and Perdue); Daniel Friedmann, The Performance Interest in Contract Damages, 111 L.Q.R. 628 (1995) (opposing the descriptive and normative claims made by Fuller and Perdue regarding the supremacy of the reliance interest); Michael B. Kelly, The Phantom Reliance Interest in Contract Damages, 1992 Wis. L. Rev. 1755 (exposing the multiplicity of meanings of "reliance interest" in Fuller and Perdue's article, and challenging the normative justification for the use of reliance as a measure of damages).

³ Avery Katz proposed to complete Fuller and Perdue's tripartite classification by adding a fourth interest: "liquidated specific performance." Avery Katz, Reflections on Fuller and Perdue's *The Reliance Interest in Contract Damages: A Positive Economic Framework*, 21 U. Mich. J.L. Reform 541 (1988). See also *infra* Part I.

⁴ See Eric G. Andersen, The Restoration Interest and Damages for Breach of Contract, 53 Md. L. Rev. 1, 32-50 (1994) (proposing to replace Fuller and Perdue's tripartite classification with a bipartite model, in which the expectation interest stands at one pole and the 'restoration interest'—consisting of restitution, compensation for other losses, and discharge of executory obligations—at the other pole); Richard Craswell, Against Fuller and Perdue, 67 U. Chi. L. Rev. 99 (2000) (criticizing Fuller and Perdue's analysis on all levels, denying its relevance to modern contract theory, and proposing the following classification: remedies above expectation, remedies approximating 'true' expectation, and remedies below expectation).

⁵ 587 F. Supp. 1354, 1357-58 (D. Conn. 1984). For further discussion of this case, see *infra* Subsection II.B.2.

but for the breach).⁶ Clayton Gillette and Steven Walt make a similar observation regarding Article 50 of the United Nations Convention on Contracts for the International Sale of Goods. This article allows the buyer to reduce the contract price proportionally as a remedy for nonconformity of the goods. After thoroughly analyzing this provision, they conclude: “[b]ecause we lack a good justification of Article 50’s price reduction, we find it puzzling.”⁷ Finally, Dan Dobbs opens his comments on the rule that in some, but not all, circumstances the injured party may recover restitution in excess of expectancy, by labeling it “doubly strange.”⁸

Do these remedies truly “violate the underlying principles” of contract remedies? Are they “puzzling” and “strange”? They certainly are if one thinks in terms of the conventional classification, because they do not conform to any of the familiar interests. These remedies are less puzzling once we realize that there is yet another interest, heretofore overlooked. The first objective of this Article is to demystify this puzzlement by identifying this new interest of contract remedies, namely, *restoration of the contractual equivalence*, or the *restoration interest*.

In awarding restoration remedies, courts and legislatures do not aim to place the injured party in the position that she would have been in had the contract been performed or had she never made the contract, nor do they aim to put the breaching party in any of these two positions. Rather, courts and legislatures strive to put the injured party in a position similar to the one she would have occupied had the parties made and performed a contract in which their obligations were adjusted to the actual performance by the breaching party, while maintaining the contractual equivalence in terms of the agreed value of performance, the chronological relation between their respective obligations, etc.⁹ Thus, for example, restora-

⁶ Edward Yorio, *Contract Enforcement: Specific Performance and Injunctions* 235 (1989 & Supp. 2006).

⁷ Clayton P. Gillette & Steven D. Walt, *Sales Law: Domestic and International* 365 (rev. ed. 2002). For a detailed discussion of the remedy of price reduction, see *infra* Subsection II.A.3.

⁸ 3 Dan B. Dobbs, *Dobbs Law of Remedies: Damages-Equity-Restitution* § 12.7(5), at 182 (Practitioner’s Treatise Series, 2d ed. 1993). On this rule, see *infra* Subsection II.A.4.

⁹ This meaning of the term “restoration” is different from the meaning of the same term as used by Andersen. While Andersen’s “restoration” means restoring “the in-

tion remedies may put a buyer in a monetary position similar to the one she would have occupied had the contract referred to a smaller amount of goods, to goods of inferior quality, or to delivery at the (belated) time in which the goods were actually delivered. I shall argue that restoration of the contractual equivalence is the only—or at the very least, the most—coherent explanation for the remedies awarded in the aforementioned examples as well as in numerous other cases.

In addition to defining and refining the interests (that is, the principles and goals) underlying contract remedies, the scholarship analyzes the different interests from the point of view of various normative theories.¹⁰ In a similar fashion, this Article not only will demonstrate that courts and legislatures actually award restoration remedies, it will also explore the normative justifications for protecting this interest and point to the broader theoretical implications of recognizing it. It will argue that protecting the restoration interest is justified by—or at least compatible with—the major normative theories of contract law, including the will theory, economic efficiency, corrective and distributive justice, and contract as cooperative relationship. Among other things, it will argue that restoration remedies realize the parties' will and provide potentially stronger (and more efficient) incentives to perform, especially when there is a considerable gap between the promisee's subjective valuation of the promisor's performance and its market value. Restoration remedies have both distributive and efficiency advantages because they often can be attained without recourse to the court system, and, even when a lawsuit is required, the cost of securing them is usually lower than that of other potential remedies. Finally, protecting the restoration interest promotes notions of contract as cooperative relationship.

jured party to the legal and economic circumstances that existed prior to contract formation," Andersen, *supra* note 4, at 4, my notion refers to restoring the contractual equivalence by adjusting the injured party's obligations to the actual performance by the breacher. There may be instances in which restoring the precontractual position and restoring the contractual equivalence would bring about similar results, but this is true with respect to all of the interests. See *infra* Section III.A.

¹⁰ For an illuminating critical survey of the literature, see Craswell, *supra* note 4, at 106–36; see also Christopher T. Wonnell, *Expectation, Reliance, and the Two Contractual Wrongs*, 38 *San Diego L. Rev.* 53, 98–133 (2001).

While this Article will further highlight the incompleteness of the conventional, tripartite classification, in contrast to some other contributions to this body of scholarship, it does not aim to undermine Fuller and Perdue's analytical framework nor deny its usefulness in discussing contract remedies.¹¹ It will reject, however, the prevailing notion that the conventional classification exhausts the possible and worthwhile goals of contract remedies.¹² On a different level, just as the expectation/reliance debate goes to the root of contractual liability, the identification of the restoration interest will contribute to a better understanding of the foundations of contract and contract law. In particular, recognition of the restoration interest may reinforce the notion of contract as a cooperative relationship and enrich our understanding of the will theory of contract.

The central policy implication of the analytical, doctrinal, and normative analyses is that restoration remedies should be more systematically and generally made available to the injured party. The injured party should in principle be entitled to opt for restoration remedies in (at least) any instance of partial, defective, or de-

¹¹ In my view, previous attempts to deny the usefulness of Fuller and Perdue's classification for describing contract remedies and its relevance to modern normative debates have not been successful. As a matter of fact, subsequent descriptive and normative analyses keep using the concepts of expectation, reliance, and restitution, while alternative classifications have not gained a comparable status in the legal and scholarly discourse. Even scholars who propose alternative classifications are forced to employ the conventional vocabulary to convey their ideas. More fundamentally, while it may be true that from an economic or other normative perspective there is no intrinsic significance to any specific point along the continuum from no remedy to extremely high remedies, real-world legal norms cannot make use of such reference points as "63 percent expectation interest," as Craswell suggests. Craswell, *supra* note 4, at 110–11. Even if courts never succeed in fully protecting any of the conventional interests, and even if there are compelling normative reasons to award remedies that do not exactly correspond to any of the interests, a legal system cannot function without organizing analytical frameworks (as Craswell concedes, *id.* at 156) or without rules phrased in meaningful terms.

¹² The prevailing notion is reflected, for example, in *Restatement (Second) of Contracts* § 344 (1981) (stating without qualification that contract remedies serve to protect one or more of Fuller and Perdue's three interests). Parenthetically, it may well be that, contrary to the currently prevailing notion, Fuller himself did not think of the three interests as the only conceivable or worthwhile goals of contract remedies. See Letter from Lon L. Fuller to Karl N. Llewellyn (Dec. 8, 1938), *quoted in* Robert S. Summers & Robert A. Hillman, *Contract and Related Obligation: Theory, Doctrine, and Practice* 41 (4th ed. 2001).

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layed performance, and to combine them with other remedies in accordance with the general principles of contract law.

The Article will proceed as follows. Part I will present the notion of restoration of the contractual equivalence against the backdrop of the conventional classification of interests protected by contract remedies. Part II will demonstrate how various existing doctrines of contract remedies, judicial as well as legislative, are best understood as intended to restore the contractual equivalence rather than protect any of the familiar interests. Section II.A will deal with cases of partial or defective performance and Section II.B with actual or expected delay. Section II.C will address cases in which restoration of the equivalence benefits the breaching party.

Based on the survey of the case law and legislative material in Part II, Part III will provide additional observations on the restoration interest, thus complementing the preliminary analytical presentation in Part I. Part III will draw a detailed comparison between restoration of the contractual equivalence and other goals of contract remedies (Section III.A); characterize the restoration interest as a goal or principle, rather than as a concrete rule (Section III.B); discuss the scope of availability of restoration remedies (Section III.C); and address the injured party's election between them and other remedies (Section III.D).

Part IV will examine whether the award of restoration remedies falls into line with some of the major foundational objectives of contract law as reflected in contract law theory. It first will examine two deontological theories that focus on the relations between the breacher and the injured party: the will theory of contract (Section IV.B) and corrective justice (Section IV.C). Then, it will move to consequentialist theories that concentrate on the effect of legal rules on society as a whole: distributive justice (Section IV.D) and economic efficiency (Section IV.E). Finally, it will evaluate restoration remedies from the perspective of social/relational conceptions of contract (Section IV.F). While under each of these theories one may offer arguments both for and against the restoration interest, I will conclude that there are persuasive arguments supporting the practice of granting such remedies. At the same time, the restoration interest sheds light on the theories themselves.

I. INTRODUCING RESTORATION AGAINST THE BACKGROUND
OF THE CONVENTIONAL INTERESTS

This Part fleshes out the concept of restoration of the contractual equivalence. To that end, it seems useful first to describe Fuller and Perdue's analytical framework summarily. As ordinarily conceived, the *expectation interest* focuses on the injured party, and it is forward-looking in the sense that it aims at putting her in the same (monetary) position that she would have been in had the contract been fully performed. It aims at letting her have the benefit of the bargain. The *reliance interest* also focuses on the injured party, but is backward-looking in the sense that it strives to put her in the position that she would have been in had she not made the contract in the first place. It does so by reimbursing her for the loss caused by her reliance on the contract. The *restitution interest*, on the other hand, focuses on the breaching party. It is backward-looking in that it aims to put the breaching party in a position similar to the one she would have been in had no contract been made. Forcing the party in breach to return the benefits she obtained from the injured party attains this goal.¹³ The following table highlights the basic characteristics of the three interests:¹⁴

	Injured Party	Breaching Party
Backward-looking	Reliance	Restitution
Forward-looking	Expectation	

This table also exposes the incomplete nature of Fuller and Perdue's analytical framework, which disregards the possibility of

¹³ For more detailed expositions of the three interests, see Restatement (Second) of Contracts § 344 (1981); 24 Samuel Williston, *A Treatise on the Law of Contracts* § 64:2, at 20–44 (Richard A. Lord ed., Thomson West 4th ed. 2002). It should be noted that there is no consensus regarding the exact meaning of these concepts. Specifically, some scholars have questioned the direct linkage between the contractual restitution interest and the breaching party's unjust enrichment. See Andrew Kull, *Disgorgement for Breach, the "Restitution Interest," and the Restatement of Contracts*, 79 *Tex. L. Rev.* 2021, 2028–30 (2001); Joseph M. Perillo, *Restitution in the Second Restatement of Contracts*, 81 *Colum. L. Rev.* 37 (1981).

¹⁴ Katz, *supra* note 3, at 545.

remedies designed to put the breaching party in the position she would have been in had she performed the contract. This goal typically is achieved by disgorging the breaching party of any benefit she gained by breaching the contract, even if such benefit was not directly drawn from anything she received from the injured party. Katz dubs this fourth interest “liquidated specific performance,” but a more suitable label seems to be disgorgement, or the *disgorgement interest*.¹⁵ While disgorgement remedies are not ordinarily available to the injured party under American contract law, they have been awarded in some cases, are awarded in other legal systems, and have attracted growing scholarly attention in recent years.¹⁶

¹⁵ Katz rightly points out that there is a common denominator to the fourth interest and the remedy of specific performance, in the sense that both put “the promisor at the welfare level she would have enjoyed had she performed.” *Id.* at 547. However, from the promisee’s point of view, there is a significant difference between the two goals. While specific performance gives the injured party no more than the benefit of her bargain (it often gives her less, due to the lapse of time), the fourth interest exceeds the expectation interest whenever the breaching party takes advantage of opportunities unavailable to the injured party. “Disgorgement” therefore seems a better term.

¹⁶ See, e.g., *EarthInfo v. Hydrosphere Resource Consultants*, 900 P.2d 113, 117–21 (Colo. 1995) (holding that the breaching party should be required to disgorge to the innocent party the benefits received as a result of the breach); *F.H. 20/82 Adras Ltd. v. Harlow & Jones GmbH*, [1988] IsrSC 42(1) 221, *translated in* 3 *Restitution L. Rev.* 235 (1995) (ruling by the Israeli Supreme Court that the plaintiff was entitled to recover all profits gained by the defendant as a result of contract breach); James Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* 149–89 (2002); (comprehensively analyzing the issue from comparative and normative perspectives); Hanoeh Dagan, *Restitutionary Damages for Breach of Contract: An Exercise in Private Law Theory*, 1 *Theoretical Inquiries in L.* 115 (2000) (discussing the desirability of disgorgement remedies from various normative perspectives); E. Allan Farnsworth, *Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 *Yale L.J.* 1339 (1985) (advocating a restricted application of disgorgement remedies); Daniel Friedmann, *Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong*, 80 *Colum. L. Rev.* 504 (1980) (analogizing between contractual rights and property rights and supporting disgorgement under certain circumstances); Kull, *supra* note 13 (criticizing *EarthInfo v. Hydrosphere Resource Consultants*); Daniel Markovits, *Contract and Collaboration*, 113 *Yale L.J.* 1417, 1493–1501 (2004) (conflating disgorgement with expectation by viewing the promisor’s exploitation of the opportunity for efficient breach as part of the benefits of the bargain, to which the promisee is entitled); Ernest J. Weinrib, *Punishment and Disgorgement as Contract Remedies*, 78 *Chi.-Kent L. Rev.* 55, 70–84 (2003) (critically analyzing disgorgement remedies from the standpoint of corrective justice).

In theory (though not in practice), all four interests represent “end cases,” or an “all-or-nothing” approach. Fully realizing the expectation interest, for example, requires putting the injured party in the position that she would have been in had the other party performed all of her obligations. Similarly, full realization of the disgorgement interest mandates that the breaching party be put in the position she would have occupied had she performed all of her obligations, thereby depriving her of any profit made by breaching the contract.

Sometimes, however, the injured party prefers—or the legal system compels her to suffice herself with—a remedy that does not aim at fully undoing the outcomes of the breach (expectation, disgorgement) or the outcomes of the contract (reliance, restitution).¹⁷ Such a remedy may adjust the obligations of the injured party to the actual performance by the breaching party. Such adjustment would put the injured party in a position similar to the one she would have been in had the parties made a different contract than the one they actually did: a contract in which the balance between their respective obligations is similar to the balance drawn by their contract, but in which the obligations of both of them are adjusted to the actual performance of the breaching party. Thus, to use a simple example, the chronological equivalence between the parties’ obligations is restored when, in response to one party’s delayed performance, the corresponding obligations of the other party are concurrently suspended. The suspended performance does not give the injured party the full benefit of the bargain, and it certainly does not put her in the position she would have been in had she made no contract at all. Rather, it puts her in a position similar to the one she would have been in had she made a contract in which performance by both parties would be postponed. Likewise, when a seller delivers three out of five similar goods and then repudiates, payment of 60% of the agreed price coupled with cancellation of the repudiated part of the contract restores the contractual equivalence. Often, restoration of the contractual equiva-

¹⁷ Cf. Wonnell, *supra* note 10 (arguing that contract breaches may stem from the promisor’s initial (wrong) decision to enter the contract or from her decision to break it, and that expectation and reliance remedies respond differently to each of these decisions).

lence requires more sophisticated responses to the breach, as illustrated in Part II below.

Beyond the seemingly simple hierarchy among the three conventional interests, there are in fact intricate interrelations between them. Similar complex relationships exist between the restoration interest and the other interests. A simple example can illustrate some of these relationships, and a fuller account is provided below in Parts II and III. Consider a sale contract in which the agreed price, \$1,200,000, accurately reflects the market value of the (indivisible) sale object at the time of contracting. By the time of delivery, market value of the same object falls to \$1,000,000 (and stays at this level from then on). After taking delivery and paying the price, the buyer discovers that the object is seriously and incurably defective. The defect reduces the object's (objective and subjective) value by 25%. Assume further that the buyer is not interested, not entitled, or missed the opportunity to cancel the entire contract. Lastly, for the sake of simplicity, assume that the buyer suffers no consequential or incidental losses as a result of the breach.

In this case, the buyer's *expectation interest* equals \$250,000. Adding this sum to the current value of the defective object (\$750,000) would put her in the monetary position she would have been in had she received a conforming object whose current market value is \$1,000,000. Had the buyer been interested in and entitled to cancel the entire contract, her *restitution interest* would equal \$1,200,000—the full purchase price paid to the seller (that is, if she returns the defective object to the seller; otherwise it would be \$450,000: \$1,200,000 minus \$750,000). In such a case, her *reliance interest* would have been somewhat higher, including—in addition to the prepaid purchase price—the costs involved in drafting, executing, and canceling the contract (and possibly also compensation for foregone opportunities). A *restoration remedy* would give the buyer 25% of the contract price (\$1,200,000), that is, \$300,000. Reducing the agreed price by 25% for a defect diminishing the goods' value by 25% maintains the contractual equivalence. Thus, under these circumstances, the restoration remedy provides her with an award exceeding her expectation interest (\$250,000). The same would be true had the market value been \$1,000,000 all along and the contract price was \$1,200,000. This is because a remedy aiming at restoring

the contractual equivalence would still be calculated according to the contract price (25% of \$1,200,000 = \$300,000), while expectation damages for the decreased value of the object would still be based on its current market value (25% of \$1,000,000 = \$250,000). This outcome would be reversed were the contract price lower than the object's market value at the date according to which expectation damages are calculated. If, for example, the market price of the object had increased from \$1,200,000 to \$1,500,000, expectation damages for the direct loss resulting from the defect would be \$375,000 (25% of \$1,500,000), while a restoration remedy would still be \$300,000. Thus, restoration remedies respond to a breach of contract by (monetarily or otherwise) adapting the injured parties' obligations to the actual performance by the breacher. Insofar as possible, such "adaptation" restores the original balance between the parties' respective performances, as envisioned by the parties and reflected in their contract.

The term "equivalence," as used in this Article, refers to the equivalence drawn by the parties. In this Article, I take no position regarding the important question of whether a minimal objective or market-based equivalence between the exchanged considerations is, or should be, a pre-condition for the enforceability of contracts. The equivalence referred to is the one the parties agreed upon, regardless of whether it corresponds to or deviates substantially from any objective valuation of the exchanged considerations.¹⁸

Following the general introduction of the restoration interest, we may now turn to legal doctrines that actually aim at protecting this interest.

II. LEGAL DOCTRINES

This Part surveys some of the instances in which courts and legislatures grant remedies aiming at restoring the contractual equivalence. The relative prevalence of such remedies is remarkable, considering that restoration of the contractual equivalence is neither explicitly mentioned in any of the canons of American contract law

¹⁸ On contractual fairness and equivalence of exchange as constraints on the enforceability of contracts, see, e.g., James Gordley, *Equality in Exchange*, 69 *Cal. L. Rev.* 1587 (1981); Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 *Colum. L. Rev.* 1710, 1778–82 (1997).

(for example, the *Restatement of Contracts* (First and Second), the Uniform Commercial Code, or the contract treatises of Williston,¹⁹ Corbin,²⁰ and Farnsworth²¹), nor in other sources. The following survey focuses on two aspects of contractual equivalence: the equivalence between the exchanged objects, and the chronological equivalence between the parties' performances.²² While in these cases restoration of the contractual equivalence benefits the non-breacher, I shall also note cases in which courts restore the contractual equivalence for the benefit of the breacher.

A. Restoration of the Equivalence Broken by Partial or Defective Performance

1. Damages for Vendor's Breach in Land Sales and Price Abatement Ancillary to Specific Performance

When it turns out that a parcel of land is smaller than it should have been under a sale contract, or that the seller cannot convey the full title she undertook to convey, the buyer may sue for damages for breach of covenant or warranty. One way to calculate the damages would be according to the difference between the current value of the nonconforming land and its value had it conformed to the contract, thus protecting the buyer's expectation interest.²³ Of-

¹⁹ Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* (4th ed. 1990–2004).

²⁰ Arthur L. Corbin, *Corbin on Contracts* (Joseph M. Perillo ed., West Publishing rev. ed. 1993).

²¹ E. Allan Farnsworth, *Farnsworth on Contracts* (3d ed. 2004).

²² Indeed, the time at which the promisee gets the object is an important element of its value to her. However, since different legal rules deal with defective performance and with delays in performance, the following survey discusses these aspects separately.

²³ See Dobbs, *supra* note 8, § 12.11(1), at 284. Dobbs maintains that “this approach is stated in a substantial portion of the cases,” but as he concedes, some of the cases he cites in support of this proposition are at least ambiguous. *Id.* at n.34. Thus, in *Emery v. Medal Building Corp.*, 436 P.2d 661, 668–69 (Colo. 1968), the court held the buyers entitled to a reduction of the purchase price in an amount equal to the value of the deficiency or defect, but did not indicate the date according to which this reduction should be calculated. The same is true with regard to *Smith v. Hornkohl*, 90 N.W.2d 347 (Neb. 1958). In *Fant v. Howell*, 547 S.W.2d 261, 265 (Tex. 1977), the court specifically ordered that abatement of the purchase price be calculated according to market value *at the time of contracting*, which is incompatible with protection of the expectation interest. As described *infra* at note 25, the Court in *Kuhlman v. Griminger*, 327 N.W.2d 104, 106 (Neb. 1982), explicitly states a *different* measure of relief.

ten, however, courts resort to a different method of calculation, namely, allowing the buyer to reduce the agreed-upon price at the same proportion as the value of the land decreased due to the seller's breach. This alternative method is straightforward when the size of the parcel is smaller than the agreed size, there are no considerable gaps between the value of different parts of the parcel, and the deficiency is not large enough to alter significantly the potential use or enjoyment of the land. In such cases, the agreed price may simply be reduced at the same proportion as the actual size of the land bears to the agreed size.²⁴ In other cases, such a simple calculation is inappropriate, because there is no direct correlation between the decrease in acreage or the deficiency in title to the land and the decrease in its value. Yet, even in such instances, courts and legislatures do sometimes resort to the proportional method of calculation by allowing the buyer to reduce the price at the same proportion as the market value of the deficient land bears to the market value of the conforming land.²⁵

²⁴ See, e.g., *State ex rel. Sec'y of Dep't of Transp. v. Regency Group, Inc.*, 598 A.2d 1123, 1131–32 (Del. Super. Ct. 1991) (finding State entitled to per-acre proportionate recovery and noting that transfer in gross would still result in proportionate award); *Humphries v. Haydon*, 179 S.W.2d 895 (Ky. Ct. App. 1944) (same ruling regarding sale in gross); *Mills v. Brown*, 568 S.W.2d 100 (Tenn. 1978) (awarding proportionate relief to the purchaser on the basis of “mutual mistake,” notwithstanding the fact that he had already sold the land to a third party for a price higher than the price he paid for it); see also *Dobbs*, *supra* note 8, § 12.11(1), at 282–83.

²⁵ See, e.g., Cal. Civ. Code § 3304 (West 2005) (“The detriment caused by the breach of a covenant of ‘seizin,’ of ‘right to convey,’ of ‘warranty,’ or of ‘quiet enjoyment,’ in a grant of an estate in real property, is deemed to be . . . if the breach is partial only, such proportion of the price as the value of the property affected by the breach bore at the time of the grant to the value of the whole property”); Mont. Code Ann. § 27-1-316 (2004) (same rule); N.D. Cent. Code § 32-03-11 (2005) (same rule); Okla. Stat. tit. 23, § 25 (2004) (same rule); S.D. Codified Laws § 21-2-5 (2005) (same); *Burton v. Price*, 141 So. 728, 729 (Fla. 1932) (“[T]he vendee may recover, if there be a failure of seizin as to a part of the premises described in the deed, and in such case the measure of damages is such fractional part of the whole consideration paid as the value at the time of the purchase of the part to which the title failed bears to the whole block purchased”); *Hillsboro Cove, Inc. v. Archibald*, 322 So. 2d 585 (Fla. Dist. Ct. App. 1975) (holding that proportional reduction of price should be calculated according to the proportionate value of the strip of land the seller was unable to convey and not according to its proportionate area); *Kuhlman v. Grimminger*, 327 N.W.2d 104, 106 (Neb. 1982) (holding that, where seller was unable to transfer a certain tract of the entire farmland and there were considerable gaps between the value of different parts of the land, the measure of buyer's damages was “the value of the lost land compared to the value of the parts or units of land actually conveyed as all

A similar monetary relief may accompany an award of specific performance. Suppose a seller undertakes to sell a piece of land. It then turns out that the actual size of the land is smaller than the size noted in the contract; that the seller is only able to convey part of the title to the property (or a title subject to restrictive covenants undiscovered at the time of contracting); or that the parcel differs in other ways from its agreed-upon description. Such differences do not necessarily preclude specific performance, if this is the remedy that the buyer seeks.²⁶ If what the buyer gets by way of specific performance is a smaller parcel, part of the title, or a title subject to third-party rights, the court may order *abatement* by reducing the purchase price proportionate to the decrease in market value of the parcel due to its nonconformity.²⁷ Such abatement is possible even if the buyer already paid the full price, by way of restitution of the difference.²⁸ Since abatement is calculated as a proportional reduction of the agreed-upon price, regardless of subsequent increase or decrease in the property's market value, it does not protect the buyer's expectation interest, but rather provides her with a relief comparable to partial restitution of the price following partial cancellation.²⁹ Just as damages for breach of covenant or warranty in land sales are calculated as a proportional price

such values relate to the contract price"); 25 Williston, *supra* note 19, § 66:85, at 37 (2002).

²⁶ See, e.g., *Shell Oil Co. v. Kelinson*, 158 N.W.2d 724, 730 (Iowa 1968) ("[T]he vendee may compel the vendor to convey his defective title or deficient estate . . ."); Restatement (Second) of Contracts § 358(1) (1981) ("An order of specific performance or an injunction will be so drawn as best to effectuate the purposes for which the contract was made and on such terms as justice requires. It need not be absolute in form and the performance that it requires need not be identical with that due under the contract.").

²⁷ See, e.g., *Fleenor v. Church*, 681 P.2d 1351, 1356–57 (Alaska 1984) (finding buyer entitled to specific performance of the contract to the extent the seller is able to convey title, subject to abatement for any deficiency so that the buyer pays for what he gets according to the rate established by the agreement); *Atkin v. Cobb*, 663 S.W.2d 48, 51 (Tex. App. 1983) (reducing the purchase price by one-fourth because the seller could convey only three-fourths of the title); Restatement (Second) of Contracts § 358 illus. 3 (1981) (illustrating proportional abatement due to decrease in the property's size); 14 Richard R. Powell, *Powell on Real Property* § 81.04[1][a], at 81-169 (Michael Allan Wolf ed., 2004); Yorio, *supra* note 6, at 214–15, 222–24.

²⁸ Restatement (Second) of Contracts § 358 illus. 3 ("If the price had already been paid in full, the decree would order the restitution of [the sum of the abatement].").

²⁹ Yorio, *supra* note 6, at 215, 227.

reduction, proportional abatement ancillary to specific performance restores the contractual equivalence.

2. Rent Abatement

In recent decades, tenants' rights and remedies have expanded steadily. This expansion has particularly benefited residential tenants, but to some extent has aided commercial ones as well.³⁰ A major development has been the introduction of a warranty of habitability. The implied warranty of habitability is a mandatory obligation imposed, first by courts and then by state legislatures, on landlords of residential units. It imposes a contractual obligation on the landlord to comply with the requirements of the relevant housing codes and to keep the premises suitable for habitation in terms of safety, sanitation, etc.³¹

One of the remedies available to tenants for breach of the warranty of habitability (and at times, for other breaches as well) is rent abatement. It is calculated according to a proportional formula, sometimes called "percentage reduction in use" or "proportional diminution in value."³² According to this formula, the agreed-upon rent is reduced in the same proportion as the apart-

³⁰ 2 Powell, *supra* note 27, § 16B.01[1], at 16B-6; Paula C. Murray, *The Evolution of Implied Warranties in Commercial Real Estate Leases*, 28 U. Rich. L. Rev. 145 (1994).

³¹ The basis for this doctrine was laid down in *Javins v. First National Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970). On the warranty of habitability, see generally 1 Milton R. Friedman & Patrick A. Randolph, Jr., *Friedman on Leases* §§ 10:1.2-1.6, at 10-10 to 10-33 (5th ed. 2004, updated to 2006).

³² See, e.g., *TM Carlton House Partners, Ltd. v. Career Planners, Inc.*, 93 B.R. 859, 873 (Bankr. E.D. Pa. 1988) (awarding rent abatement of 10% due to 13%-14% shortage of area in a commercial lease, reasoning that the loss of value was not directly proportionate to the amount of lost space); *Cazares v. Ortiz*, 168 Cal. Rptr. 108 (Cal. App. Dep't Super. Ct. 1980) (preferring proportional formula over alternative ones); *Vanlandingham v. Ivanow*, 615 N.E.2d 1361, 1369-70 (Ill. App. Ct. 1993) (applying proportional formula); *McKenna v. Begin*, 362 N.E.2d 548, 552-53 (Mass. App. Ct. 1977) (preferring proportional formula over alternative ones); *Academy Spires, Inc. v. Brown*, 268 A.2d 556, 561-62 (Essex County Ct. 1970) (applying proportional formula); *Pugh v. Holmes*, 405 A.2d 897, 909-10 (Pa. 1979) (same); see also Robert S. Schoshinski, *American Law of Landlord and Tenant* § 3:25, at 141-44 (1980); Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 Cornell L. Rev. 517, 525 (1984); Bruce Zucker, *Green Perseveres: The Implied Warranty of Habitability Enters the 21st Century in California*, 20 T. Jefferson L. Rev. 277, 287-92 (1998).

ment's market rent decreased due to its nonconformity with the housing code or general standards of suitability for use. This formula was adopted in section 11.1 of the *Restatement (Second) of Property: Landlord and Tenant*, where rent abatement is a remedy available for a broad variety of breaches.³³ Similar rules may be found in state legislation.³⁴ Even if the tenant has paid the full rent, rent abatement is available in an action for the reimbursement of the excess payment.³⁵

The proportional formula, dating back to the 19th century,³⁶ is but one of several methods courts use for calculating rent abatement.³⁷ Interestingly, this method overcomes an unusual difficulty courts have faced in cases where the agreed-upon rental fee re-

³³ Under section 11.1, “[i]f the tenant is entitled to an abatement of the rent, the rent is abated to the amount of that proportion of the rent which the fair rental value after the event giving the right to abate bears to the fair rental value before the event.” 1 *Restatement (Second) of Prop.: Landlord and Tenant* § 11.1 (1977). Unless otherwise validly agreed upon by the parties, the tenant is entitled to such abatement when her use of the leased property is adversely affected by third party rights, landlord's interference, conditions rendering the property unusable, taking by eminent domain, and more. *Id.* §§ 4.2, 4.3, 5.1, 5.2, 5.4, 6.1, 6.2, 7.1, 8.1; see also *Teodori v. Werner*, 415 A.2d 31, 34–35 (Pa. 1980) (citing section 11.1 in the context of commercial landlord's breach of a non-compete clause).

³⁴ See, for example, Wis. Stat. § 704.07(4) (2001), according to which both residential and nonresidential tenants who stay in possession despite the landlord's substantial violation of her repair duties are entitled to “rent abate[ment] to the extent the tenant is deprived of the full normal use of the premises.” While a residential tenant's rights and remedies are inalienable under this statute, they are merely default rules in commercial leases. *Id.* § 704.07(1); cf. Fla. Stat. § 83.56(1)(b) (2004) (stating that the rent may be reduced “by an amount in proportion to the loss of rental value” caused by landlord's noncompliance with her maintenance duties due to causes beyond her control); Mont. Code Ann. § 70-24-409(1)(b) (2005) (stating a similar effect for fire or casualty damage to property).

³⁵ *Glasoe v. Trinkle*, 479 N.E.2d 915, 922 (Ill. 1985); *Vanlandingham v. Ivanow*, 615 N.E.2d 1361, 1369–70 (Ill. App. Ct. 1993); 1 *Restatement (Second) of Prop.: Landlord and Tenant* § 11.1 cmt. b (1977); 2 Powell, *supra* note 27, § 16A.01[6][b], at 16A–32.

³⁶ See *Taylor v. Hart*, 18 So. 546, 549 (Miss. 1895) (allowing an agricultural plantation tenant to abate the rent proportionally after a building on the land was destroyed by fire).

³⁷ *Cazares v. Ortiz*, 168 Cal. Rptr. 108 (Cal. App. Dep't Super. Ct. 1980); *Glasoe*, 479 N.E.2d at 920–22 (stating that the “difference in value” method ordinarily should be preferred, but the “percentage reduction in use” and other methods may be used when appropriate); *McKenna v. Begin*, 362 N.E.2d 548, 552–53 (Mass. App. Ct. 1977); 2 Powell, *supra* note 27, § 16A.01[6][b].

flects the poor condition of the apartment.³⁸ In such cases, the difference between the market rent of the defective unit and the market rent of the same unit had it met the statutory requirements—the normal measure of expectation damages for nonconformity of a leased property—equals, or even exceeds, the agreed rent. This means that the tenant could use the apartment for no rent at all, or even for a negative rental fee! Suppose the market rent of an apartment, had it met the requirements of the relevant housing code, would be \$500. The market rent of the same apartment given its poor condition is \$200, and the agreed rent is \$250. In this case, the sum necessary to put the tenant in a monetary position similar to the one she would have occupied had the code's requirements been met is \$300 (\$500 minus \$200). However, if one subtracts this sum from the agreed-upon rent, every month the defaulting *landlord* should pay the *tenant* \$50 (\$250 minus \$300)! The proportional formula avoids this extreme result by reducing the rent in the same proportion the market rent of the apartment decreased due to its nonconformity. In the above example, the tenant is entitled to a 60% (\$300/\$500) reduction of the agreed rent (\$250), that is, a reduction of \$150 off the monthly rent.

As the *Restatement's* comments explain, the aim of the proportional measure of abatement is “to preserve [the parties'] original bargain in so far as possible.”³⁹

3. Price Reduction Under the CISG

The United Nations Convention on Contracts for the International Sale of Goods (“CISG”) was approved at a diplomatic conference held in Vienna in 1980, and became effective in the United States in 1988, applying to international sales contracts entered between American and foreign parties.⁴⁰ Articles 45 through 52 of the

³⁸ Besides the poor condition of the apartment, a tenant may pay particularly low rent when she resides in heavily subsidized public housing. See *Hous. Auth. of the City of E. St. Louis v. Melvin*, 507 N.E.2d 1289, 1295 (Ill. App. Ct. 1987).

³⁹ 1 *Restatement (Second) of Prop.: Landlord and Tenant* § 11.1 cmt. c (1977).

⁴⁰ See United Nations Conference on Contracts for the International Sale of Goods, Vienna, Austria, Mar. 10–Apr. 11, 1980, Final Act, U.N. Doc. A/CONF.97/18 (Apr. 10, 1980) [hereinafter CISG]. On the CISG and its relations to American sales law, see generally Henry Deeb Gabriel, *Contracts for the Sale of Goods: A Comparison of Domestic and International Law* (2004); John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3d ed. 1999).

Convention deal with the buyer's remedies for the seller's breach. One remedy available to the buyer for delivery of nonconforming goods is price reduction under Article 50. This article provides:

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time.⁴¹

If the seller delivers only part of the goods or if only part of them are nonconforming, the buyer is entitled to price reduction with respect to the part that is missing or that does not conform.⁴² Reduction of the price is an alternative to the following remedies: rejection of the goods, removal of the nonconformity by the seller, and damages for the decrease in the goods' value due to their nonconformity. Price reduction does not, however, preclude the buyer's right to damages for consequential and incidental losses, beyond the mere decrease in the goods' value.⁴³

As formulated in the CISG following the civil law tradition, the amount of price reduction is calculated according to a proportional formula. The buyer is entitled to reduce the price in the same proportion as the value of the goods decreased due to their nonconformity.⁴⁴ As demonstrated in Part I, this formula may result in a monetary relief lower than, equal to, or higher than expectation damages for the decrease in the market value of the goods. Price reduction under the CISG does not put the buyer in the position she would have occupied had she received conforming goods, nor

⁴¹ CISG, *supra* note 40, at art. 50.

⁴² *Id.* at art. 51(1).

⁴³ The second sentence of Article 50 states: "[h]owever, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price." Article 45(2) clarifies that "[t]he buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies." The buyer cannot, however, get both price reduction and damages for the direct loss caused by the decrease in the goods' value, because this would be double compensation for the same loss.

⁴⁴ For further explanation and illustrations of this formula, see, e.g., Honnold, *supra* note 40, at 336–39; Eric E. Bergsten & Anthony J. Miller, *The Remedy of Reduction of Price*, 27 *Am. J. Comp. L.* 255, 258–63 (1979).

does it protect her reliance or restitution interests.⁴⁵ Rather, it puts her in as good a position as she would have been in had she contracted for goods of the same quality, quantity, and description as the ones she actually received, and had the price been set accordingly. Price reduction restores the contractual balance.⁴⁶

The remedy of price reduction is well known to civil law jurists.⁴⁷ While close examination reveals that American courts and legislatures also use the proportional formula in various contexts,⁴⁸ price reduction is not a standard remedy for breach of warranty under the Uniform Commercial Code (“UCC”), nor is it thought of as a standard remedy for breach of contract outside of the UCC.⁴⁹ Thus, its inclusion in the CISG—a convention drafted by both civil law

⁴⁵ See Harry M. Flechtner, *More U.S. Decisions on the U.N. Sales Convention: Scope, Parol Evidence, “Validity” and Reduction of Price under Article 50*, 14 J.L. & Com. 153, 172 (1995) (“Indeed, the price reduction remedy of CISG operates in a fashion that cannot be justified by any of the remedial principles recognized in U.S. contract law. In other words, Article 50 is not designed to protect the expectation interest, the reliance interest, or the restitution interest.”); Catherine Piché, *The Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code Remedies in Light of Remedial Principles Recognized under U.S. Law: Are the Remedies of Granting Additional Time to the Defaulting Parties and of Reduction of Price Fair and Efficient Ones?*, 28 N.C. J. Int’l L. & Com. Reg. 519, 556 (2003) (stating the same argument as Flechtner).

⁴⁶ Bergsten & Miller, *supra* note 44, at 262 (arguing that price reduction “preserves the balance of the bargain struck between the two parties”); Flechtner, *supra* note 45, at 174 (“[E]xpectation damages are designed to preserve for an aggrieved party the benefit of her bargain; reduction in price under Article 50 attempts to preserve the *proportion* of her bargain.”). The similarity between the monetary outcomes of price reduction and of restitution following partial cancellation of a divisible contract led some commentators (including the present author) to conclude that the underlying principle of price reduction is the restitution interest. See G.H. Treitel, *Remedies for Breach of Contract: A Comparative Account* § 100, at 108 (1988); Eyal Zamir, *The Failure of the Remedy of Reduction in Israeli Law—Causes and Lessons*, 23 Isr. L. Rev. 469, 475 (1989). However, since the sum of reduction does not necessarily correspond to the seller’s enrichment, this proposition is ultimately unsatisfactory. See Gillette & Walt, *supra* note 7, at 364 (rejecting the restitution rationale). Thus, given the special characteristics of price reduction, understanding it in terms of restoration of the contractual equivalence is much more persuasive. See also *infra* Section III.A.

⁴⁷ On the historical origins of the remedy of price reduction and its role in modern civil law systems, see Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* 311–29 (1990); Bergsten & Miller, *supra* note 44, at 256–58.

⁴⁸ See *supra* Subsections II.A.1 and II.A.2.

⁴⁹ See, e.g., 3 Farnsworth, *supra* note 21, § 12.9, at 204–05 (stating that price reduction is a remedy unknown to common law); Piché, *supra* note 45, at 557–58 (explaining that there is no direct equivalent to CISG Article 50 in the UCC).

and Anglo-American jurists—resulted in some misunderstandings.⁵⁰ To avoid the confusion of price reduction with the buyer's right to set off damages against the contract price,⁵¹ Article 50 stresses that the buyer is entitled to price reduction “whether or not the price has already been paid.”⁵²

4. Monetary Restitution for Non-Monetary Performance in Divisible Contracts

When a contract is totally breached or repudiated and the injured party gets back everything she has given the breacher, one could say that such restitution restores the contractual equivalence. But this statement is devoid of much interest because paying zero dollars for zero goods, for example, is compatible with any conceivable equivalence. The same statement is more meaningful when, following a breach of part of a divisible contract, the injured party performs her obligations corresponding to the *remaining* parts of the contract, and is discharged of the obligations corresponding to the breached part. If the injured party has already given something in return for the breached part, she is entitled to restitution of this part of her performance. Such restitution may be said to protect the injured party's restitution interest and may also

⁵⁰ See Bergsten & Miller, *supra* note 44, at 267–72; Michael Will, Remedies for Breach of Contract by the Seller, *in* *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* 368–69 (C.M. Bianca & M.J. Bonell eds., 1987).

⁵¹ Bergsten & Miller, *supra* note 44, at 255; Flechtner, *supra* note 45, at 171 (referring to the “tendency of common law lawyers to misperceive the price reduction remedy as a mere setoff provision”).

⁵² Since proportional price reduction aims at restoring the contractual balance as determined at the time of contracting, the German Civil Code provides that the proportion between the value of the nonconforming and conforming goods is determined according to that time. Bürgerliches Gesetzbuch [BGB] [Civil Code] § 441, ¶ 3. This was also the rule laid down in Article 46 of the Uniform Law for the International Sale of Goods of 1964 and in earlier drafts of the CISG. Following a last-minute change, CISG Article 50 refers in this regard to the time of delivery. It avoids the need to construct a theoretical value for the defective goods that might not exist at the time of contracting. Honnold, *supra* note 40, at 340. The change is of little practical significance. It matters only in those rare cases in which market value of the conforming goods and the estimated market value of the nonconforming ones develop differently between the conclusion of the contract and the time of delivery. It nevertheless attracted some criticism because it seems to be in tension with the remedy's rationale. See Peter Schlechtriem, From the Hague to Vienna—Progress in Unification of the Law of International Sales Contracts?, *in* *The Transnational Law of International Commercial Transactions* 125, 132 (Norbert Horn & Clive M. Schmitthoff eds., 1982).

be described as maintaining the contractual equivalence.⁵³ Beyond this general comparability between (partial) restitution and restoration of the contractual equivalence, special attention is due to cases in which the restitution interest exceeds the expectation interest.

It is widely accepted that *reliance* damages for breach of contract should not exceed the injured party's expectation interest. Reliance may serve as a minimal approximation of the expectation interest (especially when the latter is difficult to establish due to its speculative nature), on the basis of the common assumption that people make profitable contracts. If, however, the breaching party proves that in a certain case reliance exceeds expectation, the latter caps the former.⁵⁴ It is almost equally accepted that under certain circumstances the injured party is entitled to protection of her *restitution* interest above and beyond her expectation interest.⁵⁵ Yet, differentiating between the cases in which the expectation interest caps the protection of the restitution interest and those in which it does not is no simple task. In *Boomer v. Muir*, the court ruled that a subcontractor who, after completing part of the work, rightfully

⁵³ The comparability between proportional price reduction (which is quintessentially a restoration remedy) and restitution following partial rescission or cancellation of a contract has long been noted. See *supra* note 47 and accompanying text.

⁵⁴ See Restatement (Second) of Contracts § 349 (1981) ("As an alternative to [expectation damages], the injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed." (emphasis added)); Dobbs, *supra* note 8, § 12.3(2), at 56–62; 3 Farnsworth, *supra* note 21, § 12.16, at 284–88; Kelly, *supra* note 2, at 1768 (describing the possibility of awarding reliance damages in excess of expectation damages as one that "virtually no one supports"). Even scholars who support reliance as the standard measure of damages for breach of contracts do not advocate this measure when it exceeds the expectation interest. See, e.g., Andersen, *supra* note 4, at 13–15; Fuller & Perdue, *supra* note 1, at 75–80; Mark Pettit, Jr., Private Advantage and Public Powers: Reexamining the Expectation and Reliance Interests in Contract Damages, 38 *Hastings L.J.* 417, 444–53 (1986).

⁵⁵ See, e.g., Dobbs, *supra* note 8, §§ 12.7(1), 12.7(5), at 162, 178; 3 Farnsworth, *supra* note 21, § 12.20, at 334; Joseph M. Perillo, Calamari and Perillo on Contracts § 15.4, at 624–26 (5th ed. 2003); Andersen, *supra* note 4, at 15–16. An uncontroversial example of a right to restitution exceeding expectation is the buyer's right to recover the pre-paid price following cancellation of the contract for the seller's breach even if the current market price of the goods is lower than the contract price. See U.C.C. § 2-711(1) (2005).

terminated the contract for the contractor's breach, was entitled to recover the reasonable value of his services in *quantum meruit* without being limited to the agreed remuneration.⁵⁶ Other courts deviated from this ruling, and the issue is extensively debated in the legal literature.⁵⁷ Relatively less controversial are the cases of *divisible* contracts. The basic rule is that the injured party is entitled to restitution exceeding her expectation interest if the contract was materially breached, unless she has performed all, or a divisible part of, her duties under the contract and the other party's remaining obligation is to pay a definite sum of money for that performance.⁵⁸ The following hypotheticals, in all of which the injured

⁵⁶ 24 P.2d 570 (Cal. Ct. App. 1933).

⁵⁷ For arguments that restitution damages should not exceed expectation, see, e.g., Hanoch Dagan, *The Law and Ethics of Restitution* 282–89 (2004) (concluding that, except for restitution of money paid by the injured party, the default rule should be a denial of restitution beyond expectation); Andrew Kull, *Restitution as a Remedy for Breach of Contract*, 67 S. Cal. L. Rev. 1465 (1994); Henry Mather, *Restitution as a Remedy for Breach of Contract: The Case of the Partially Performing Seller*, 92 Yale L.J. 14 (1982) (maintaining that from a liberal perspective, the injured party should be limited to her expectation interest). For arguments supporting the majority view that contract price does not cap recovery of restitution, see, e.g., 1 George E. Palmer, *The Law of Restitution* § 4.4, at 389–401 (1978) (supporting the majority view according to which the contract price does not cap recovery of restitution); Wendy J. Gordon & Tamar Frankel, *Comment, Enforcing Coasian Bribes for Non-Price Benefits: A New Role for Restitution*, 67 S. Cal. L. Rev. 1519 (1994) (opposing Kull's argument and arguing that seemingly losing contracts often involve non-monetary benefits and are therefore profitable); Bernard E. Gegan, *Comment, In Defense of Restitution: A Comment on Mather, Restitution as a Remedy for Breach of Contract: The Case of the Partially Performing Seller*, 57 S. Cal. L. Rev. 723 (1984) (criticizing Mather's argument); see also Dobbs, *supra* note 8, § 12.7(5), at 178–85 (analyzing different variables bearing on the issue); Andrew Skelton, *Restitution and Contract* (1998) (objecting convincingly to a strict capping of restitution by expectation; but, arguing that, given the breacher's cogent claim that she would not have been willing to pay for performance above contract price, contract price should be taken into account and restitution be calculated according to a pro rata formula, subject to accounting for such factors as the greater cost of early performance, non-price benefits to the contractor from the contract, increase in performance costs due to breach by owner or buyer, etc.); Andersen, *supra* note 4 (rationalizing the case law by reference to the *certainty principle*, which places the burden of proving that the injured party made a losing contract on the breaching party, and the *extent-of-benefit principle*, which holds that, as the performance of the contract unfolds, the parties are gradually more committed to the contractual allocation of risks).

⁵⁸ Restatement (Second) of Contracts § 373 (1981); Dobbs, *supra* note 8, § 12.7(5), at 178–85; Palmer, *supra* note 57, §§ 4.3, 4.4(e), at 378–89, 404–06. Notably, the *Restatement (Third) of Restitution and Unjust Enrichment* § 38 (Tentative Draft No. 3, 2004) deviates from the rule of the *Restatement (Second) of Contracts* by providing

party's restitution interest exceeds her expectation interest, will clarify this rule.

Assume, first, that *A* hires *B* to do some work for her or to render her certain services for \$1000, paid in advance (Hypothetical 1). Before any of the work is done, *B* repudiates, and *A* rightfully terminates the contract and sues for restitution. *A* is entitled to full restitution even if *B* can prove that current market value of the same work or services is only \$800, and even if *A* has actually hired another person to render her the same services for this sum.⁵⁹ Next, assume *A* hires *B* to do certain work for \$800, to be paid after completion of the work (Hypothetical 2). *B* properly does the work, but *A* wrongfully refuses to pay. Even if *B* proves current market value of the work to be \$1000, according to the present rule, she is not entitled to more than \$800.⁶⁰ Had *B* performed, say, 60% of the work before terminating the contract for *A*'s breach, given the same figures (agreed remuneration \$800, current market value \$1000) she would be entitled to \$480 for what she did (Hypo-

that the agreed-upon price limits restitution for the uncompensated contractual performance.

⁵⁹ See, e.g., *Mobil Oil Exploration & Producing Se., Inc. v. United States*, 530 U.S. 604, 623–24 (2000) (following government's repudiation, oil companies entitled to restitution of \$156 million paid for conditional lease contracts giving them rights to explore for and develop oil, regardless of whether the contract would have proven profitable for them); *Bush v. Canfield*, 2 Day 485, 488 (Conn. 1818) (Swift, C.J.) (requiring a seller who failed to deliver goods after receiving partial payment to repay this sum notwithstanding the fact that buyer would have lost from the contract had it been fully performed); Restatement (Second) of Contracts § 373 cmts. a, b, illus. 1, 6 (1981). Arguably, the assumption that the owner paid the entire remuneration in advance is not very realistic. However, the analysis would not change if she paid in advance only part thereof or nothing at all. In all cases, rightful cancellation of the contract for the supplier's breach, followed by restitution of whatever the injured party has already paid, put her in a better position than she would have been in had the contract been performed.

⁶⁰ See, e.g., *United States ex rel. Harkol, Inc. v. Americo Constr. Co.*, 168 F. Supp. 760, 761–62 (D. Mass. 1958) (holding that a subcontractor who completed the work despite contractor's default on progress payments could not recover in *quantum meruit*, but was limited to the contract price); *John T. Brady & Co. v. City of Stamford*, 599 A.2d 370, 377–78 (Conn. 1991) (holding that, when ninety-nine percent of the work was completed, the injured party was not entitled to a remedy in restitution measured by *quantum meruit*); *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 516 N.E.2d 190, 193 (N.Y. 1987) (“It is impermissible . . . to seek damages in an action sounding in quasi contract where the suing party has fully performed on a valid written agreement”); Restatement (Second) of Contracts § 373(2) (1981).

thetical 3).⁶¹ Finally, assume the agreed remuneration is \$1000, current market value is \$800, and *A* terminates the contract for *B*'s breach after the latter performed 60% of the work (Hypothetical 4). Under these circumstances, *B* would be entitled to \$600 for the work she did.⁶² If, however, it cannot be reasonably ascertained what part of the work or services *B* provided before performance was halted, according to the *Boomer* rule, *B* is entitled to restitution of the reasonable value of what she has done, and the amount of restitution should not be calculated on the basis of the contract remuneration, nor limited thereby.⁶³

My aim here is neither to explicate the doctrinal intricacies, nor to discuss the conflicting normative arguments involved in this issue. Rather, I propose that (at least) in the case of divisible contracts, understanding the rule through the restoration interest is more illuminating than through the paradigm of the three conventional interests.

⁶¹ See, e.g., *Dibol & Plank v. W. & E.H. Minnott*, 9 Iowa 403 (1859) (holding that a painter hired to paint 10 houses for \$70 each was not entitled to more than \$280 for the 4 houses he painted before owner breached the contract, plus lost profit on the remaining 6 houses); *Kehoe v. Mayor of Rutherford*, 27 A. 912 (N.J. 1893) (holding that a contractor was entitled to remuneration of the part completed before the owner's breach in proportion to the contract price); Restatement (Second) of Contracts § 373 cmt. c (1981); 3 Farnsworth, supra note 21, § 12.20, at 334–35; Andersen, supra note 4, at 77–87 (noting that, while this rule seems desirable, it is not the majority rule).

⁶² Andersen, supra note 4, at 87–88.

⁶³ The distinction drawn in the present context between divisible and non-divisible contracts is questionable. Calculation of the contractor's remuneration for partial performance (due to either her or the owner's breach) on the basis of the contract price seems feasible even if the contract is not divisible. Provisions calling for such calculation, without distinguishing between divisible and non-divisible contracts, may be found, for example, in the Mechanic's Lien legislation. Thus, for example, Michigan adopted the following rule:

If a lien claimant, by reason of the failure of an owner or lessee to perform the contract, and without fault on the part of the lien claimant, has been prevented from completely performing the contract, the lien claimant shall be entitled to compensation for as much as was performed by the claimant under the contract, *in proportion to the price stipulated for complete performance of the whole contract*, less any payments made to the lien claimant and also to any additional damages which the lien claimant may be entitled to as a matter of law.

Mich. Constr. Lien Act, Mich. Comp. Laws § 570.1120 (1996) (emphasis added). For similar rules, see Ohio Rev. Code Ann. § 1311.17 (West 2002); S.C. Code Ann. § 29-5-250 (1991); W. Va. Code § 38-2-30 (2005).

In terms of the conventional classification of interests, in Hypothetical 1, the injured party (*A*) receives full protection of her restitution interest, despite the fact that it exceeds her expectation interest. In Hypothetical 2, *B* is denied protection of her restitution interest to the extent that it exceeds her expectation interest. In Hypothetical 3, as one could expect, *B* is denied protection of her exceeding restitution interest insofar as she performed her obligations. With regard to the part she has already performed, the agreed remuneration, corresponding to her expectation interest, caps her relief. As regards the remaining performance (the 40%), presumably *B* could now use her resources to render comparable services to a third person under current market conditions, that is, for a remuneration of \$400. If successful, then with regard to this part of the contract she is not restricted by her expectation interest. Regarding this part, she is placed in a position similar to the one she would have been in had she not contracted with *A* (which is similar to protecting her reliance interest by allowing her to recapture a forgone opportunity). Finally, in Hypothetical 4, *A* has to pay *B* \$600 for what *B* did, and is presumably able to hire another contractor to do the remaining work for \$320 (given the price decline). As in Hypothetical 3, to the extent that *B* performed the contract, *A* is not entitled to protection of her restitution interest beyond her expectation interest. With regard to the unperformed part, however, *A* is free to hire another person to do the work for current, lower prices (which may be described as protecting her reliance interest by allowing her to recapture this forgone opportunity).

In conventional terms, the theories underlying the prevailing rulings in the above Hypotheticals are therefore restitution in Hypothetical 1, expectation in Hypothetical 2, and expectation coupled with (sort of) reliance in Hypotheticals 3 and 4. This set of rules lends itself to a much more coherent portrayal through the lens of restoration interest. Assuming restoration of the contractual equivalence is a worthy goal of contract remedies, this goal is attained in all four hypothetical cases. In Hypothetical 1, since *B* has done nothing, adjusting *A*'s obligation to what *B* actually did, in accordance with the contractual equivalence, means that *A* should pay nothing. *A* is therefore entitled to get back all the money she advanced to *B*. In Hypothetical 2, since *B* fully performed her obli-

gations, and since *B*'s performance cannot be undone, maintaining the contractual equivalence means that *A* should pay the full contract price, and no more. In Hypotheticals 3 and 4, since *B* performed 60% of the contract, she is entitled to 60% of the agreed remuneration, thus upholding the contractual equivalence.

B. Restoration of the Chronological Equivalence

The contractual equivalence consists not only of the objects the parties exchange (goods, services, money, etc.) but also of the timing of performance. Usually, the sooner the promisee gets an object, the greater its value to her. Assuming each party values what she is entitled to receive more than what she is parting with, and that performance by each party is conditional on the counter-performance, the chronological relationship between the parties' obligations also provides built-in incentives to perform. The contractual equivalence may thus be broken not only by a partial or defective performance but also by a delayed one. In such cases, the injured party may be interested in restoring the broken chronological equivalence. She is in fact entitled to such restoration, as demonstrated below.

1. Suspension of Performance

Where performance by both parties is due simultaneously, failure to render performance by one party automatically suspends the other party's obligation until the latter is reasonably assured that the breaching party will perform too.⁶⁴ Similarly, when performance by one party is due on a certain date, failure to render performance may suspend the other party's subsequent, remaining duties.⁶⁵ Finally, under certain circumstances, prospective non-

⁶⁴ U.C.C. § 2-507(1) (2005) ("Tender of delivery is a condition to the buyer's duty to accept the goods and, unless otherwise agreed, to the buyer's duty to pay for them."); id. § 2-511(1) ("Unless otherwise agreed tender of payment is a condition to the seller's duty to tender and complete any delivery."); Restatement (Second) of Contracts § 238 (1981) (quoting similar language).

⁶⁵ Restatement (Second) of Contracts § 237 (1981) ("[I]t is a condition of each party's remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time."); id. § 225(1) ("Performance of a duty sub-

performance entitles the other party to suspend her performance until adequate assurance of due counter-performance is provided by the prospective breacher.⁶⁶

Although not ordinarily classified as such, the right to withhold performance until counter-performance is carried out, or at least assured, is a very important self-help remedy for breach of contract. Without resorting to the slow and costly court system, it provides a powerful incentive to perform by depriving the actual or prospective breacher of the benefits that she expects to get from the bargain. By suspending her performance, the nonbreacher also avoids the burden of extending credit to the other party (or financing her beyond the period envisaged by the parties, in the case of prospective breach), and possibly mitigates her losses. Often, the non-breaching party will satisfy herself with this remedy.

What interest do these rules protect? In and of itself, suspension of one's performance in response to the other party's material breach of earlier obligations, unwillingness to perform concurrent obligations or prospective non-performance of future ones, does not aim to put the non-breaching party in the position she would have been in had the contract been fully performed. The non-breaching party does not get the benefit of the bargain merely by suspending her own performance. Such suspension neither restores her to the position she would have occupied in absence of the contract (reliance), nor does it restore the breaching party to her position prior to the contract (restitution). Finally, the suspension of the non-breaching party's performance does not deprive the breaching party of the benefits she might have gotten from the breach (disgorgement). Rather, the likely outcome of suspension is that both parties perform the contract; the agreed chronological relation between the parties' obligations is maintained; yet, performance by both parties is postponed. It puts the innocent party in a position akin to the one she would have been in had she made a

ject to a condition cannot become due unless the condition occurs . . ."); *id.* § 225 cmt. a.

⁶⁶ U.C.C. § 2-609(1) (2005) ("If reasonable grounds for insecurity arise with respect to the performance of either party, the other may demand in a record adequate assurance of due performance and . . . suspend any performance for which it has not already received the agreed return."); Restatement (Second) of Contracts § 251(1) (1981) (stating a similar rule).

contract similar to the one she actually did, save the dates of performance. Such suspension allows the non-breaching party to enjoy the resources that she otherwise would have transferred to the other party and to avoid extending extra financing to the other party. Thus, for example, a buyer withholding payment in response to a delay in delivery may meanwhile invest the purchase money in an interest-yielding investment. This interest may be equal to, higher than, or lower than the benefit she would have gotten from the goods during the same period (a benefit constituting a central element of her expectation interest). True, mere suspension of one's performance does not necessarily attain exact restoration of the contractual chronological equivalence. But neither do expectation, reliance, restitution, or disgorgement remedies ordinarily attain the exact outcome for which they supposedly aim.⁶⁷

2. Interest on Price Paid as a Remedy for Seller's Delay

When a seller (or other obligor) performs her obligations after the agreed time (either voluntarily, or pursuant to a court order of specific performance), the buyer (or other obligee) is ordinarily entitled to a monetary relief for this delay. Such a relief may come in the form of damages calculated according to the partial loss of the benefit of the bargain (ordinarily the lost use and enjoyment of the property during the period of delay), thus protecting her expectation interest.⁶⁸ Alternatively, to put the parties in as good a position as they would have been in had the contract been performed on time, courts awarding specific performance often grant *equitable accounting*. Typically, in contracts for the sale of real property, the buyer is entitled to the gross rental value of the property during the period of delay minus the expenses the seller incurred in managing the property, and the seller is entitled to interest on the unpaid purchase price for the same period.⁶⁹ The underlying principle of

⁶⁷ See also *infra* Section III.B.

⁶⁸ *Billy Williams Builders & Developers, Inc. v. Hillerich*, 446 S.W.2d 280, 284–85 (Ky. Ct. App. 1969) (upholding award of damages for delay ancillary to specific performance of a contract for the sale of land); see also *Freidus v. Eisenberg*, 510 N.Y.S.2d 139, 142–43 (App. Div. 1986); Restatement (Second) of Contracts § 348(1) (1981).

⁶⁹ See, e.g., *Ellis v. Mihelis*, 384 P.2d 7, 15 (Cal. 1963); *Chan v. Smider*, 644 P.2d 727, 731 (Wash. Ct. App. 1982); *Yorio*, *supra* note 6, at 229–30.

equitable accounting is said to be restitution: each party is compelled to part with the gains she made, or could have made, during the delay.⁷⁰

At times, the interest on the unpaid purchase price is higher than the net rental value or profits made from the property during the period of delay. Under such circumstances, equitable accounting presumably would result in the buyer having to pay the breaching seller the difference between the interest and the net rental value of the land. This is not the rule, however. Reasoning that the defaulting party should not profit from her delay, courts have denied the seller the right to such accounting.⁷¹ By waiving her own entitlement to the rental value of the property, the innocent buyer denies the breacher's right to the interest on the unpaid purchase price.⁷² At least in theory, the outcome is that the injured party is made better off as a result of the breach (compared to her position had the contract been performed on time). This outcome is not astonishing, as it sometimes happens that one party's breach actually benefits the other party.

More intriguing are the less common cases in which the non-breaching buyer has paid the purchase price prior to, or in spite of, the seller's breach. In such cases, courts sometimes award the buyer interest on the purchase price she paid on time, for the duration of the delayed performance. Thus, in *Fast v. Southern Offshore Yachts*,⁷³ the buyer of a customized yacht paid 90% of the agreed price on time (20% at the time of contracting and 70% upon arrival of the yacht at a United States port of entry, with the remaining 10% being due upon delivery), but for various reasons delivery of the yacht was not executed. The buyer brought suit for specific performance and for statutory interest on the sums of money he paid, to be calculated from the agreed date of delivery until actual delivery.⁷⁴ The court granted the buyer specific performance and such

⁷⁰ Yorio, *supra* note 6, at 228–29.

⁷¹ See, e.g., *Shelter Corp. of Can. v. Bozin*, 468 So. 2d 1094, 1097–98 (Fla. Dist. Ct. App. 1985); *Brotman v. Roelofs*, 246 N.W.2d 368, 373–74 (Mich. Ct. App. 1976); Yorio, *supra* note 6, at 232–33.

⁷² *Chan v. Smider*, 644 P.2d 727, 731 (Wash. Ct. App. 1982); Yorio, *supra* note 6, at 232–33.

⁷³ 587 F. Supp. 1354 (D. Conn. 1984).

⁷⁴ In fact, the contract stipulated no specific time for delivery. But since the delay in delivery was caused by the buyer rightfully rejecting the first yacht arriving in the

“incidental damages” as requested. Similar relief was granted in *Worrall v. Munn*.⁷⁵ In this latter case, the rental value of land bought for clay mining was extremely low because it was hardly usable for any other purpose. Thus, the measure of damages for the very long delay in transferring the land was held to be the interest on the purchase money.⁷⁶

Clearly, in cases like *Fast* and *Worrall*, the court aims neither to place the innocent buyer in the position she would have occupied had the contract been performed on time (the buyer would not have gained interest on the money had the contract been duly performed), nor to restore the breacher to its pre-contract position (the interest does not necessarily reflect the breacher’s enrichment at the expense of the injured party).⁷⁷ It places the injured party in

United States for substantial nonconformity, the court held that the time it actually took to build the yacht and ship it to the United States constituted the reasonable time for delivery under the contract. *Id.* at 1357.

⁷⁵ 53 N.Y. 185 (1873); see also *Worrall v. Munn*, 38 N.Y. 138 (1868) (clarifying factual background of same case).

⁷⁶ The same relief was awarded in *Mitchell v. Mutch*, 179 N.W. 440 (Iowa 1920). In this case, the buyer paid the seller a down payment of \$600, tendered a further sum of \$5000 in cash, and executed and tendered an interest-bearing note for \$52,000. The court saw the tender as equivalent of payment, and the vendor thus was deemed to have the benefit of it as such. The buyer got specific performance. Instead of the rents and profits accrued on the property during the period of delay, the court allowed the buyer to elect a remission of the 5% annual interest accrued upon the \$52,000 note and 6% interest upon the sum of \$5600, thus enjoying the interest these sums have yielded. But compare *Freidus v. Eisenberg*, 510 N.Y.S.2d 139 (App. Div. 1986), in which a purchaser was awarded specific performance after lengthy litigation but was denied any monetary relief because the land was undeveloped and had no current rental value. Criticizing the majority view for its “rigid adherence to an inflexible valuation approach,” the dissent suggested that damages for delay be calculated as percentage of the property’s value. *Id.* at 148.

⁷⁷ After noting that the court’s ruling in *Fast v. Southern Offshore Yachts* does not fall into line with either the ordinary goal of damages or the restitutionary rationale of equitable accounting, Yorio proposes that the ruling may have nevertheless been correct. This is “because the interest served as a reasonable surrogate for the interim rental value of the yacht, which was not sought by the buyer and which might have been difficult to determine . . .” Yorio, *supra* note 6, at 235–36 (internal citation omitted). One may doubt that this explanation holds in the circumstances of *Fast*; and it certainly does not hold in other instances, where the interest clearly exceeds the rental value of the property, as was the case in *Worrall*. When interest on the value of property serves as a minimal approximation of its rental value, the injured party would never get such interest if the breaching party can prove that the interest actually exceeds the rental value. See Restatement (Second) of Contracts § 348 cmt. b (1981) (“[P]ossible basis for recovery, as a last resort, is the interest on the value of

a monetary situation akin to the one she would have been in had she made a contract similar to the one she actually made, but in which the dates of performance by both parties were deferred. In such a contract, the buyer would have earned interest on the money while the seller enjoyed the net rental value of the property until the deferred date of performance. Depending on the rate of market interest and the market rental value of the property, damages measured by interest on the prepaid price may be similar to, higher than, or lower than expectation damages for the direct loss caused by the delay. At any rate, granting interest on the money paid by the buyer for the period of the delayed delivery monetarily restores the contract's chronological equivalence.

In the same vein, the seller is in principle entitled to the rental value of the sale object she delivered to the buyer on time (or that she held vacant pending a lawsuit the seller filed for specific performance), as a remedy for delayed payment.⁷⁸ Such a remedy monetarily restores the chronological equivalence broken by the defaulting buyer.

C. Restoration of the Equivalence in Favor of the Breaching Party

While restoration of the contractual equivalence typically benefits the injured party, at times it benefits the party in breach. Before listing instances of this outcome, it should be noted that such

the property Although [this basis] will ordinarily give a smaller recovery than loss in value, it is always open to the party in breach to show that this is not so and to hold the injured party to a smaller recovery based on loss in value to him."'). Furthermore, had the interest granted in *Fast* been meant to approximate the rental value of the yacht, one would have expected it to be calculated according to its full value, and not only on the 90% of the price prepaid by the buyer.

⁷⁸ Such remedy was recognized in *Graves v. Winer*, 351 S.W.2d 193, 196 (Ky. 1961). In *Graves*, the property was not transferred to the defaulting purchaser, yet the vendor could not rent it because he sued for specific performance and thus had to keep the property vacant so as to be able to transfer it to the buyer. While the court acknowledged the vendor's right to the rental value of the property, this remedy was not actually awarded because the vendor failed to prove the property's rental value. A parallel situation was discussed in *Mitchell v. Mutch*, 179 N.W. 440 (Iowa 1920); cf. *Hirschfeld v. Borchard Affiliations, Inc.*, 190 N.Y.S.2d 588 (Sup. Ct. 1959), in which a vendor was awarded specific performance, but was denied interest on the unpaid purchase price since both parties were responsible for the delay in executing the contract. Instead, the court awarded the rental value of the property which the vendor could not rent in the meantime because such renting would have frustrated the contract. *Id.* at 592-94.

an effect is not unique to restoration of the contractual equivalence. For example, when following the cancellation of a contract, both parties are obliged to give back what they received from each other, such mutual restitution operates for the benefit of the breaching party as well.⁷⁹ Two instances of restoration of the contractual equivalence in favor of the breaching party are recovery by workers and contractors for part performance and payment for excessive quantity the seller delivered.

1. Recovery by Workers and Contractors for Part Performance

Where a contract calls for performance that requires a period of time (for example, a worker's obligation to do the work or a contractor's obligation to construct a building), in exchange for a momentary performance (for example, the employer's and owner's obligation to pay the remuneration), the default rule is that the latter obligation is due only after completion of the former and is conditional upon its completion.⁸⁰ This rule may bring about harsh results when a worker or a contractor performs a substantial part of her obligations and then quits before completing the job. Strict application of the rule would allow the employer/owner to enjoy the work already done without paying for it.⁸¹ One way to mitigate this harsh outcome is to award the breaching party a right to a proportional part of the agreed remuneration, at least in cases where the contract remuneration can be apportioned to corresponding parts of the worker's or contractor's performance.⁸² The entitlement to a proportional part of the agreed remuneration does not

⁷⁹ See Restatement (Second) of Contracts §§ 374(1), 384 (1981). Similarly, when specifically enforcing the obligations of the defaulting party, courts may require the injured party to perform her outstanding obligations as well (or give security for her performance). See *id.* § 363. Such ruling may be seen as protecting the expectation interest of both parties, or alternatively as maintaining the contractual equivalence.

⁸⁰ Restatement (Second) of Contracts §§ 234(2), 237 (1981); 3 Farnsworth, *supra* note 21, § 8.11, at 486–87.

⁸¹ See Wythe Holt, *Recovery by the Worker Who Quits: A Comparison of the Mainstream, Legal Realist, and Critical Legal Studies Approaches to a Problem of Nineteenth Century Contract Law*, 1986 *Wis. L. Rev.* 677.

⁸² Restatement (Second) of Contracts § 240 (1981); 3 Farnsworth, *supra* note 21, § 8.13, at 496–500. The practical significance of this rule has been diminished by statutes entitling employees to frequent periodic payment of wages and by widespread contractual provisions entitling contractors to progress payments. See *id.* § 8.11, at 486–87.

detract from the right of the injured party (the owner, the employer) to damages for the losses caused by the breach. It does, however, maintain the contractual equivalence with respect to the completed part.

2. *Delivery of Excessive Quantity*

Article 52(2) of the CISG provides as follows:

If the seller delivers quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.⁸³

A similar rule is implied by the cumulative effect of UCC §§ 2-606 and 2-607(1).⁸⁴ Arguably, by sending a larger quantity the seller makes an implied offer to modify the original contract, and the buyer accepts the offer by taking delivery of the excess quantity. Be that as it may, by obliging the buyer to pay for the excess quantity at the contract rate (rather than at current market price or not at all), this rule directly restores the contractual equivalence to the benefit of the seller, who (at least technically) breached the contract by deviating from the agreed quantity.⁸⁵

III. GENERAL OBSERVATIONS ON THE RESTORATION INTEREST

Based on the survey of doctrines awarding the injured party (and sometimes the breaching party) remedies that aim to restore the contractual equivalence, it is now possible to make some general observations regarding the restoration interest. The following ob-

⁸³ CISG, *supra* note 40, at Article 52(2). On this Article, see generally Honnold, *supra* note 40, at 348; Markus Müller-Chen, Remedies for Breach of Contract by the Seller, *in* Commentary on the UN Convention on the International Sale of Goods (CISG) 519, 614–17 (Peter Schlechtriem & Ingeborg Schwenzer eds., 2d Eng. ed. 2005); Will, *supra* note 50, at 379, 381–82. On the CISG, see also *supra* Subsection II.A.3.

⁸⁴ *Van Dorn Co. v. Future Chem. and Oil Corp.*, 753 F.2d 565, 574 (7th Cir. 1985); 14 Williston & Lord, *supra* note 19, § 40:7, at 29–30.

⁸⁵ Under CISG Article 35(1), *supra* note 40, the seller “must deliver goods which are of the quantity . . . required by the contract.” In the case of falling market prices, the buyer may negotiate with the seller for a lower rate for the excess quantity, or refuse to take delivery of the excess.

servations compare restoration of the contractual equivalence with other goals of contract remedies; characterize the restoration interest as a goal or principle, rather than as a concrete rule; discuss the scope of availability of restoration remedies; and address the injured party's choice among, or accumulation of, remedies.

A. The Restoration Interest and Other Goals of Contract Remedies

At this point we can more clearly see the relationships between the restoration interest and the familiar goals of contract remedies. The restoration interest is not similar to any of the conventional interests, but it has significant correlations with each one of them.

Starting from the noticeable comparability of the remedy of price reduction and the outcome of restitution following partial cancellation of a divisible contract, restoration of the contractual equivalence and protection of the *restitution interest* sometimes bring about identical results.⁸⁶ When available, both kinds of remedies may give the injured party a relief exceeding her expectation interest. However, while restitution aims at undoing the outcomes of the contract, restoration seeks to restore the contractual balance struck by the parties. Restoration remedies do not focus on the breacher's unjust enrichment, although they may actually prevent it. To illustrate the difference between restoration and restitution, assume that a buyer has paid the price on time, but delivery of the sale object is delayed for one year. Restoration damages would allow the buyer to claim the amount of interest that she could have received on the price had she postponed payment for one year.⁸⁷ Restitution of the seller's enrichment may be calculated according to the interest the seller earned (or could have earned) on the price during the same period. Since the rate of interest each party could have reasonably received on the same amount of money need not be identical (and assuming calculation is based on the parties' specific characteristics, rather than on general standards), there may be a difference between restoration damages calculated according

⁸⁶ See supra Subsections II.A.3 and II.A.4; Yorio, supra note 6, at 216, 227 (describing the governing principle of equitable accounting as unjust enrichment); Treitel, supra note 46, at 108 (making a similar assertion regarding the remedy of price reduction).

⁸⁷ See supra Subsection II.B.2.

to the buyer's interest, and restitution calculated according to the seller's.⁸⁸

The restoration interest also shares a common feature with the *reliance interest*. A typical element of reliance on a contract is foregoing alternative uses of one's resources. Thus, buying raw materials from one supplier generally means that a factory foregoes the opportunity to buy similar materials from other suppliers. Proving lost profits from alternative bargains, their foreseeability, and the existence of a causal connection may be rather difficult, and thus the status of the entitlement to reliance damages based on lost profits from alternative contracts is uncertain.⁸⁹ Nevertheless, putting the injured party in the position she would have occupied had she made an alternative contract is analytically part of the reliance interest. Now, one way to describe restoration remedies is to say that they put the injured party in a monetary position similar to the one she would have occupied had she made an alternative contract—a contract for the lease of property of inferior quality, for the supply of a smaller quantity of goods (or a smaller parcel of land), or for acquiring the object at a later date. While in this sense restoration resembles reliance, in other respects the two are sharply different. In protecting the reliance interest, the goal is to put the injured party in as good a position as she would have been in had she not entered the present contract. Contrarily, restoration remedies are based directly on the present contract, and on the parties' agreement underlying it. One implication of this difference is that, while it makes perfect sense to protect one's reliance interest in cases where the contracting process was flawed by duress, for

⁸⁸ This conclusion is not affected by the rule allowing courts to measure restitution according to either the "reasonable value to the [breacher] of what he received in terms of what it would have cost him to obtain it from a person in the [nonbreacher's] position," or "the extent to which the [breacher's] property has been increased in value or his other interests advanced." Restatement (Second) of Contracts § 371 (1981). In the present example, this rule would allow the court to choose among different measures of benefit *to the seller*, but if *the buyer* could have earned higher interest on her money than the seller could, no measure of restitution would equal this restoration remedy. Cf. *id.* § 371, illus. 1.

⁸⁹ Fuller & Perdue, *supra* note 1, at 55 (stating that although reliance interest at least potentially covers lost opportunities, "certain scruples concerning 'causality' and 'foreseeability' are suggested"); 3 Farnsworth, *supra* note 21, §§ 12.1, 12.16a, at 154, 284–88 (explaining that damages claims based on lost opportunities are rare, and courts have not been receptive to them).

example, it would not make sense to endorse restoration in such circumstances, because restoration of the contractual equivalence presupposes the validity of the agreed upon equivalence.

Like the *expectation* and *disgorgement interests*, the restoration interest is closely linked to the parties' actual agreement. The equivalence protected is the one the parties assented to. When a contract is perfectly performed by both parties, all three interests—expectation, disgorgement, and restoration—are fully realized. In such a case, both parties get the benefit of their bargain (even if this “benefit” is actually a loss); neither of them gets any benefit from pursuing alternative courses of action; and the contractual equivalence is fully maintained. However, once the contract is breached, protecting each of these interests may yield considerably different results. Under different circumstances each of these three interests may yield the largest reward to the innocent party (and, of course, the three may coincide). Schematically, whenever the object's market price at the time according to which expectation damages are calculated is lower than the contract price, and whenever postponing performance would be more advantageous to the innocent party than performing at the agreed time, restoration gives the injured party a relief larger than expectation. Indeed, under such circumstances, not only the restoration but also the restitution and reliance interests are likely to exceed expectation, and to an even greater extent.⁹⁰ Yet, there is a fundamental difference between awarding reliance or restitution remedies and awarding restoration remedies. While the former arguably disregard the parties' agreement, restoration remedies build on it. One could say that a contracting party has not only a legitimate expectation, based on the contract, to the benefit of the bargain, but also to the agreed-upon balance between the parties' undertakings. Paren-

⁹⁰ To illustrate, suppose after a fixed-price sale contract is concluded, market price of the goods falls from \$1000 to \$800 (the contract price being \$1000). Suppose further that the seller delivers defective goods, the value of which is only 75% of the value of conforming ones. While expectation damages for the direct loss would be \$200 (25% of \$800) and restoration relief would be \$250 (25% of \$1000), rightfully rejecting the goods and getting back the price money (or avoiding paying it) would enable the buyer to buy comparable defective goods for \$600, keeping the difference of \$400. Adding up the current value of the defective goods (\$600) and the monetary relief, the buyer gets \$800 (\$600 + \$200) under the expectation measure, \$850 (\$600 + \$250) under restoration, and \$1000 (\$600 + \$400) under restitution.

thetically, this understanding of the notion of restoration bears on the availability of restoration damages under the prevailing rules of contract damages. A powerful argument against reliance damages as a remedy for breach of contract (except when used instrumentally as a minimal approximation of expectation), is the lack of *causal connection* between the breach and the loss. When reliance exceeds expectation, the injured party's loss is not a result of the breach, but rather a result of the poor bargain she made.⁹¹ Contrarily, when the innocent party sues for a restoration relief, the broken equivalence is a direct result of the breach, and thus merits compensation. Thus, unlike restitution and reliance, restoration of the contractual equivalence in a meaningful sense effectuates the parties' will.⁹²

The relative magnitude of restoration and disgorgement depends both on the profitability of the contract for the innocent party (as seen above) and on the profits made, or losses saved, by the breaching party through the breach. Often, when restoration exceeds expectation, it also exceeds disgorgement, and vice versa. Disgorgement (that is, the profits made or losses saved by the breaching party through the breach) is particularly large when the *breaching party* has made a losing contract and tries to cut down her losses by breaking the contract. Restoration is particularly large when the *injured party* has made a losing contract. These generalizations assume that when one party stands to lose from a contract, the other stands to gain. It may well be that both parties stand to lose from executing the contract, in which case comparison between restoration (and reliance and restitution) and disgorgement may depend on who is about to lose more.⁹³

⁹¹ Treitel, *supra* note 46, § 94, at 98; Pettit, *supra* note 54, at 421, 450–51.

⁹² In this sense, restoration differs not only from reliance, but also from restitution. See Kull's critique of the rule allowing the injured party to get restitution in excess of her expectation interest on the ground that it "has the effect of undoing the allocation of risks negotiated by the parties." Kull, *supra* note 57, at 1472. Weighing the merit of Kull's argument exceeds the scope of the present discussion.

⁹³ One should hope that in such a case, instead of engaging in strategic threats to perform the contract, the parties would agree to call off the bargain. See Ian Ayres & Kristin Madison, *Threatening Inefficient Performance of Injunctions and Contracts*, 148 U. Pa. L. Rev. 45 (1999) (discussing legal means to deter inefficient performance threats).

B. The Restoration Interest—A Goal or Principle, Not a Rule

The concept of restoration is arguably indeterminate. For example, suppose that under a sale contract concluded on 1/1/04 the buyer commits to pay the price in 13 equal installments, starting on the contracting day and ending on 1/1/05—the day in which delivery of the sale object is due. The buyer duly pays all installments, but delivery is delayed for one year. As indicated in Subsection II.B.2 above, while expectation damages for this delay are based on the net rental value of the object, restoration damages are calculated according to the interest the buyer would have earned on the purchase price had the payments been postponed accordingly. Yet, there are different ways to monetarily restore the chronological equivalence in such a case. One possibility would be to calculate interest on the assumption that all installments would have been postponed by one year (that is, starting on 1/1/05 instead of 1/1/04). Another possibility is to spread the thirteen installments along two years instead of one, from 1/1/04 (the contracting date) to 1/1/06 (the actual delivery date). These two alternatives may yield different outcomes at times of fluctuating interest. The court may also have to consider whether to award interest according to the statutory rate or to let the buyer prove that she could have attained a higher rate. Moreover, one may contend that none of the above methods of calculation actually restores the contractual equivalence, because rescheduling the performance may have plausibly affected other aspects of the transaction as well. Analogous questions and contentions may be raised with respect to other restoration remedies.

While I do not deny the flexibility of restoration remedies, I submit that in this respect there is no difference between restoration of the contractual balance and other goals of contract remedies. The latitude courts have in setting the criteria and calculating expectation damages is certainly not smaller.⁹⁴ Restitution may

⁹⁴ In the case of delivery of defective goods, for example, the buyer's expectation interest may be protected by specific performance (forcing the seller to replace the goods or remedy the defects), or by awarding damages that are based either on the cost of repair or on the goods' diminished value due to the defect (in addition to damages for any consequential or incidental losses). These choices may lead to very different results. See generally Craswell, *supra* note 4, at 138–40; Timothy J. Muris, *Cost of Completion or Diminution in Market Value: The Relevance of Subjective Value*,

similarly be attained in different manners,⁹⁵ and the reliance interest is notorious for having multiple meanings.⁹⁶ Like expectation, reliance, restitution, and disgorgement, restoration is a principle, not a rule.⁹⁷ In fact, since calculation of restoration remedies often refers to the contract price or to a standard measure such as statutory interest, it is less prone to manipulation than other goals of contract remedies.

Characterizing restoration as a principle or a goal implies that there may be considerable differences between different restoration remedies. In fact, the remedies surveyed above in Part II vary in many respects. While most of them are monetary, some are not; while most of them benefit the injured party, some favor the party in breach; some are more akin to one of the familiar interests than others; and so forth. Just as any of the familiar interests may in certain circumstances equal any of the other interests and may instrumentally serve as an approximation thereof,⁹⁸ so does the restoration interest sometimes equal other interests and may serve as an approximation thereof (and the other interests may approximate restoration).

These interrelations explain the various attempts to interpret and rationalize particular restoration remedies on the basis of familiar interests. But as the above analysis demonstrated, these ex-

12 J. Legal Stud. 379 (1983). See also Robert Cooter & Melvin Aron Eisenberg, *Damages for Breach of Contract*, 73 Cal. L. Rev. 1432 (1985) (discussing alternative formulae for measuring expectation damages and their implications under different market structures). Similarly, courts may calculate any remedy on the basis of either general, abstract standards, or by reference to the concrete circumstances of the parties and the actual effects of the breach on them. See Dobbs, *supra* note 8, §§ 12.2(2)–(3), at 28–50; Treitel, *supra* note 46, §§ 102–05, at 111–24.

⁹⁵ The restitution interest may be protected by either forcing the breaching party to return the object she received, or by forcing her to pay its value. See Dobbs, *supra* note 8, § 12.7(2), at 164–66.

⁹⁶ Even in Fuller and Perdue's own article, "reliance interest" and "reliance damages" have several distinguishable meanings. See, e.g., Robert E. Hudec, *Restating the "Reliance Interest"*, 67 Cornell L. Rev. 704, 712, 733 (1982); Kelly, *supra* note 2; Todd D. Rakoff, Fuller and Perdue's *The Reliance Interest* as a Work of Legal Scholarship, 1991 Wis. L. Rev. 203, 213.

⁹⁷ See Dobbs, *supra* note 8, § 12.2(2), at 28 ("Protection of the plaintiff's expectancy is a goal, not a measure of damages."); Wonnell, *supra* note 10, at 91 (explaining that the expectation and reliance interests are principles; they help thinking about and structuring concrete rules "but are in themselves too vague to serve as determinate legal rules").

⁹⁸ See, e.g., Katz, *supra* note 3.

planations have been problematic, partial and forced. The notion of restoration provides a more unified and coherent account of a relatively wide range of remedy doctrines. It presents rules and rulings that otherwise seem puzzling or awkward as resting on a sound analytical basis. Despite their differences, all restoration remedies share a fundamental characteristic. They all aim at restoring the contractual equivalence, rather than at any of the three (or four) conventional interests.

C. Scope of Availability

The survey of judicial and legislative awards of restoration remedies in Part II revealed that they are available for various breaches in a broad range of contracts. Inter alia, restoration remedies are awarded for breaches of contracts for the sale of goods and real property, leases of residential and other property, and construction contracts. They are awarded for physical nonconformity of the contract object, breaches concerning title, and delay in performance. As yet, however, restoration remedies are not generally available. No express, systematic regulation of restoration remedies exists in either the Uniform Commercial Code or the Restatement (Second) of Contracts. The availability of restoration remedies in some contracts and not in others does not seem to follow any rational criterion. Rather, it reflects peculiar historical developments. Thus, for example, it is not clear why the purchaser of real property and the buyer of goods in international sales are entitled to monetary relief calculated according to the proportional formula, while such a remedy is unavailable to buyers of goods in domestic sales.⁹⁹ Such a remedy, aimed at restoring the contractual equivalence, should be available in domestic sales of goods as well. In principle, restoration remedies should be available for other types of breach as well. Assume, for example, that a contract calls for delivery of goods in location *A* and the seller delivers the goods in location *B*. A restoration remedy would strive to put the buyer in a monetary position similar to the one she would have been in had the contract called for delivery in location *B*, and the price and other obligations of the buyer would have been adjusted accordingly.

⁹⁹ See supra Subsections II.A.1 and II.A.3.

Since restoration remedies are normatively justified (as argued in Part IV below), they should in principle be available to the injured party in any instance of partial, nonconforming, or delayed performance (and presumably for other breaches).¹⁰⁰ To the (somewhat limited) extent that parties are free to contract around remedy rules, they should be able to contract around restoration remedies as well.¹⁰¹

D. Election Among Remedies

Although heavily concealed behind a myriad of specific doctrines, rules, exceptions, and conflicting precedents, the general principle of contract remedies is that the injured party is entitled to choose among the different remedies available to her and resort to more than one remedy, provided that they are not inconsistent. The injured party may even shift from one remedy to another as long as the other party has not materially changed her position in reliance on the injured party's manifestation of choice of a certain remedy.¹⁰² This general principle should apply (and usually does apply) to the election between, and the accumulation of, restoration and other remedies. Hence the injured party is ordinarily entitled to the higher between the restoration and expectation measures of relief.¹⁰³ Some restoration doctrines, like abatement of the

¹⁰⁰ General availability and systematic regulation of restoration remedies for partial and nonconforming performance may be facilitated by the adoption of a general concept of conformity in the performance of contracts. See Eyal Zamir, *Toward a General Concept of Conformity in the Performance of Contracts*, 52 *La. L. Rev.* 1 (1991).

¹⁰¹ Although the accepted point of departure is that remedy rules are merely defaults, there are considerable limitations to contracting around such rules. See Dobbs, *supra* note 8, § 12.9, at 245–73; 3 Farnsworth, *supra* note 21, § 12.18, at 300 (“[The parties’] power to bargain over their remedial rights is surprisingly limited.”).

¹⁰² Restatement (Second) of Contracts § 378 (1981).

¹⁰³ As Omri Ben-Shahar and Robert Mikos demonstrate, the option to choose *ex post* between different measures of relief in cases involving *ex ante* uncertainty (in the present context, uncertainty regarding future market fluctuations) places extra costs on the defendant, and may thus result in incentives distortion. Omri Ben-Shahar & Robert A. Mikos, *The (Legal) Value of Chance: Distorted Measures of Recovery in Private Law*, 7 *Am. L. & Econ. Rev.* 484 (2005). For a comparable argument in the context of election between expectation damages and specific performance, see Jonathan Levy, *Against Supercompensation: A Proposed Limitation on the Land Buyer’s Right To Elect Between Damages and Specific Performance as a Remedy for Breach of Contract*, 35 *Loy. U. Chi. L.J.* 555 (2004). This is, however, a general characteristic

purchase price ancillary to partial specific performance, are invariably accompanied by another remedy. Other restoration remedies, such as suspension of one's performance in response to the other party's delay, or suing for the interest on the price paid for the duration of the seller's delay, do not preclude the injured party's right to damages for consequential losses.¹⁰⁴ The same applies to proportional price reduction for nonconformity under the CISG,¹⁰⁵ and to proportional rent abatement.¹⁰⁶ The injured party is not, however, entitled to proportional price reduction coupled with damages for the decrease in the object's value, because this would be double relief for the same harm. Similarly, the buyer is not entitled to interest on the price paid for the duration of the seller's delay together with the rental value of the object during this period.¹⁰⁷

There are also exceptions to the principles of election and accumulation of remedies. Some of the exceptions have to do with the particular circumstances in which a restoration remedy is awarded. For example, restoration remedies are sometimes available while remedies protecting the expectation interest are not. This is justifiably the case when non-performance is due to unanticipated, supervening circumstances.¹⁰⁸ This is also the case when the propor-

of the election among remedies doctrine, which lies beyond the present discussion of the restoration interest.

¹⁰⁴ See, e.g., *C.L. Maddox, Inc. v. Coalfield Servs., Inc.*, 51 F.3d 76 (7th Cir. 1995) (holding that a subcontractor who rightfully stopped working due to a contractor's failure to provide assurance of due performance was entitled to damages); *Fast v. S. Offshore Yachts*, 587 F. Supp. 1354, 1357–58 (D. Conn. 1984) (expressing willingness to award consequential damages along with specific performance of a sale contract and recovery of interest on prepaid price for the period of delayed delivery); *T. Ferguson Const., Inc. v. Sealaska Corp.*, 820 P.2d 1058 (Alaska 1991) (finding that a contractor's behavior justified the withholding of progress payments and gave rise to right for damages).

¹⁰⁵ See supra note 43 and accompanying text. As regards breach of covenant or warranty in land sales, see, e.g., Cal. Civ. Code § 3304 (West 2006) (stating that, in addition to the proportional price reduction for breach of covenant, a purchaser is entitled to any expenses she properly incurred in defending her possession).

¹⁰⁶ 1 Restatement (Second) of Prop.: Landlord and Tenant § 11.1 cmt. h (1977).

¹⁰⁷ Cf. *Yorio*, supra note 6, at 241 (explaining that, to avoid duplicative adjustments, buyer is not entitled to equitable accounting of net rental value and to damages measured by the actual profits he would have realized on the property but for the seller's delay).

¹⁰⁸ Section 272 of the Restatement (Second) of Contracts denies expectation damages—but allows for protection of the restitution and reliance interests—in cases of impracticability and frustration of purpose. In this context, restoration resembles reli-

tional formula is used to calculate rent abatement for breach of the implied warranty of habitability, when ordinary expectation damages would result in a disproportionately large sum.¹⁰⁹ Other exceptions to the principles of election and accumulation of remedies stem from peculiar historical developments, and are hardly justifiable. For example, some courts still refuse to combine specific performance with ancillary expectation damages, thus limiting the injured party to restoration of the contractual equivalence by price abatement.¹¹⁰

IV. NORMATIVE AND THEORETICAL ANALYSIS

A. General

In the preceding Parts, I claimed that, analytically, restoration of the contractual equivalence is an independent goal of contract remedies, and that courts and legislatures actually award remedies directed at restoring the contractual equivalence. This Part addresses the normative question of whether restoration of the agreed equivalence is a worthwhile goal of contract remedies, and the theoretical implications of recognizing this goal. Within contract law theory there is a longstanding debate as to whether the organizing principle and central goal of remedies for breach of contract should be protection of the expectation interest or rather protection of the reliance interest. This debate is rooted in the fundamental questions of contract law theory.¹¹¹ While I shall not directly

ance and restitution. Similarly, under CISG Article 79, the buyer is not entitled to damages (but is still entitled to price reduction) if the breach was due to supervening circumstances she could not reasonably have been expected to anticipate, nor to avoid or overcome. Honnold, *supra* note 40, at 336; Will, *supra* note 50, at 373.

¹⁰⁹ See *supra* note 39 and accompanying text.

¹¹⁰ See Yorio, *supra* note 6, at 213–21. For a discussion on price abatement, see *supra* Subsection II.A.1.

¹¹¹ See generally P.S. Atiyah, *Promises, Morals, and Law* (1981) (developing a theory of contractual liability based on restitution and reliance); Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* 17–27 (1981) (advocating a liberal theory of contract and expectation as its corollary); Robert Birmingham, *Notes on the Reliance Interest*, 60 *Wash. L. Rev.* 217 (1985) (critically analyzing Fuller and Perdue's article); Fuller & Perdue, *supra* note 1; Kelly, *supra* note 2 (criticizing Fuller and Perdue's thesis and endorsing the expectation interest coupled with a rebuttable presumption of zero profits); Pettit, *supra* note 54 (supporting the reliance interest on distributive grounds); W. David Slawson, *The Role of Reliance in Contract Damages*, 76 *Cornell L. Rev.* 197 (1990) (supporting the expectation measure); Wonnell, *supra*

discuss this debate, I shall indicate how the restoration interest contributes to understanding the nature of contracts and the role of contract law.

The present discussion does not challenge the prevailing (doctrinal and normative) conception that the basic goal of contract remedies is to protect the injured party's expectation interest. It further assumes that damages may legitimately be calculated according to the reliance interest whenever such calculation is used as a minimal approximation of the expectation interest, but not when the breaching party establishes that reliance exceeds expectation.¹¹² I shall argue that, whether restoration remedies provide the injured party with a relief equal to, smaller than, or larger than her expectation interest, restoration of the contractual equivalence is justified by—or at least compatible with—the major normative theories of contract law. Finally, following the general principle concerning election of remedies, it is assumed that the injured party is free to choose between restoration and other types of remedies, and whenever appropriate, to combine restoration remedies with other remedies. Thus, I do not try to justify restoration as a *substitute* for expectation (or for any other interest), but rather as an additional interest or goal of contract remedies.

This Part examines the justification for restoration of the contractual equivalence from the perspectives of a liberal theory of contracts (the will theory), corrective justice, distributive justice, economic efficiency, and contract as a cooperative relationship. It does not discuss in any detail the philosophical underpinnings of these normative perspectives, nor their relative merit.¹¹³ Rather, it examines the desirability of protecting the restoration interest according to each theory on its own terms. By demonstrating that the

note 10 (proposing a theory of liability that endorses both reliance and expectation, each one under different circumstances). For a general account of contract theories, including reliance-based theories, see Stephen A. Smith, *Contract Theory* 41–163 (2004).

¹¹² See *supra* note 54 and accompanying text.

¹¹³ On the possibility of normative pluralism (focusing on the level of foundational normative theories), see Shelly Kagan, *Normative Ethics* 294–99 (1998). For a defense of moral pluralism, see John Kekes, *The Morality of Pluralism* (1993). For a pluralistic theory of contract law, see, e.g., Melvin A. Eisenberg, *The Theory of Contracts*, in *The Theory of Contract Law: New Essays* 206 (Peter Benson ed., 2001) [hereinafter, *Theory of Contract Law*]; cf. Izhak England, *The Philosophy of Tort Law* 64–92 (1993) (advocating a pluralist theory of tort law).

restoration interest is justified by—or at least compatible with—various normative theories, I seek to persuade adherents of different normative perspectives of its attractiveness. At the same time, the discussion will dialectically shed light on the theories and perspectives themselves.

B. The Will Theory

The will theory of contract stems from the liberal notion that every human being is an autonomous moral agent, obliged to keep her promises because she freely undertook them. By forcing a person to live up to her promises, we respect her as an autonomous, rational entity, and promote the trust created by her promise.¹¹⁴ The moral obligation to keep a promise and the legal obligation to keep a contractual promise do not rest, according to this theory, on any utilitarian or other consequentialist theory, but rather on the promise's intrinsic moral force.

Arguably, the will theory of contract requires that expectation damages be the standard remedy for breach. In the words of Charles Fried:¹¹⁵

If I make a promise to you, I should do as I promise; and if I fail to keep my promise, it is fair that I should be made to hand over the equivalent of the promised performance. In contract doctrine this proposition appears as the expectation measure of damages for breach.

. . . .

. . . [T]o the extent that contract is grounded in promise, it seems natural to measure relief by the expectation, that is, by the promise itself.

¹¹⁴ The most influential, modern version of the will theory is Fried, *supra* note 111. For a critical discussion of Fried's theory, see, e.g., Eisenberg, *supra* note 113, at 223–35; P.S. Atiyah, *Fried: Contract as Promise: A Theory of Contractual Obligation*, 95 *Harv. L. Rev.* 509 (1981) (book review); Anthony T. Kronman, *A New Champion for the Will Theory*, 91 *Yale L.J.* 404 (1981) (book review). For a different version, stressing the detachment facilitated by legally enforceable contracts, as opposed to interpersonal trust advanced by promises, see Dori Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (2003).

¹¹⁵ Fried, *supra* note 111, at 17–18.

Two attacks have been launched against this proposition. The first maintains that respect for individual autonomy indeed requires that people be allowed to commit themselves to legally binding promises, but that it gives no reason to prefer expectation damages over any other conceivable remedy, including reliance damages.¹¹⁶ This argument proves too much. While the will theory of contract does not necessarily entail expectation damages as the standard remedy for breach, there is a significant linkage between this theory and remedies for breach of contract. If a breach of contract is regarded as intrinsically, morally wrong, then, other things being equal, one should prefer remedies providing the promisor with a stronger incentive to keep her promise. One should opt for remedies that more clearly express the inherent moral virtue of keeping one's promise and condemnation for its breach.

This brings us to the second attack on Fried's endorsement of expectation damages. Several scholars pointed out that the will theory might justify remedies that deter people from breaching contracts more effectively than expectation damages do. These may include specific performance,¹¹⁷ reliance damages exceeding the expectation interest, disgorgement, and punitive damages.¹¹⁸

¹¹⁶ Responding to the claim that the will theory entails protection of the expectation interest, Fuller and Purdue note: "If a contract represents a kind of private law, it is a law which usually says nothing at all about what shall be done when it is violated." Fuller & Purdue, *supra* note 1, at 58. In the same vein, see Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 *Mich. L. Rev.* 489, 517–20 (1989); Markovits, *supra* note 16, at 1501–03; Pettit, *supra* note 54, at 428–31. For a defense of the connection between the promissory basis of contract and performance-based remedies (expectation damages and specific performance), see Kimel, *supra* note 114, at 89–94.

¹¹⁷ P.S. Atiyah, *The Liberal Theory of Contract*, in *Essays on Contract* 121, 124 (1986); Friedmann, *supra* note 2, at 637; Pettit, *supra* note 54, at 429.

¹¹⁸ Smith, *supra* note 111, at 418–20 ("[F]rom the traditional rights-based view of contract law, the refusal to punish deliberate breach is a genuine puzzle."); Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 *Harv. L. Rev.* 961, 1107–08 (2001) (making a similar argument). On punitive damages for breach of contract, see, for example, William S. Dodge, *The Case for Punitive Damages in Contracts*, 48 *Duke L.J.* 629 (1999); John A. Sebort, Jr., *Punitive and Nonpecuniary Damages in Actions Based upon Contract: Toward Achieving the Objective of Full Compensation*, 33 *UCLA L. Rev.* 1565 (1986). Some attempts have been made to square the common law reluctance to award specific performance or punitive damages with promissory theories of contract law. See, e.g., Kimel, *supra* note 114, at 97–109; Stephen A. Smith, *Performance, Punishment and the Nature of Contractual Obligation*, 60 *Mod. L. Rev.* 360 (1997).

This cogent argument paves the way to justifying restoration according to the will theory.

Restoration of the contractual balance is justified by the will theory for two cumulative reasons. First, like the aforementioned remedies, restoration remedies reinforce the notion that contractual promises should be kept. They do so by awarding the innocent party a relief that is potentially greater than her expectation interest, thereby increasing the deterrence against contract breaches. Second and more important, contrary to other remedies that may attain this result (for example, reliance damages exceeding the expectation interest or punitive damages), restoration remedies more directly and concretely reflect the parties' actual agreement, as embodied in their contract. The criterion for calculating restoration remedies is not external to the contract, but rather based on it. The criteria for calculation are the value that the parties attributed to the exchanged objects, the agreed chronological relations between their corresponding obligations, and so forth.¹¹⁹ For this reason, even if remedies that I characterize as restoring the contractual equivalence are viewed as "reformation of the original contract" or "modification" thereof,¹²⁰ they do not adversely affect the parties' autonomy. The breaching party is the one who, by her breach, deviated from the agreement. She cannot persuasively object to adjusting the counter-performance to her own actual performance when this adjustment is based on the originally agreed upon equivalence. As for the innocent party—she is the one opting for a restoration remedy, preferring it to remedies aimed at other goals.

A counter-argument might be that restoration remedies cannot be based on the parties' *actual* consent. The parties envisaged a full, conforming, and timely performance. They did not envision a partial, nonconforming, or belated performance coupled with corresponding adjustment of the injured party's obligations. Thus—the counter-argument proceeds—the most one can claim is that restoration rests on a *hypothetical* agreement, not on the parties'

¹¹⁹ See *Cazares v. Ortiz*, 168 Cal. Rptr. 108, 113 (App. Dep't Super. Ct. 1980) (justifying the proportional formula of rent abatement for breach of the implied warranty of habitability, the court noted: "The agreed rent is something the parties have fixed, so traditional contract law instructs us to give it substantial weight.").

¹²⁰ Bergsten & Miller, *supra* note 44, at 274 (referring to the remedy of price reduction under the CISG); Flechtner, *supra* note 45, at 174 (same).

actual will. Indeed, while contracts sometimes explicitly adopt the restoration measure of relief,¹²¹ my aim is to justify its availability, at least as a default rule, in cases where they do not. This counterargument applies, however, to any contract remedy and indeed to any contract default rule, thus denying the possibility of justifying any contract remedy on the basis of the will theory. To the extent that the will theory can meaningfully evaluate contract remedies—which I believe it can to some extent—restoration of the contractual equivalence is a commendable goal of contract remedies. It is a commendable goal because it closely follows the *agreed upon* equivalence (in which sense it is comparable with the expectation measure), and because the nonbreacher’s option to resort to restoration remedies provides a powerful incentive to keep one’s promises (sometimes stronger than the expectation measure).

Alternatively (that is, if one insists that no remedy rule or principle can be derived from the will theory), the above discussion indicates that restoration may be justified as resting on an *ex ante* hypothetical agreement. Reasonable parties may well agree, for example, that partial performance by one of them will result in correspondingly partial counter-performance, or that any delay in performance by one party will entitle the other party to similarly delay her counter-performance.¹²² This alternative justification also seems applicable to the instances in which restoration benefits the breaching party, such as obliging the buyer to pay for excessive quantity and allowing workers and contractors to recover for part performance.

Lastly, when crafting remedies for breach of contract, an additional concern from the point of view of a liberal theory aiming at enhancing people’s autonomy is to refrain from excessive sanc-

¹²¹ See, e.g., 200 E. 87th St. Assoc. v. MTS, Inc., 793 F. Supp. 1237, 1256 (S.D.N.Y. 1992) (regarding a contract that provided tenant with a remedy of proportional rent reduction for square footage deficiency in a lease of a newly constructed building); Reed v. U.S. Postal Serv., 660 F. Supp. 178, 180 (D. Mass. 1987) (regarding lease contract that provided for rent abatement in proportion to the area determined by tenant as unfit for use due to landlord’s failure to keep it in good repair); Hous. Auth. of the City of E. St. Louis v. Melvin, 507 N.E.2d 1289, 1291–92 (Ill. Ct. App. 1987) (regarding lease that provided for “abatement of rent in proportion to the seriousness of the damage and loss in value as a dwelling in the event repairs are not made” by landlord).

¹²² On the restoration interest and the parties’ reasonable expectations, see also *infra* Section IV.F.

tions. A remedy is excessive if it unnecessarily curtails the breaching party's freedom (as is arguably the case with specific performance, at least in some circumstances),¹²³ or is disproportionate to the costs and benefits that are at stake in the contract itself.¹²⁴ Restoration remedies are clearly proportionate to the contract and to the potential outcomes of its breach and are not intrusive at all.

Contrary to first appearances, severing the connection between the will theory and the expectation interest does not adversely affect the theory's coherence and purity; it may in fact strengthen it. Realizing that the will theory is compatible with different remedial goals that courts and legislatures actually pursue (as well as contextualizing people's expectations) can make the will theory more acceptable and more fruitful.¹²⁵

C. Corrective Justice

The basic idea underlying corrective justice is that people have a duty to remedy wrongful losses they inflict on others. Unlike distributive justice, which deals with the allocation of entitlements among members of society, corrective justice narrowly focuses on the interaction between two people. As stated by Aristotle, corrective justice requires that the balance breached by the wrongful enrichment of one person at the expense of another's loss be restored.¹²⁶

Fuller and Perdue argued that from a corrective justice point of view, the restitution interest is the most worthy of protection, reliance comes second, and expectation only third. Restitution compensates the innocent party for her loss and concurrently deprives the breaching party of her unjust profit, while protecting the reli-

¹²³ See Kimel, *supra* note 114, at 100–09.

¹²⁴ Thomas M. Scanlon, Promises and Contracts, *in* *Theory of Contract Law*, *supra* note 113, at 86, 105.

¹²⁵ On the different motives and expectations people have in different types of contracts, see *infra* Section IV.F.

¹²⁶ Aristotle, *The Nicomachean Ethics*, Book V (David Ross trans., J.L. Ackrill & J.O. Urmson eds., rev. ed. Oxford 1998); see also *Compensatory Justice: NOMOS XXXIII* (John W. Chapman ed., 1991). The most ardent, modern advocate of corrective justice as the underlying foundation of private law is Ernest Weinrib. See, e.g., Ernest J. Weinrib, *The Idea of Private Law* (1995). For a critique of Weinrib's conception of the private law, see Robert L. Rabin, *Law for Law's Sake*, 105 *Yale L.J.* 2261 (1996).

ance interest attains the first goal only. Protection of the expectation interest exceeds the sphere of corrective justice altogether because it does not restore the breached equivalence, but rather places the innocent party in a better position than the one she occupied prior to the contract.¹²⁷ Fuller and Perdue assumed that the balance that needs to be restored is the one that existed before the conclusion of the contract. If, however, one refers to the parties' position had the contract been fully performed as the relevant benchmark, then corrective justice would be realized to a fuller extent by protecting the expectation interest. Contractual rights may be viewed as something the obligee already has. According to this view, breaching a contractual obligation is tantamount to wrongfully taking another person's property. To correct this wrong, the injured party should be put in as good a position as she would have occupied had the contract been performed.¹²⁸

The ease with which both reliance and expectation interests may be justified on the basis of the notion of corrective justice demonstrates the inherent weakness of corrective justice as a justificatory theory. Concepts of corrective and distributive justice are basically structural concepts, rather than substantive principles of justice.¹²⁹ Just as there may be different criteria for distributing entitlements among members of society, so there may be different answers to the question of when the balance between two individuals is unjustifiably breached. While Fuller and Perdue beg the question by assuming that the balance that needs to be restored is the one that existed prior to the conclusion of the contract, others beg the ques-

¹²⁷ Fuller & Perdue, *supra* note 1, at 56–57.

¹²⁸ For arguments of this sort, see, e.g., Peter Benson, *The Unity of Contract Law*, in *Theory of Contract Law*, *supra* note 113, at 118, 127–38; Daniel Friedmann, *The Efficient Breach Fallacy*, 18 *J. Legal Stud.* 1, 13–18 (1989); Friedmann, *supra* note 2; Weinrib, *supra* note 16, at 62–70.

¹²⁹ Kaplow & Shavell, *supra* note 118, at 1044–52. For structural conceptions of corrective justice and a critique of substantive conceptions thereof, see, for example, Englard, *supra* note 113, at 11–12, 16–17; Weinrib, *supra* note 126; Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 *J. Legal Stud.* 187 (1981). For a critique of the formal conception and a defense of a substantive conception of corrective justice, see Richard W. Wright, *Substantive Corrective Justice*, 77 *Iowa L. Rev.* 625 (1992).

tion by assuming that the relevant benchmark is the parties' position had the contract been fully performed.¹³⁰

One may nevertheless connect between the restoration interest and the Aristotelian concept. Both expectation and reliance damages strive to rectify the injury caused to the innocent party, regardless of the existence or absence of actual enrichment by the breaching party following the breach. Similarly, restitution and disgorgement, aimed at depriving the breaching party of her unjust enrichment, disregard the existence or absence of actual loss to the innocent party.¹³¹ In contrast, in the case of restoration there is a closer correlation (although not necessarily an identity) between the injured party's loss and the breacher's gain. Assume, for example, that the parties' reciprocal obligations are scheduled for the same time; the innocent party duly performs her part; whereas the other party performs her part two months later. In this case, the innocent party stands to lose from receiving the counter-performance two months *after* doing her share, while the breaching party stands to profit from receiving the counter-performance two months *before* rendering her performance. When a restoration relief aims at restoring the chronological balance, it does so both in terms of the non-breaching party's loss and the breaching party's gain.¹³²

The significance of this difference between restoration and the other interests is admittedly limited. In the case of expectation and reliance interests, *vis-à-vis* the innocent party's loss stands the breaching party's normative (or notional) profit that she would make if she does not compensate the innocent party for her losses. In the case of restitution and disgorgement, as against the enrich-

¹³⁰ Craswell, *supra* note 4, at 121–28; Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 *Yale L.J.* 829, 871 (2003).

¹³¹ This point is made clear in the table reproduced in Part I, *supra*, showing that in Fuller and Perdue's analytical framework, as well as in Katz's fuller account, each interest focuses on one party only. See also Katz, *supra* note 3, at 544.

¹³² The same is true with regard to other restoration remedies and doctrines. When, for example, a seller delivers a defective object worth only 60 percent of a conforming one, reduction of 40 percent of the agreed price rectifies the imbalance created by the breach by both compensating the buyer for her loss and removing the seller's gain. When a buyer who has not rejected excessive quantity of goods is obliged to pay for them in accordance with the contract price, this payment both avoids her enrichment from getting the goods without paying for them and compensates the seller for these goods.

ment of the breaching party, stands a normative loss to the innocent party if she will not get the profits made at her expense.¹³³ One may nevertheless commend restoration because rectifying the imbalance created by the breach is its primary goal, rather than just a by-product of focusing on one side of the equation.¹³⁴

Restoration remedies seem desirable from a corrective justice perspective for a much more practical reason. Sometimes, the injured party resorts to a restoration remedy not because it would get her a reward exceeding her expectation interest, but rather because there are insurmountable or very considerable obstacles to protecting her expectation interest at all. Thus, for example, when courts grant damages for belated delivery of the sale object on the basis of the interest the prepaid price would have yielded during the delay period,¹³⁵ they often do so because it is impossible or very difficult to figure out the net rental value of the object during that period. At the same time, it may be quite easy to find out the statutory or market interest the buyer could have received on the money she paid on time. The point here is not that the restoration interest is higher or lower than the expectation interest. Rather, it is that in the absence of a restoration remedy the injured party would not have been compensated at all.¹³⁶ Suspension of the nonbreacher's performance in response to an actual or expected breach bypasses in an even more straightforward manner any difficulty in establishing the injured party's expectation interest.¹³⁷ Similarly, when a seller delivers 60 percent of the agreed quantity of customized goods, it is much easier to reduce 40 percent of the contract price than to determine the missing goods' current market price.¹³⁸ The

¹³³ Weinrib, *supra* note 126, at 115–20 (discussing factual and normative aspects of gains and losses under corrective justice); Wright, *supra* note 129, at 693–94.

¹³⁴ A different way to express this idea would be to say that protecting the restoration interest is supported by both considerations of corrective or compensatory justice (focusing on the injured party) and by considerations of restitutionary justice (focusing on the party in breach). See Jules L. Coleman, *Risks and Wrongs* 371 (1992) (“When the wrongful gains and losses exactly coincide, satisfying the demands of corrective justice suffices to satisfy the demands of restitutionary justice as well, and vice versa.”).

¹³⁵ See *supra* Subsection II.B.2.

¹³⁶ For a striking example of such a harsh result, see *Freidus v. Eisenberg*, 510 N.Y.S.2d 139 (App. Div. 1986), described in note 76, *supra*.

¹³⁷ See *supra* Subsection II.B.1.

¹³⁸ See *supra* Subsection II.A.3.

same is true with regard to price abatement in real property transactions.¹³⁹

Arguably, in such cases, the contractual equivalence is restored as a means to protect the innocent party's expectation interest, just as reliance expenses are sometimes used as a minimal approximation of expectation.¹⁴⁰ This counter-argument should be rejected for two interrelated reasons. First, contrary to reliance damages, restoration remedies are compatible with effectuating the parties' will.¹⁴¹ Since the break of the contractual equivalence is sensibly a result of the breach, restoration remedies are available even when they manifestly exceed the expectation interest.¹⁴² Second and more fundamentally, restoration of the contractual equivalence is a different goal than putting the nonbreacher in the position she would have occupied had the contract been fully performed. The fact that under certain circumstances protecting the expectation interest is unattainable does not imply that restoration remedies are used in such circumstances to protect expectation. It does mean that restoration remedies are doubly important as a means of corrective justice in such circumstances.

D. Distributive Justice

The distributive outcomes of restoration remedies are not unequivocal; yet seem to be desirable.¹⁴³ Indeed, when the innocent

¹³⁹ See Yorio, *supra* note 6, at 223 ("The [abatement] remedy's virtue lies in its apparent simplicity: where the availability of specific relief implies that damages are difficult to quantify, an abatement may enable a court to avoid the potentially thorny task of assessing damages for the seller's partial default.").

¹⁴⁰ See *supra* note 54 and accompanying text.

¹⁴¹ See *supra* Section IV.B.

¹⁴² In contrast, reliance expenses are arguably the result of making the contract and not of its breach. See *supra* notes 91–92 and accompanying text.

¹⁴³ The following analysis assumes that it is morally right to aspire to a fairer distribution of wealth and power in society, that redistribution of resources is a legitimate role of the state, and that contract law is a legitimate and appropriate vehicle for enhancing distributive justice. These assertions are highly debatable, yet these debates remain beyond the scope of this Article. In the contractual context, two leading articles dealing with these issues are: 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 (1982); and Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 *Yale L.J.* 472 (1980). Admittedly, the concern for distributive justice in contract law violates the very distinction between the

party is weaker or poorer than the party in breach, extending the scope of remedies available to her may bring about desirable distributive outcomes. Thus, for example, the availability of such remedies to residential tenants suing for breach of the warranty of habitability, as well as to other consumers, may seem desirable.¹⁴⁴ However, it is not clear that the breaching party is typically stronger or richer than the innocent one. Whenever the innocent party is stronger or richer, extending the scope of her remedial rights may further strengthen and enrich her. In fact, given the considerable costs involved in filing a lawsuit, it may well be that courts are more accessible to the rich and the strong.¹⁴⁵ However, some restoration remedies—such as suspension of performance and price reduction when the price has not been paid yet—are self-help remedies not entailing a lawsuit. Given the costs and cumbersome nature of civil litigation, this is a major advantage for the poor.¹⁴⁶

Even when protecting one's contractual rights requires the filing of a lawsuit, the availability of restoration remedies is likely to benefit the poor. First, increasing the expected gains from a lawsuit (by awarding restoration remedies exceeding expectation remedies) would encourage the weak and the poor to sue.¹⁴⁷ Second, restoration remedies are especially advantageous when establishing the facts necessary to obtain expectation damages is difficult or expensive.¹⁴⁸ Allowing the injured party to sue for proportional rent

realms of corrective and distributive justice, as does the efficiency analysis, *infra*, in Section IV.E.

¹⁴⁴ In the case of habitability, however, damages are sometimes calculated according to the proportional formula when expectation damages, if available, would yield a higher relief to the tenant. In fact, courts sometimes resort to the proportional formula because expectation damages appear to be disproportionately high in such cases. See *supra* Subsection II.A.2. Determining whether the use of the proportional formula benefits the tenants thus depends on one's benchmark—expectation damages or no damages at all (because expectation damages are too high).

¹⁴⁵ See Craswell, *supra* note 4, at 119 (“[T]here are good reasons to expect that stronger parties do sue more often . . .”).

¹⁴⁶ See Mark P. Gergen, *The Law's Response to Exit and Loyalty in Contract Disputes*, in *Comparative Remedies for Breach of Contract* 75, 76 (Nili Cohen & Ewan McKendrick eds., 2005) [hereinafter Gergen, *Comparative Remedies*] (emphasizing the importance of remedial simplicity in the context of the power to withhold performance in response to default by the other party).

¹⁴⁷ See Craswell, *supra* note 4, at 119 (making a similar argument in a slightly different context).

¹⁴⁸ See *supra* Section IV.C.

abatement or for proportional price abatement without having to prove the net rental value or current market value of the property is a significant advantage for poor and unsophisticated plaintiffs. This was in fact one of the central arguments in favor of the proportional formula of rent abatement for breach of the warranty of habitability.¹⁴⁹

Furthermore, restoration remedies are particularly advantageous when the agreed price exceeds the goods' or services' market value. In the cases of proportional price abatement, rent abatement, and price reduction under the CISG, this is because, unlike expectation damages, restoration remedies are measured by reference to the contract price. The fact that a party is charged a higher price may indicate that she is less informed, has an inferior bargaining power, or is a less sophisticated bargainer. In fact, a host of empirical studies reveal that the poor, women, and people belonging to ethnic minorities pay more for the same products and services.¹⁵⁰ The positive distributive effects of restoration remedies may thus exceed the dimension of economic disparity.

A fundamental argument against viewing restoration remedies as a means of redistribution points to their *ex ante* effects. In general, one should examine not only the effect of contract remedies on the parties following the breach, but also their effect on future contracts. Extending the scope of remedies available to the promisee increases the potential costs of the bargain to the promisor. The promisor may try to pass on these costs to the promisee.

¹⁴⁹ See, e.g., *Cazares v. Ortiz*, 168 Cal. Rptr. 108, 110 (App. Dep't Super. Ct. 1980) (referring to the drawbacks of the regular measure of damages, the court noted that "in the usual small case like the present no one can afford to hire the experts" necessary to establish the exact decrease in the market rental value of the property); Philip W. Coleman, Special Project on Landlord-Tenant Law in the District of Columbia Court of Appeals, 29 *How. L.J.* 177, 186 (1986) ("The percentage reduction approach does not require expert testimony to determine loss of value, thereby greatly simplifying the task of the court and relieving the tenant of an undue burden."); Zucker, *supra* note 32, at 288-89 ("[T]enants may not have the money to retain the services [of experts]."). It should be noted, however, that the courts' willingness to employ the proportional formula without requiring expert testimony regarding the exact relative decrease of the usability of the leased property is logically not an indispensable corollary of the proportional formula.

¹⁵⁰ See, e.g., Ian Ayres, *Pervasive Prejudice? Unconventional Evidence of Race and Gender Discrimination* 19-124 (2001); David Caplovitz, *The Poor Pay More: Consumer Practices of Low-Income Families* (1967); John Yinger, *Evidence on Discrimination in Consumer Markets*, 12 *J. Econ. Persp.* 23 (1998).

Whether the promisor fully or partially succeeds in passing on these costs, the distributive outcomes of restoration remedies—as between suppliers and customers and among the customers themselves—depend on various factors. These factors include the relative risk-aversion of the different customers and the supplier, the existence of market substitutes for the product or service, and the distribution of the risk of breach for which remedies have been expanded.¹⁵¹ These distributive outcomes are hard to predict. In response to this argument, one may doubt that relatively small differences in remedy rules, which are likely to affect only a small fraction of the contracts, would have any influence on the ex ante contractual allocation of costs and benefits.¹⁵²

These competing considerations make it difficult to reach a definite conclusion regarding the distributional outcomes of restoration remedies. Nonetheless, a review of the judicial awards of such remedies seems to not only remove the fear of negative distributional outcomes (to the extent that one can deduce this from reading court judgments), but also to indicate that sometimes they have positive distributive effects. A conspicuous example is the case of the breaching employee who quits her job before the end of the contract period. In that instance, restoration of the contractual equivalence assists the breacher, who is probably the weaker and poorer of the two parties, by entitling her to remuneration for the work she had already done.¹⁵³ The proportional formula used to calculate damages for breach of the warranty of habitability is also part of an (admittedly controversial) redistributive legal scheme.¹⁵⁴

¹⁵¹ See Craswell, *supra* note 4, at 118–21; Richard Craswell, *Passing On the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 *Stan. L. Rev.* 361 (1991) [hereinafter Craswell, *Passing on the Costs*].

¹⁵² For a further elaboration of this point in the context of the efficiency of restoration remedies, see *infra* Subsection IV.E.3.

¹⁵³ See *supra* Subsection II.C.1.

¹⁵⁴ See *supra* Subsection II.A.2. On the difficult questions of whether and under what conditions the warranty of habitability may be expected to yield positive redistributive results, see generally Bruce Ackerman, *Regulating Slum Housing Markets On Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 *Yale L.J.* 1093 (1971); Craswell, *Passing on the Costs*, *supra* note 151. See also Richard S. Markovits, *The Distributive Impact, Allocative Efficiency, and Overall Desirability of Ideal Housing Codes: Some Theoretical Clarifications*, 89 *Harv. L. Rev.* 1815 (1976).

The procedural and evidential advantages of some of the restoration remedies are very significant as well.

An argument against these positive distributional effects of restoration remedies is that most of these effects are indirect and un-systematic; and if one seriously seeks to attain redistribution through contract remedies, it should be done in a more systematic and direct manner. A response to this contention is that, given the heated debate regarding the appropriateness of redistribution through contract rules, the indirect and covert nature of these distributive effects may actually be an advantage.¹⁵⁵

E. Economic Efficiency

1. General

This Section explores the economic efficiency of protecting the restoration interest. The discussion focuses on cases where restoration remedies benefit the injured party (Subsections 1–3), and then analyzes the special cases in which restoration remedies benefit the breaching party (Subsection 4).

Normative economics is a consequentialist moral theory attributing equal weight to the well-being of every person. It evaluates acts and rules according to their effect on aggregate social welfare. According to the prevailing (Kaldor-Hicks) criterion, a rule is efficient if the sum of benefits it generates is greater than the sum of its costs. Welfare economics is ordinarily committed to maximizing aggregate human welfare.¹⁵⁶ The outcomes of a legal rule are examined first and foremost by their influence on the behavior of the people to whom the rule applies.¹⁵⁷

¹⁵⁵ See generally Daphna Lewinsohn-Zamir, In Defense of Redistribution through Private Law, 91 *Minn. L. Rev.* 326 (2006).

¹⁵⁶ For a short summary of the philosophical foundations of economic efficiency, see Eyal Zamir, The Efficiency of Paternalism, 84 *Va. L. Rev.* 229, 233–35 (1998). For more extensive discussions, see Daniel M. Hausman & Michael S. McPherson, *Economic analysis and moral philosophy* (1996); Kaplow & Shavell, *supra* note 118, at 977–99. Presumably, as long as contracts do not adversely affect third parties, they also meet the stringent criterion of Pareto efficiency: increasing the well-being of at least one person while decreasing the well-being of none.

¹⁵⁷ Additional factors that may affect the efficiency of a rule are its effects on third persons, the costs of formulating the rule and enforcing it, the costs of contracting around the rule (if it is merely a default), and the effect of the rule on ex post distribution of gains and losses.

From an economic point of view, remedies for breach of contract are primarily evaluated according to the incentives they create for the parties at different stages of the contractual process: prior to and at the time of contracting (for example, the decision whether to enter into a contract, with whom, and under what conditions; how much information to gather before contracting; and what information to share with the other party), after contracting (for the promisor: how much effort and what precautions to take to ensure performance; for the promisee: to what extent to rely on the contract and whether to get ready for its potential breach), at the performance stage (whether to perform or to breach), and even later (what measures to take to mitigate the loss in case of breach, whether to sue for the breach, etc.). In any of these stages and with regard to both parties, economic analysis endorses rules creating incentives for behavior that would maximize aggregate social utility (which, in the absence of externalities, means maximization of the joint contractual surplus). However, different remedy rules generate different (and countervailing) incentives for the parties in different stages of the contractual process and under different circumstances. The efficient rules should either generate the most efficient incentives overall, or be tailored for specific types of transactions. The possibilities of *ex ante* contracting around remedy rules and *ex post* renegotiation between the parties, as well as the parties' relative risk-aversion and the cumulative effect of non-legal sanctions, further complicate the picture.¹⁵⁸ Not surprisingly, one could find efficiency arguments supporting almost any conceivable remedy rule.¹⁵⁹

¹⁵⁸ For general analyses of these incentives and considerations, see Robert Cooter & Thomas Ulen, *Law & Economics* 237–67 (4th ed. 2004); A. Mitchell Polinsky, *An Introduction to Law and Economics* 29–41, 63–69 (3d ed. 2003); Steven Shavell, *Foundations of Economic Analysis of Law* 304–14, 342–67, 375–80 (2004); Richard Craswell, *Contract Remedies, Renegotiation, and the Theory of Efficient Breach*, 61 *S. Cal. L. Rev.* 629 (1988); Richard Craswell, *Instrumental Theories of Compensation: A Survey*, 40 *San Diego L. Rev.* 1135 (2003) [hereinafter Craswell, *Instrumental Theories*]; Lewis A. Kornhauser, *An Introduction to the Economic Analysis of Contract Remedies*, 57 *U. Colo. L. Rev.* 683, 692–725 (1986). On the effect of non-legal sanctions, see Robert Cooter & Ariel Porat, *Should Courts Deduct Nonlegal Sanctions from Damages?*, 30 *J. Legal Stud.* 401 (2001).

¹⁵⁹ See Polinsky, *supra* note 158, at 69 (“[T]here does not exist a breach of contract remedy that is efficient with respect to every consideration.”); Barak Medina, *Renegotiation, ‘Efficient Breach’ and Adjustment: The Choice of Remedy for Breach of*

Focusing on the performance of the contract and the promisor's precautions, the common point of departure of economic analysis is that remedy rules should urge the promisor to perform and take precautions to avoid breach as long as performance and such precautions are efficient, and to breach and avoid such precautions if breach is efficient.¹⁶⁰ This is the well-known efficient breach theory.¹⁶¹ A perfect protection of the promisee's expectation interest through damages supposedly creates an optimal incentive in that sense. Full expectation damages make the promisee indifferent between performance and breach while at the same time making the promisor (and society at large) better off. Expectation damages are necessary because they force the breaching party to internalize the costs her breach inflicts on the nonbreacher.

Contract as a Choice of a Contract-Modification Theory, *in* *Comparative Remedies*, supra note 146, at 51, 56–61; Shavell, supra note 158, at 360; Craswell, supra note 4, at 111; see also Posner, supra note 130, at 838–39. Posner writes that, given the multiplicity of factors, one may either try to tailor different rules for different conditions or argue for one measure of damages as the optimal one under ordinary circumstances. As Posner points out, however, the first approach hardly resembles existing contract law and would lead to indeterminacy given the unavailability of relevant information, and the second approach is unsupported by any evidence.

¹⁶⁰ There are two reasons to focus on these effects. First, despite the complexity and indeterminacy stemming from the multiplicity of incentives generated by any remedy rule, under a relatively broad range of conditions contract remedies' most powerful and direct effects relate to the promisor's post-contracting behavior, while other effects are less significant, narrower in scope, or considerably mitigated by the specific rules of contract damages (like mitigation and foreseeability). See Cooter & Ulen, supra note 158, at 264–67 (“The problem of over-reliance . . . is not so pervasive as [the prediction of the paradox of compensation] suggests.”); Melvin A. Eisenberg & Brett H. McDonnell, *Expectation Damages and the Theory of Overreliance*, 54 *Hastings L.J.* 1335 (2003) (arguing that the problem of over-reliance is not generally significant). The second reason to focus on the promisor's post-contractual behavior is that its analysis better explains existing law, in which expectation damages is the standard remedy for breach.

¹⁶¹ For recent analyses of the theory in the broader context of incentives created by contract remedies, see references cited in supra note 158. For criticism of the efficient breach theory and its implication that expectation damages are ordinarily superior to specific performance, see, e.g., Melvin A. Eisenberg, *Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law*, 93 *Cal. L. Rev.* 975 (2005); Friedmann, supra note 128; Anthony T. Kronman, *Specific Performance*, 45 *U. Chi. L. Rev.* 351 (1978); Ian R. Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 *Va. L. Rev.* 947 (1982); Alan Schwartz, *The Case for Specific Performance*, 89 *Yale L.J.* 271 (1979).

2. Overcoming Undercompensation, Underenforcement, and Uncertainty

The endorsement of expectation damages by proponents of the efficient breach theory is problematic, however, because it unrealistically assumes perfect compensation, perfect enforcement, and certainty of rules and rulings. Once these assumptions are relaxed, the advantages of restoration remedies become clear. This Subsection addresses several difficulties characterizing the award of expectation damages and demonstrates how restoration remedies may overcome these difficulties. It starts with the problem of *undercompensation* due to gaps between subjective and objective valuations of entitlements. Then, drawing on arguments made earlier in the contexts of corrective and distributive justice, it argues that restoration remedies may also mitigate the problem of *underenforcement*. The prospect of receiving larger rewards through restoration remedies makes them potentially superior in coping with undercompensation and underenforcement. Restoration remedies may contribute to the enhancement of *certainty* even if they do not yield greater rewards. Finally, I shall argue that restoration remedies sometimes provide direct incentives to perform, thus circumventing to some extent the problems of undercompensation, underenforcement, and uncertainty characterizing expectation damages.

Subjective Value. Contrary to the assumption of the efficient breach theory, the injured party is hardly ever indifferent between getting the contractual performance and receiving expectation damages. Typically, expectation damages do not fully protect the expectation interest of the injured party. This is due to the difficulties of establishing the loss with sufficient certainty, the foreseeability requirement, the mitigation of loss rule, the reluctance to award emotional distress damages, the limited or no recovery of legal costs, and so forth.¹⁶² While each of these limitations on the availability of damages typically has its own economic justification, they nevertheless undermine the efficiency of expectation dam-

¹⁶² See generally Treitel, *supra* note 46, at 143–207; Dodge, *supra* note 118, at 664–65; Eisenberg, *supra* note 161, at 989–97; Stewart Macaulay, *The Reliance Interest and the World Outside the Law Schools' Doors*, 1991 *Wis. L. Rev.* 247, 249–53; Sebert, *supra* note 118, at 1566–71; Louis E. Wolcher, *The Accommodation of Regret in Contract Remedies*, 73 *Iowa L. Rev.* 797, 806–09 (1988).

ages. Due to these limitations, expectation damages are likely to create suboptimal incentives for performance. Inasmuch as restoration remedies aid in solving the problem of undercompensation, they are likely to enhance efficiency. The first reason why restoration remedies may indeed contribute in this respect has to do with the problem of subjective valuation.

A well-known difficulty in protecting the expectation interest is due to the possible gap between the objective, market value of entitlements and their subjective value for the innocent party.¹⁶³ It is commonly assumed that from an economic point of view, the yardstick for determining the value of an entitlement for any person is the sum that person is willing to pay for it—namely, the subjective value of the entitlement to her.¹⁶⁴ Thus, if the benefit to the breacher from the breach is smaller than the subjective value of performance to the innocent party (and there are no readily available substitutes on the market), breach would be inefficient.¹⁶⁵ However, when calculating damages, it is obviously difficult to trust the assertion of the injured party regarding the subjective value she attributes to performance, because she has a clear incentive to exaggerate.¹⁶⁶ For this reason, damages are usually calculated according to the objective value of entitlements. Such calculation yields suboptimal incentive to perform. This difficulty is particularly acute in contracts referring to unique goods or services (as opposed to standard ones), ordered or purchased for self use, and in particular for personal, household or family use (as opposed to commercial uses). These are the contracts in which the difference between subjective and objective value may be particularly large.¹⁶⁷ What differentiates restoration remedies from expectation

¹⁶³ Dobbs, *supra* note 8, §§ 12.2(2), 12.19(1), at 28–39, 432–43; Muris, *supra* note 94.

¹⁶⁴ Allan Feldman, *Welfare Economics and Social Choice Theory* 9–22 (1980); Hausman & McPherson, *supra* note 156, at 38–83; Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 *J. Legal Stud.* 103, 119–21 (1979).

¹⁶⁵ Craswell, *Instrumental Theories*, *supra* note 158, at 1141–43 (observing that the promisee's subjective value of the contract performance is the most efficient measure of damages, deterring inefficient breaches while permitting efficient ones).

¹⁶⁶ Muris, *supra* note 94, at 381–82.

¹⁶⁷ *Id.* at 382–83. Arguably, alongside the phenomenon of undercompensation in cases where subjective value exceeds objective market value, there is a comparable phenomenon of overcompensation where the subjective value is lower than the objective value. However, the latter phenomenon seems rather rare. Unless the seller is a monopoly that successfully engages in complete price discrimination, there may cer-

damages is that restoration remedies are much more closely related to the subjective value of performance to the promisee.

Take, for example, the remedies of price abatement ancillary to specific performance and proportional price reduction. Suppose the market price of the object at all relevant times is \$100,000, yet the agreed price is \$120,000. Suppose further that a deficiency in the land's acreage or a defect in the goods diminishes its value by 25%. In this case, expectation damages for the direct loss would be \$25,000 (the difference between current market value of the conforming object and current market value of the nonconforming one), while proportional reduction would provide the buyer with \$30,000 (25% of \$120,000). The fact that the buyer was willing to pay a price exceeding the object's market value indicates that her subjective loss due to the decrease in the object's value is at least \$30,000.¹⁶⁸ True, one may resort to this argument in an attempt to receive expectation damages higher than the decrease in the object's market value. But the abatement and price reduction remedies bring about this result in a much more direct and immediate fashion.

The same is true where, as a remedy for delayed delivery of real property (or any other object), the buyer recovers market interest on the prepaid purchase money for the duration of the delay. In pure monetary terms, whenever market interest rates are higher than rental rates (measured as a percentage of the leased property's value), the buyer would have done better investing the purchase money in an interest-yielding financial investment and renting a property similar to the one she contracted to buy. Even under such circumstances, however, people often prefer to live in their

tainly be a positive difference between the subjective and objective value of performance. In contrast, when the buyer's subjective value is lower than the object's market value, then she would not make the contract in the first place. Furthermore, since the promisee may often resell the object to others at its market price, its value to her should not ordinarily be lower than this market value. Thus, even when, as a result of increase in the object's market value between the time of contracting and the time of performance, the current market value is higher than the promisee's initial subjective evaluation, the loss to the promisee would ordinarily be according to its current market value. Finally, one may relax the simplifying assumptions of competitive market and assume instead that the promisee's subjective evaluation of the object is not detached from its (increasing) market value.

¹⁶⁸ Id. at 384 (describing how subjective value necessarily exists if the original price of the performance exceeds fair market value).

own homes rather than renting. Presumably, they do so because they derive additional, non-monetary benefits from living in their own home above and beyond the saving of rent payments.¹⁶⁹ When a buyer claims damages for belated delivery not in accordance with the net rental value of the property (expectation), but according to the interest the price money would have yielded had she suspended payments (restoration), the latter is probably higher than the former. Making the contract in the first place indicates that the subjective value the buyer attributed to having the property during the delay period exceeded not only its market rent, but also the even-higher market interest rate for that time. Once again, the restoration remedy better compensates the non-breaching party for her subjective loss, without relying on her ex post, highly suspect testimony.¹⁷⁰

A possible critique of the subjective-value argument is that expectation damages, based on the objective, market value of entitlements, adequately protect the injured party's subjective valua-

¹⁶⁹ Indeed, numerous studies indicate that this is a rational preference. See, e.g., Thomas P. Boehm & Alan M. Schlottmann, Does Home Ownership by Parents Have an Economic Impact on Their Children?, 8 J. Housing Econ. 217 (1999) (finding significant correlation between homeownership and children's academic success and future income); Henny Coolen et al., Values and goals as determinants of intended tenure choice, 17 J. Housing & Built Env't 215 (2002) (discussing the incentives and values underlying choice between owning and renting one's residence); N. Edward Coulson & Lynn M. Fisher, Tenure Choice and Labour Market Outcome, 17 Housing Stud. 35 (2002) (finding that, despite their reduced mobility, home owners better cope with regional unemployment); Richard K. Green & Michelle J. White, Measuring the Benefits of Homeowning: Effects on Children, 41 J. Urban Econ. 441 (1997) (finding statistically significant correlation between renting—rather than owning—an apartment and rates of children's drop out from school and of likelihood of daughters to have children as teenagers). Additional factors bearing on the choice between homeownership and renting include the expected increase or decrease in the market value of real property, maintenance costs, risks of inflation, and taxation. There may also be pertinent differences between different locations.

¹⁷⁰ On this point, see *Worrall v. Munn*, 53 N.Y. 185 (1873), which discusses the rationale of the rule allowing a buyer who has suspended payment due to the seller's breach to waive his right to the rental value of the land during the period of delay and avoid paying the seller interest on the price money. Judge Andrew explains:

It is not because the rental value of the land is, or is supposed to be, equal to the interest on the purchase-money that the right of election is given. It is, often . . . less. But the enjoyment of the possession of the land, according to the contract, may be of more value to the purchaser, or he may regard it as of more value to him than the amount of rents and profits he might realize from the use.

Id. at 188–89.

tion. Expectation damages enable the injured party to buy satisfactory substitutes in the market, from which she will derive similar subjective benefit. But this argument is inapplicable to most of the cases of defective and belated performance in which restoration remedies are typically available. In the cases of delivery of nonconforming real property or customized goods, belated delivery of land or durable goods, and breach of the warranty of habitability, such substitutes are unavailable. Remember that restoration remedies are resorted to when the injured party retains the defective object, keeps living in the defective leased property, or accepts the delayed delivery. By definition, the subjective benefit a person derives from living in her own apartment cannot be compensated by reference to the rental value of a similar apartment. Likewise, a person who was willing to pay for a property more than its market price, and who retains the property despite its physical nonconformity or defect of title, typically cannot buy a substitute for the partial loss of enjoyment from the property.

Underenforcement. The argument that the expectation measure of damages yields optimal incentive to perform not only unrealistically assumes that expectation damages fully protect the expectation interest, but also that there is a 100 percent probability that the breacher will compensate the injured party for her losses. Inasmuch as this probability decreases, so do both the expected damages paid by the breaching party and her incentive to perform. This results in inefficient breaches (although risk aversion of the breacher may mitigate this effect).¹⁷¹ Often the data necessary to establish the expectation interest (for example, rental value or current market value of customized goods or real property) is more difficult to collect and prove than the data necessary to calculate restoration remedies (for instance, statutory or market interest, the quantity of missing goods, the contract price).¹⁷² By facilitating the

¹⁷¹ Craswell, *Instrumental Theories*, supra note 158, at 1167–69; Daniel A. Farber, *Reassessing the Economic Efficiency of Compensatory Damages for Breach of Contract*, 66 Va. L. Rev. 1443 (1980) (arguing that difficulties in detecting and litigating contract breaches may result in insufficient deterrence, thus justifying supercompensatory damages); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 936–38 (1998) (discussing how, when a nonperforming party has a chance of escaping liability, supracompensatory damages may be efficient).

¹⁷² See supra Section IV.C; supra notes 148–49 and accompanying text.

enforcement of the injured party's rights, restoration remedies mitigate the problem of underenforcement. Similarly, increasing the expected payoffs to the injured party (who may choose between expectation and restoration remedies) somewhat rectifies the distortion caused by the reluctance of the weak and the poor to protect their contractual rights, thereby increasing the probability of enforcement.¹⁷³

Uncertainty. Some law-and-economics scholars, notably in recent years Alan Schwartz and Robert Scott, have claimed that the norms applying to contracts between sophisticated, commercial parties should be as concrete, predictable and certain as possible. Vague standards fail to provide the parties with *ex ante* guidance and create *ex post* moral hazard, especially in cases of asymmetric information. Since adjudication is costly, courts should resolve contract disputes using a narrow evidentiary base, rather than a broad one.¹⁷⁴

While this self-proclaimed formalism is contestable,¹⁷⁵ it provides some support for restoration remedies whenever their calculation is based on easily verifiable data, such as the contract price, the quantity of supplied goods, and statutory or market interest. From an efficiency point of view, the relative predictability and certainty of remedies is an important advantage even if more certainty is achieved at the price of some deviation (downward or upward) from a supposedly ideal measure of damages that is less predict-

¹⁷³ Cf. Craswell, *Instrumental Theories*, supra note 158, at 1169–71; Linda Curtis, Note, *Damage Measurements for Bad Faith Breach of Contract: An Economic Analysis*, 39 *Stan. L. Rev.* 161, 165–68 (1986) (analyzing this justification to imposing punitive damages in favor of consumers in general, and on insurers delaying payments of policy benefits in particular).

¹⁷⁴ See, e.g., Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 *Yale L.J.* 541, 594–610 (2003). These claims have focused on legislative default rules and judicial interpretation, but their implications are broader.

¹⁷⁵ See, e.g., James W. Bowers, *Murphy's Law and The Elementary Theory of Contract Interpretation: A Response to Schwartz and Scott*, 57 *Rutgers L. Rev.* 587 (2005) (claiming that Schwartz and Scott misconceive firms' preferences for contract doctrine and that different contract problems require different solutions in terms of their context-sensitivity); Roy Kreitner, *Fear of Contract*, 2004 *Wis. L. Rev.* 429 (arguing that to serve as institutional infrastructure of cooperation, contract law cannot depend exclusively on actual, explicit consent); George G. Triantis, *The Efficiency of Vague Contract Terms: A Response to the Schwartz-Scott Theory of UCC Article 2*, 62 *La. L. Rev.* 1065 (2002) (criticizing Schwartz and Scott's thesis by exploring the widespread phenomenon of including vague terms in sophisticated commercial contracts).

able, more susceptible to manipulation, and costly to determine. This is true from both the parties' perspectives and from the institutional point of view of the courts.¹⁷⁶ A predictable remedy rule also provides the parties with a certain benchmark should they wish to negotiate a different measure of relief.

Direct Incentives. Sometimes restoration remedies create direct efficient incentives. Thus, the right to suspend performance in response to actual or expected non-performance by the other party (discussed in Subsection II.B.1 above) ordinarily prompts the other party to perform, knowing that her performance (or assurance of future performance) is a condition to receiving the counter-performance. Since contracting parties usually value the counter-performance more highly than their own performance (otherwise the contract would not be profitable), this is ordinarily a significant incentive. Interestingly, suspension of one's performance seems efficient also in adapting the promisee's reliance expenditures to the promisor's actual or expected non-performance. When the innocent party suspends her performance in response to an actual or expected non-performance by the other party, she at least partially bypasses the problems of undercompensation, underenforcement, and uncertainty characterizing monetary damages.

3. Counter-Arguments and Responses

As against these arguments,¹⁷⁷ one may submit at least two counter-arguments. First, some of the factors making restoration

¹⁷⁶ Anecdotal support for this claim regarding the parties' perspective may be found in cases in which the parties have ex ante agreed on restoration remedies. See examples supra note 121.

¹⁷⁷ A different set of arguments may demonstrate the efficiency of the specific rules determining the availability and scope of restoration remedies. For example, the foreseeability requirement applies to restoration damages just as it applies to expectation damages. Thus, when damages for delayed delivery are calculated according to the interest the buyer could have received on the prepaid price, supra Subsection II.B.2, even if the buyer establishes that she could have earned extremely high interest on her money, the seller is not liable for such interest unless she should have been aware of it at the time of contracting. This requirement prompts the promisee to share information with the promisor prior to contracting. See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *Yale L.J.* 87 (1989) (introducing the notion of penalty default rule and explaining the foreseeability rule as an incentive to efficiently share information at the contracting stage).

remedies efficient do not equally characterize all situations in which these remedies are available, or do not characterize all of the remedies. Thus, restoration remedies are available even where there is no considerable gap between the objective and subjective valuations of the promisee's entitlement, and where the fear of underenforcement of the injured party's remedial rights is not particularly significant. Likewise, the promisee's right to suspend her performance for fear of future non-performance by the promisor is phrased in vague standards of reasonableness, thus not necessarily enhancing certainty and predictability.¹⁷⁸ Indeed, the scope and import of the efficiency arguments analyzed above vary among different restoration remedies and the different situations in which they are available.

A more fundamental counter-argument is that most of the above arguments provide reasons to use restoration remedies instrumentally to protect the 'true' expectation interest, rather than justifications for restoration as an independent goal of contract remedies (just as a reliance measure is sometimes used as a minimal approximation for expectation). If it is assumed that expectation is the most efficient measure (at least in terms of incentive for performance and for taking precautions), restoration remedies may miss this goal and result in overcompensation. This is because, contrary to the use of reliance as a minimal approximation for expectation, restoration remedies are available even when they exceed the innocent party's expectation interest. Overcompensation is undesirable not only because it *ex post* prompts the promisor to perform when breach would be more efficient, but also because it *ex ante* prompts her to demand a higher price for her performance (due to the risk of being exposed to greater liability), thus discouraging otherwise efficient contracts.¹⁷⁹ Generally, if efficiency calls for exact protection of the expectation interest, then arguably one should seek more adequate ways to protect this interest, rather than award restoration remedies.¹⁸⁰

¹⁷⁸ See *supra* note 66 and accompanying text.

¹⁷⁹ Cf. Alan Schwartz, *The Myth that Promisees Prefer Supracompensatory Remedies: An Analysis of Contracting for Damage Measures*, 100 *Yale L.J.* 369 (1990).

¹⁸⁰ See Gillette & Walt, *supra* note 7, at 364-65 (discussing a possible justification of the remedy of price reduction under the CISG as a solution to the problem of undercompensation and concluding that it would be "miraculous that the proportional re-

I concede that the instrumental nature of the subjective value and underenforcement arguments seem to weaken the analytical claim that restoration of the contractual equivalence is a separate goal of contract remedies. Yet, other economic justifications for restoration (enhancing certainty, providing direct incentives to perform) do not hinge on its being an approximation of expectation, and the non-economic justifications (discussed in the preceding sections and in the next one) similarly do not rest on restoration serving as an approximation of expectation. Moreover, the fact that—in addition to being justified on its own merit—restoration is useful as an approximation of other interests, is not a disadvantage but rather an advantage.

At the end of the day, restoration remedies seem to enhance efficiency, but this conclusion is not unequivocal. It should be stressed that the question under discussion is not whether to replace expectation remedies with restoration ones. In most cases, the question is whether to allow the injured party to choose between the two. This option is significant when there are considerable obstacles to effectively protecting the injured party's expectation interest, and in losing contracts. Since the scope of these cases is relatively limited, and since considering the effect of restoration remedies in such cases *ex ante* requires a rather sophisticated planning capacity, one may doubt that the availability of restoration remedies significantly influences people's decision whether to enter contracts and under what circumstances.¹⁸¹ Given the limitations of human imagination and capacity for analysis and planning, the benefit of taking this consideration into account at the contracting stage is probably smaller than its cost. For this reason, despite the fact that restoration remedies are ordinarily default rules, one would rarely expect the parties to contract around them.¹⁸² Restora-

covery given by Article 50 mirrors the extent of undercompensation buyer faces Even as a rough approximation, the asserted correlation seems *ad hoc*.”).

¹⁸¹ See Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 *Am. Soc. Rev.* 55, 56–60 (1963) (describing empirical evidence that business people are least concerned about the legal enforceability of their transactions and about remedies for breach); H. Beale & T. Dugdale, *Contracts Between Businessmen: Planning and the Use of Contractual Remedies*, 2 *Brit. J. Law & Soc'y* 45 (1975) (discussing similar findings).

¹⁸² Cf. Muris, *supra* note 94, at 380 (“In most situations, contracting parties will have to rely on the judicial system to provide them with a damage formula.”). When a res-

tion remedies have a larger effect on people's decisions and behavior at the performance stage. To the extent that the decisions regarding precautions and performance are affected by legal rules,¹⁸³ the availability of restoration remedies influences these decisions whenever the difference between them and other remedies is not trivial. Given the typical inability of expectation damages to effectively protect the expectation interest, the limited availability of specific performance, and almost no availability of disgorgement remedies, restoration of the contractual equivalence may well be an effective means to prompt efficient performance, especially when it is executed outside of the court system (through self-help remedies), and in those cases where its implementation requires data that is simpler to attain and establish in court proceedings. At the same time, when the restoration interest is likely to exceed the full expectation interest of the injured party, restoration remedies are likely to discourage (presumably) efficient breaches. These conclusions may be rephrased in the language of ex ante allocation of risks: Realizing that expectation damages do not adequately deter against inefficient breaches and being aware of the boundaries of specific performance, rational parties may well agree to grant the promisee an option to get restoration remedies.

4. The Efficiency of Restoration Favoring the Breaching Party

The case for the efficiency of restoration doctrines favoring the breaching party is straightforward. Recall that these doctrines disallow the injured party—the employer whose employee stopped working before the end of the agreed term, the owner whose contractor failed to complete the project, the buyer who received an

toration remedy is the primary or sole remedy protecting a promisee's non-alienable right (as is the case with the warranty of habitability), it should be non-alienable as well.

¹⁸³Numerous studies have indicated that the fear of legal sanctions is only one incentive to keep contractual promises (along with short- and long-term self-interest motivations, social norms, and moral sentiments), and not necessarily the most powerful one. See, e.g., David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 *Harv. L. Rev.* 373 (1990) (systematically analyzing nonlegal sanctions); John Kidwell, *A Caveat*, 1985 *Wis. L. Rev.* 615, 615–18 (describing the market, moral, social, and legal incentives for keeping contractual promises); Macaulay, *supra* note 181, at 60–62 (pioneering empirical study of the limited role of legal sanctions in business relations).

excessive quantity of goods, etc.—to enjoy the breacher’s performance without paying for it. The prospect of such an enjoyment would distort incentives on both sides. It would discourage even extremely efficient breaches by contractors and employees, and it would prompt owners and employers to strategically and opportunistically provoke a default by the contractor or employee.¹⁸⁴ In the case of delivery of an excessive quantity of goods, it would mean that the buyer may retain the goods even if she values them below—even far below—their value to the seller. Restoring the contractual equivalence in favor of the breaching party is therefore clearly efficient.

F. Contract as Cooperative Relationship

Notwithstanding their fundamental differences, the will theory of contract and standard economic analysis share some fundamental notions about contracts. They both tend to view contracts as discrete transactions allocating rights and risks between autonomous, rational people, each interested in pursuing her interests. Competing perceptions view “the contractual relationship (even in commercial settings) . . . not only as a locus of competition or an instrument for the allocation of risks and the production of wealth, but also as a zone of mutual cooperation and confidence, dependence and vulnerability.”¹⁸⁵ Sociological studies have shown that legal sanctions play a relatively minor role in people’s contractual behavior. The desire to enhance one’s long-term reputation as an honest, reliable and considerate contractual partner, the wish to preserve meaningful interpersonal relations and the fear of social disapproval, as well as moral sentiments of decency and promise-keeping, are usually much more important. Thus, both short- and long-term self-interest and other-regarding considerations motivate contracting parties to act cooperatively, to take into account the needs and constraints of the other party, and to flexibly adjust the contract to changing circumstances.¹⁸⁶ While some contracts (such

¹⁸⁴ Cf. Kull, *supra* note 57, at 1511–12 (discussing a comparable situation in which the prospect of getting “something for nothing” distorts the promisee’s incentives).

¹⁸⁵ Dagan, *supra* note 57, at 278.

¹⁸⁶ See Macaulay, *supra* note 181; Beale & Dugdale, *supra* note 181; Kidwell, *supra* note 183; see also Peter Vincent-Jones, *Contract and Business Transactions: A Socio-*

as speculative investments in commodity options and commodities futures) primarily or even solely serve as means for risk allocation, most contracts are more aptly described, and are typically perceived by the parties, as cooperative joint projects.

Some scholars accept this description of contracts, yet insist on a strict “division of labor” between the social and moral norms governing people’s behavior in relational settings, and the legal norms that ought to govern the resolution of disputes once the economic and social incentives have failed to sustain cooperative relations. According to this view, the rules governing contract disputes should be categorical, formalistic, and strict. Such legal rules—the argument goes—are not only economically efficient, but also reflect the parties’ preferences regarding the norms that would govern their dispute once their relations break down.¹⁸⁷

Other scholars reject the division-of-labor argument, and maintain that there cannot and should not be such a dichotomy between the legal system and the social environment in which it functions. The legal enforcement mechanism is a public system. It uses public resources, and should reflect and enhance society’s values. The law has an expressive and educational role.¹⁸⁸ Contract law—including remedy rules—should thus endorse relational, moral, and social values of cooperation, trust, fairness, good faith, mutual consideration of each other’s interests, and loyalty to joint objectives.¹⁸⁹ Shar-

Legal Analysis, 16 *J.L. & Soc’y* 166 (1989) (analyzing the empirical findings against the backdrop of a Weberian theoretical model).

¹⁸⁷ See, e.g., Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms*, 144 *U. Pa. L. Rev.* 1765, 1796–1802 (1996) (drawing a sharp distinction between the parties’ expectations regarding their behavior during ongoing, valued relations and when such relations break down); Kidwell, *supra* note 183 (arguing that, given the institutional limitations of the legal system, it is preferable to shape contract law on the basis of the contract-as-transaction paradigm, rather than on the more realistic and rich paradigm of contract-as-relation); Robert E. Scott, *Conflict and Cooperation in Long-Term Contracts*, 75 *Cal. L. Rev.* 2005, 2050–51 (1987) (arguing that flexible and complex legal rules are undesirable, because they sacrifice clarity in return for only marginal reinforcement of existing extralegal norms of cooperation).

¹⁸⁸ For a general account of the expressive role of law, see Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 *U. Pa. L. Rev.* 1503 (2000).

¹⁸⁹ See, e.g., John N. Adams & Roger Brownsword, *Key Issues in Contract Law* 295–362 (1995) (advocating a theory of contract and contract law based on the ideal of cooperation); Jay M. Feinman, *Critical Approaches to Contract Law*, 30 *UCLA L. Rev.*

ing many of the insights of relational contract theory, feminist theory points in the same direction.¹⁹⁰ Moreover, if the empirical claims about people's behavior and expectations are correct, then contract law infused with these values also better reflects the actual will of the parties and is probably efficient as well.¹⁹¹

The division-of-labor argument takes us back to the analyses based on the will theory and on standard economic efficiency.¹⁹² The following analysis rests on the opposite notion that the law should reflect and endorse values of cooperation and mutual consideration.

Much like the other theoretical perspectives discussed in this Part, the present conceptions of contract law may seem too vague to generate any specific goal of contract remedies. They nevertheless provide substantial support for restoration of the contractual equivalence. Restoration remedies are typically relevant in cases

829 (1983) (juxtaposing individualist and collectivist conceptions of contract law, and calling for making contract more humane); Ian R. Macneil, *The Many Futures of Contracts*, 47 S. Cal. L. Rev. 691, 805–16 (1974) (suggesting that infusing general contract law with relational norms may lead to reunification of the field and to more effective administration of contract justice); Thomas Wilhelmsson, *Questions for a Critical Contract Law—and a Contradictory Answer: Contract as Social Cooperation*, in *Perspectives of Critical Contract Law 9* (Thomas Wilhelmsson ed., 1993) (discussing a model of contract as social cooperation). See also Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685 (1976) (analyzing substantive individualistic and altruistic conceptions of private law and their connection to formal aspects of legal norms); Zamir, *supra* note 18, at 1777–88 (describing social conceptions of contract law and their bearing on contract interpretation and supplementation).

¹⁹⁰ See, e.g., Debora L. Threedy, *Feminists & Contract Doctrine*, 32 Ind. L. Rev. 1247, 1257–59 (1999) (highlighting the parallels between relational contract theory and relational feminism); Patricia A. Tidwell & Peter Linzer, *The Flesh-Colored Band Aid—Contracts, Feminism, Dialogue, and Norms*, 28 Hous. L. Rev. 791 (1991) (discussing the feminist perspective on contract law and its connection to relational contract theory); see also John Wightman, *Intimate Relationships, Relational Contract Theory, and the Reach of Contract*, 8 Feminist L. Stud. 93 (2000) (praising relational contract theory from feminist and gay and lesbian perspectives, and examining its potential contribution to contractual analysis of intimate relationships).

¹⁹¹ See Zamir, *supra* note 13, at 1771–77, 1788–89 (arguing that typically the parties' actual intentions are to treat each other according to the prevailing norms of reasonableness, fairness, and cooperation, rather than according to the written text of the formal agreement, and that, for this reason, application of former norms is also efficient); Kreitner, *supra* note 175, at 455–74 (discussing how standards of fairness may be an indirect route to enhancing efficiency and may efficiently generate additional confidence in the market because they imply sharing of unexpected costs).

¹⁹² See *supra* Sections IV.B and IV.E.

where the promisor has not fulfilled her contractual obligations, yet the promisee is willing to accept a partial, defective, or belated performance, rather than calling off the entire transaction or insisting on its exact performance. In a cooperative setting where the parties are committed to a fair resolution, reverting to the equivalence originally agreed upon, while adjusting the actual performance to the new facts (that is, the promisor's breach), provides a fair and mutually considerate solution.¹⁹³ Thus, in a meaningful way, restoration of the contractual equivalence realizes the parties' *reasonable expectations*.¹⁹⁴

The conventional expectation interest is based on the image of a contract as a calculated allocation of risks. Subject to circumstances that lie beyond the parties' control (for example, fluctuations in market price), the contract entitles each party to a certain profit. This profit is what the parties made the contract for. But if most contracts are more accurately conceived of as cooperative projects, where the element of risk allocation is less central, then the contracting parties may have different expectations. They may expect a joint venture based on an agreed formula for each party's contribution and reward (the contractual equivalence). Restoration remedies nicely cohere with this alternative notion of expectation. This is particularly true of self-help restoration remedies, such as withholding the promisee's performance until the agreed counter-performance is rendered or assured, withholding payment for the missing quantity of goods, and proportional rent abatement in response to a landlord's failure to properly maintain the leased property.¹⁹⁵ It is also true of judicially awarded restoration remedies, such as ordering the seller to return the sums paid for the part of the goods she did not deliver. Restoration doctrines that prevent the injured party from harshly and unfairly taking advantage of the

¹⁹³ For the notion that contract remedies may serve as "modification mechanisms," inspired by relational conceptions of contract law, see Medina, *supra* note 159, at 64–69.

¹⁹⁴ On realization of the parties' reasonable expectations as the underlying goal of contract law, see generally Corbin, *supra* note 20, § 1.1, at 2–5 (1993); Barry J. Reiter & John Swan, *Contracts and the Protection of Reasonable Expectations*, in *Studies in Contract Law 1* (Barry J. Reiter & John Swan eds., 1980); Johan Steyn, *Contract Law: Fulfilling the Reasonable Expectations of Honest Men*, 113 *L.Q. Rev.* 433 (1997); Zamir, *supra* note 100, at 66–67.

¹⁹⁵ See *supra* Subsections II.B.1, II.A.3, and II.A.2, respectively.

other party's breach also squarely fit into this conception of contract. An example would be the right of workers and contractors to recover for part performance.¹⁹⁶ Finally, the redistributive effects of restoration remedies discussed above also fall into line with social, relational, and feminist conceptions of contract law.¹⁹⁷

In addition to providing a plausible justification for restoration remedies, this analysis sheds light on the very notion of contract and the role of contract law. The availability of restoration remedies reinforces the notion of contract as a cooperative relationship, rather than as a risk-allocation mechanism. To the extent that contract remedies shape the meaning of contract, restoration remedies arguably shape it as a cooperative endeavor.¹⁹⁸

An (already familiar) argument against this proposition is that it does not equally apply to all contracts. Indeed, the above analysis implies that restoration remedies are more apt for contracts that may be plausibly described as cooperative projects than to pure risk-allocation contracts. As a matter of fact, restoration remedies are primarily available in contracts of the former type—contracts for the sale of goods and real property, lease of residential and other property, and construction contracts.

Another critique of the above analysis is that sometimes restoration remedies provide the injured party with a relief greater than her expectation interest, thus resulting in a harsh sanction for breach that is incompatible with notions of mutual consideration and flexibility. One rejoinder to this critique is that, once we move from the paradigm of risk allocation to the one of cooperative relations, the question of whether restoration remedy is higher or lower than the expectation interest loses much of its significance. If, for example, the buyer agreed to pay \$1000 for 10 similar items and the seller delivered only 7 items, the buyer should be entitled to a price reduction of \$300 even if the current market value of each item has decreased from \$100 to \$80 (thus reducing the expectation interest to \$240). Such price reduction is not “harsh”; it

¹⁹⁶ See supra Subsection II.C.1; see also supra Subsection II.C.2 (discussing the buyer's obligation to pay for excessive quantity at the contract rate).

¹⁹⁷ See supra Section IV.D.

¹⁹⁸ The prevailing conception of contract as a means for risk allocation (and the ensuing centrality of the expectation interest) may have contributed to the failure of contract scholars to identify the restoration interest.

merely places the parties in the position they would have been in had they contracted for the sale of 7 items instead of 10. Another reply to the same critique is that the move from risk-allocation to joint cooperation does not imply less commitment to the transaction. On the contrary, it means that even if due to market fluctuations the buyer is about to lose from full performance of the contract, the seller must not unilaterally break her promise. Breaching the contract and paying expectation damages is *not* acceptable or legitimate behavior. The seller may negotiate a modification (or even termination) of the original contract; but if she unilaterally makes a defective, partial or belated delivery, the buyer is entitled to restoration of the contractual equivalence.

G. Summary

One of the major debates in contract law theory concerns the question of what should be the primary goal of contract remedies and the organizing principle of contract law in general: the expectation interest or the reliance interest. As seen above in Section III.A, the restoration interest combines features of both reliance and expectation. On the one hand, restoration remedies strive to put the injured party in the position she would have occupied had she made a different contract, in which the agreed-upon counter-performance would have been the one actually rendered by the breaching party. On the other hand, restoration remedies do not disregard the contractual agreement, because it is the parties' agreed equivalence that these remedies strive to restore. The restoration interest is different from the other two interests in that it does not aim to *fully* undo the outcomes of the contract or of the breach, but rather to adjust the injured party's performance to the partial, defective, or belated performance by the breacher. Thus, since restoration is *to some extent* a hybrid carrying genes of reliance as well as expectation, its justifications are related to the justifications for each of these interests. Yet, since it is different from the other interests, its justifications also differ considerably. This Section summarizes the main conclusions of the above analysis.

According to the will theory, restoration remedies are justifiable even if they put the nonbreacher in a better position than the one she would have been in had the contract been fully performed, because they reinforce the moral-legal principle that contractual

promises should be kept. Compared to other remedies that potentially exceed the expectation interest (for example, punitive damages and disgorgement), restoration remedies better cohere with the will theory of contract because they rely on the equivalence agreed upon by the parties. They therefore reflect the parties' expectations, or at least their hypothetical or reasonable expectations.

Restoration of the contractual equivalence is fully compatible with corrective justice principles because it reinstates the balance broken by the breach. Remedies aiming at this goal compensate the injured party for her loss, and at the same time deprive the breaching party of the benefit gained through the breach. While remedies aiming at other goals may attain this result as a by-product of their focus on compensating the injured party (expectation, reliance) or depriving the breacher of her wrongful gains (restitution, disgorgement), restoration remedies purposefully aim at restoring the equivalence. Restoration remedies are a particularly important means to attaining corrective justice goals when there are considerable (or even insurmountable) obstacles to protecting other goals of contract remedies, such as expectation.

Inasmuch as restoration remedies have predictable distributive effects, these effects seem to be desirable. Restoration remedies that may be realized without recourse to the court system provide the poor with inexpensive and convenient relief. Restoration remedies also encourage the poor to sue by increasing the expected gains from a lawsuit. This effect would be especially significant where establishing the facts necessary to get expectation damages is particularly burdensome, while establishing the data necessary for restoration remedies is significantly easier. Finally, the direct linkage between some restoration remedies and the agreed price benefits underprivileged populations that are systematically charged higher prices.

The efficiency effects of restoration remedies are inconclusive, yet seem to be positive as well. While economic analysis uncovers the incentives created by any measure of damages (or any other remedy) for the parties' behavior at different stages of the contractual process, it falls short of concluding which remedy yields the most efficient incentives overall. Since it is hardly likely that the availability of restoration remedies would significantly affect pre-

contracting decisions, one should focus on the post-contracting incentives for the promisor's precautions and performance. In this respect, standard economic analysis advocates expectation damages as the most efficient remedy because it encourages efficient breaches and discourages non-efficient ones. Whenever ordinary damages are unlikely to put the nonbreacher in a position similar to the one she would have occupied absent the breach, restoration remedies may assist in attaining this goal. They do so by better coping with the gap between subjective valuation and the market value of entitlements, and by encouraging the enforcement of contractual rights. The relative simplicity of calculating some of the restoration remedies and the limited data necessary to that end also serve the goal of certainty. Finally, some restoration remedies provide direct incentives to perform. One has to concede, however, that restoration remedies may (at least in theory) result in inefficient over-deterrence. Restoration doctrines benefiting the breaching party are more obviously efficient, primarily because they discourage strategic and opportunistic behavior by the promisee.

Relational, social, and feminist perceptions of contract view contracts primarily as a locus for cooperation, rather than as a means for a calculated allocation of risks. Restoration remedies are justified by these perceptions because they typically result in a fair adjustment of the promisee's performance to the actual performance by the promisor, while maintaining the agreed-upon equivalence. Restoration doctrines also prevent the injured party from unfairly taking advantage of the other party's breach.

The identification and recognition of the restoration interest shed light on at least some of the theories discussed in this Part and on contractual liability in general. Thus, by demonstrating that the will theory does not necessarily entail that the expectation interest should be the sole or even the primary goal of contract remedies, the analysis actually strengthens this theory as an explanatory and justificatory theory of the complexity of contract doctrine. Even more significantly, the relatively broad availability of restoration remedies seems to reinforce the notion of contract as cooperative relationship.

CONCLUSION

This Article made three types of mutually reinforcing arguments: analytical, descriptive, and normative. *Analytically*, the Article demonstrated that restoration of the contractual equivalence is a distinctive goal of contract remedies. While sharing some characteristics with other recognized interests protected by contract remedies, it is essentially different from them. Like the intricate relations between the other interests, under different circumstances the restoration interest may equal, exceed, or be lower than other interests, and it may be used as an approximation of other interests.

Descriptively, the survey of contract doctrines, judicial and legislative, demonstrated that various remedies, both for partial or defective performance and for delayed performance, are best understood as aiming at restoring the contractual equivalence, while attempts to explain them as aiming at any of the other interests are forced and problematic. Restoration of the contractual equivalence was also shown to underlie some doctrines favoring the breaching party.

Normatively, the Article showed that protection of the restoration interest is justified by, or at least compatible with, various theories of contract law, including the will theory, corrective justice, distributive justice, economic efficiency, and contract as a cooperative relationship. Notably, it sought to establish that the availability of restoration remedies exceeding ordinary expectation remedies is justified even under the assumption that reliance damages should not exceed expectation. Unlike some advocates of either the expectation or the reliance interests, I did not argue that restoration should be the only measure of the injured party's relief—neither in general nor even under specific circumstances.

The Article's central policy recommendation is that restoration remedies be made available to contracting parties in a more general and systematic manner than they currently are. Such remedies should be generally available for partial and defective performance, for delays in performance, and possibly for other breaches as well.

While the Article's primary contribution lies in identifying, analyzing, and justifying restoration as a goal of contract remedies, it also offers some broader implications for contract remedies and

contract theory. Thus, the descriptive analysis exposed incoherencies among remedy doctrines applying to different types of contracts. The multiplicity of remedy doctrines (including those aiming at restoring the contractual equivalence) may have been one of the reasons why restoration has not been previously identified. On a different level, the normative analysis revealed that no goal of contract remedies, and not even any measure of monetary remedies, is unequivocally supported by even one theory of contract law. Rather, any normative perspective may plausibly endorse different goals and different measures of remedies. The discussion demonstrated the richness of contract theory and the fruitfulness of theoretical pluralism. The identification of restoration and its close connection to the parties' expectations opens up new possibilities for conceivable contractual expectations. Contracting parties are interested in things other than (or additional to) getting "the benefit of the bargain." Preservation of the contractual equivalence is one such thing, and there may be others. This last observation also lends support to the notion of contracts as cooperative relationship.

Concepts and classifications sometimes preclude us from seeing the entire, complex picture. They are therefore in need of continuous rethinking and refinement. Such rethinking is likely to have broader implications. This Article is meant to be one step in that ongoing process.