

CAN'T BUY ME LOVE: MONETARY VERSUS IN-KIND REMEDIES

*Daphna Lewinsohn-Zamir**

The choice of appropriate remedies is a major concern in all legal spheres, yet little has been done to determine which remedies people actually prefer. Scholarly debates on this issue are typically based on theoretical arguments and intuitions rather than experimental or empirical data. It is often assumed that people are indifferent between in-kind and monetary remedies of equal pecuniary value. Consequently, some scholars have argued, for instance, that people ordinarily view a contractual obligation as an option to either perform in-kind or pay expectation damages.

This Article challenges the conventional wisdom that monetary remedies are usually a satisfactory substitute for in-kind redress. It presents new experiments that examine the choices laypersons and experienced businesspeople make between remedies and entitlements. The findings establish that members of both groups strongly prefer in-kind entitlements and remedies over monetary ones. For example, they would rather be given the very thing to which they were entitled than receive a monetary substitute, however accurately calculated. It is therefore possible that damages routinely fail to provide adequate compensation, even when they pertain to fungible, easily quantifiable assets.

Since promoting individuals' welfare is a major concern for legal policy making, ignoring the preference for in-kind redress may lead to both inefficiency and unfairness. The Article offers various normative implications of the experimental findings, through the dis-

* Louis Marshall Professor of Environmental Law, Faculty of Law, Hebrew University of Jerusalem. I am grateful to Richard Brooks, Eric Claeys, Hanoach Dagan, Avihay Dorfman, Robert Ellickson, Yuval Feldman, Lee Fennell, Larissa Katz, Russell Korobkin, Amnon Lehavi, Ronit Levine-Shnur, Barak Medina, Jonathan Nash, Eduardo Peñalver, Ariel Porat, Eric Posner, Jeffrey Rachlinski, Kerry Rittich, Joseph Singer, Henry Smith, Stephanie Stern, Lior Strahilevitz, Eric Talley, Doron Teichman, Katrina Wyman, Eyal Zamir, and participants in the Fifth Annual Conference of the Society for Empirical Legal Studies (Yale Law School), the Annual Conference of the Association for Law, Property and Society (Georgetown Law Center), the Property Law and Theory Workshop (New York University School of Law), and faculty seminars at the Center for Transnational Legal Studies (London), UCLA Law School, the Hebrew University of Jerusalem, and Sapir College, for their helpful comments and suggestions. Special thanks are due to Ilana Ritov for her invaluable guidance in all stages of the experimental process and to Einav Hart and Marina Motsenok for their assistance in statistical analysis of the data.

cussion of such in-kind remedies as specific performance of contractual obligations, injunctions for wrongful interference with property, compensation in development rights for takings of land, and apologies in defamation cases.

TABLE OF CONTENTS

INTRODUCTION	152
I. WHICH TYPE OF REMEDY DO PEOPLE PREFER?	157
A. <i>Previous Studies</i>	157
B. <i>Experiment 1: Laypersons</i>	159
C. <i>Experiment 2: Businesspeople</i>	167
D. <i>Discussion</i>	174
II. NORMATIVE IMPLICATIONS OF THE PREFERENCE FOR IN-KIND REMEDIES	178
A. <i>Efficient Breach, Specific Performance, and Liquidated Damages</i>	178
B. <i>Property Rules, Liability Rules, and Wrongful Interference with Property</i>	184
C. <i>Land-Use Planning and Takings of Property</i>	186
III. RESPONSES TO POSSIBLE CRITIQUES.....	189
A. <i>Irrationality or Objectionability of Preferences</i>	189
B. <i>Autonomy of the Receiving Party</i>	191
C. <i>Interests of the Giving Party</i>	192
D. <i>Institutional Costs</i>	193
CONCLUSION	193

INTRODUCTION

Most people would agree with Paul McCartney that money cannot buy the experience of love, the delight at hearing a baby coo, or the awe inspired by the sight of a towering mountain. At the same time, there is a common belief that money is an apt substitution for other entitlements in proprietary and commercial contexts. Specifically, legal practitioners, policymakers, and academics often assume that people are basically indifferent between monetary and in-kind remedies of equal pecuniary value. The choice between remedies is a subject of fierce debate in the legal literature, and it is therefore surprising that little research has been directed at determining which type of remedy people prefer. To date, arguments for or against particular remedies rest on theoretical reasoning and intuitions, rather than on experimental or empirical data. A case in point is the debate regarding remedies for breach of contract. Law-and-economics scholars often claim that people ordinarily view a contractual obligation as an option to either perform in-kind or to provide

monetary compensation.¹ This claim is based on an untested presumption that promisees would prefer to afford promisors an option to perform or pay in return for a price reduction.² Others respond that this is not the case,³ but they, too, fail to support their claims with hard evidence.⁴

The few existing experimental studies of contract remedies have not resolved this issue. These studies elicited laypersons' opinions⁵ and focused on moral judgments regarding breach.⁶ Critics have dismissed such studies for two reasons. First, it was argued that businesspeople plausibly hold different preferences than laypersons and would be more inclined toward maximizing monetary profits.⁷ Second, participants in the experiments were told that a breach of contract had occurred, whereas the option-theory posits that promisees allow promisors to substitute money for in-kind performance.⁸ Accordingly, voluntary payment of damages constitutes fulfillment of the contractual obligation, not breach. Outside of contract law, there has been no experimental testing of preferences with respect to different types of legal remedies.

This conspicuous absence of data may be due to the widespread belief in the adequacy of monetary remedies. Indeed, monetary compensation is the most common form of redress for rights violations. When the state takes land for public use, when a seller breaches a contract to deliver goods, or when an employer wrongfully discharges an employee, the injured party will ordinarily receive a monetary award.⁹ A monetary

1. See Daniel Markovits & Alan Schwartz, *The Myth of Efficient Breach: New Defenses of the Expectation Interest*, 97 VA. L. REV. 1939, 1948 (2011) (“[C]ontracts typically impose alternative obligations on the promisor: either to supply goods or services for a specified price or to transfer to the promisee the gain the promisee would have made had those goods or services been supplied.”).

2. Steven Shavell, *Specific Performance Versus Damages for Breach of Contract: An Economic Analysis*, 84 TEX. L. REV. 831, 840–44 (2006).

3. STEPHEN A. SMITH, CONTRACT THEORY 402 (2004) (“It just seems implausible, as a matter of fact, to regard contracting parties as having agreed, in the typical case, to disjunctive obligations to perform or compensate.”); Melvin A. Eisenberg, *The Disgorgement Interest in Contract Law*, 105 MICH. L. REV. 559, 574–75 (2006) (asserting that contracting parties in real life implicitly agree on performance rather than performance or payment).

4. As Richard Brooks rightly observed: “Regrettably, scholars have made relatively little effort to identify empirically the social meaning of contractual promises.” Richard R.W. Brooks, *The Efficient Performance Hypothesis*, 116 YALE L.J. 568, 588 (2006).

5. See, e.g., Tess Wilkinson-Ryan, *Do Liquidated Damages Encourage Breach? A Psychological Experiment*, 108 MICH. L. REV. 633, 655, 663–64 (2010).

6. See Tess Wilkinson-Ryan & Jonathan Baron, *Moral Judgment and Moral Heuristics in Breach of Contract*, 6 J. EMPIRICAL LEGAL STUD. 405, 413–14, 420–21 (2009) (finding that people view breach of contract motivated by the prospect of making more profits as more immoral than breach aimed at cutting losses, and that people therefore think that promisees should receive overcompensatory damages in the former case).

7. Markovits & Schwartz, *supra* note 1, at 1954–55 n.32.

8. *Id.*

9. See 3 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 8.02[1] (Mathew Bender ed., 3d ed. 2009) (“[I]n a standard condemnation proceeding, money is both the proper measure and tender of ‘just compensation.’”) [hereinafter, NICHOLS]; 3 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 12.8, at 189 (3d ed. 2004) (“The award of damages is the common form of relief for breach of contract.”); 3 DAN B. DOBBS, DOBBS LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION

remedy has various advantages. It does not interfere excessively with the autonomy of the injuring party. Thus, when a contract for personal services has been breached, the promisor's liberty is curtailed to a lesser extent if she is only obligated to compensate the promisee than if she is required to render the personal services.¹⁰ At the same time, monetary remedies presumably place the right holder in the same position she would have been in had her rights not been infringed upon. For example, it is assumed that takings compensation enables the owner of a vacant parcel to buy a substitute for the expropriated land,¹¹ and that expectation damages afford the promisee the benefit of the bargain.¹² Moreover, monetary awards allow the recipient greater freedom in pursuing her goals than in-kind awards do. The right holder can use the money to directly remedy her loss or for any other purpose, and thus monetary remedies are closely attuned to individuals' changing preferences. A final advantage monetary remedies afford is that they are comparatively easy to administer. It is far more difficult to supervise the construction of a building than to enforce a monetary judgment on a breaching contractor.¹³ Monetary redress seems to be a win-win-win situation for all the parties concerned: plaintiffs, defendants, and the court.

True, the law has always recognized exceptions to the rule of monetary compensation, as in the case of a contract for the sale of unique goods.¹⁴ Since, by definition, there are no satisfactory substitutes for the contracted-for asset, it would be difficult to quantify the losses to the promisee. Therefore, specific performance is granted when the breached contract involves goods like heirlooms and works of art.¹⁵ Another example of in-kind redress is cases of wrongful interference with property. Injunctions are the typical remedy against trespassers to land.¹⁶

§ 12.21(4), at 489 (2d ed. 1993) (explaining that the general rule with respect to breach of employment contracts "leaves the employee to a claim for damages or restitution").

10. DOBBS, *supra* note 9, § 12.22(2), at 496–97.

11. Compensation awards for takings are generally based on the objective, fair market value of the property. DAVID A. DANA & THOMAS W. MERRILL, PROPERTY TAKINGS 169–71 (2002). Market value would be undercompensatory when owners subjectively value their property above the market. *Id.* at 173–74. It is commonly believed that this problem is relevant for certain types of *occupied* lands (such as residences), in contrast to vacant parcels. *See id.* at 174–75.

12. Expectation damages are defined as the sum of money which would put the injured party in as good a position as she would have been in had the contract been performed. FARNSWORTH, *supra* note 9, § 12.8, at 190. Scholars assume that when the injured party's losses are easy to ascertain—such as when a similar asset can be purchased in the market—monetary damages give as good a redress as specific performance. Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 691 (1990).

13. A construction contract is the classic example of a contract that would not be specifically enforced due to the excessive supervision burden involved. FARNSWORTH, *supra* note 9, § 12.7, at 184.

14. *Id.* § 12.6, at 177–78.

15. *Id.* § 12.6, at 174.

16. Gideon Parchomovsky & Alex Stein, Essay, *Reconceptualizing Trespass*, 103 NW. U. L. REV. 1823, 1829 (2009); Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1723, 1732 (2004).

Notwithstanding such examples, there is a widespread, staunch belief that accurate monetary quantification of losses is ordinarily both attainable and advantageous.¹⁷ This can explain the argument, mentioned above, that a promisor who voluntarily makes a payment in lieu of delivering the stipulated goods or services has not breached the contract at all.¹⁸ If there is no difference between performance in-kind and its monetary equivalent, promisees would presumably agree to grant such an option to promisors for a reduction in the price. Indeed, promisors should be encouraged to seek opportunities for more profitable transactions.¹⁹ The crucial question, however, is whether the assumption of indifference between remedies of equal pecuniary value in fact holds true.

This Article sets out to fill the void in the literature by presenting a new experimental study of people's choices between in-kind and monetary redress, examining both *ex ante* choices among entitlements, such as between two contractual terms, and *ex post* choices among remedies. In the experiments, laypersons and experienced businesspeople were asked to envision a scenario in which they could choose between an in-kind remedy and a monetary remedy of equal or greater value. The vignettes used in the experiments referred to a wide array of rights from contract, property, torts, and labor law. The results reveal a strong preference for in-kind remedies over monetary ones, even when the right holder is a firm and even when the remedy is related to fungible, easily replaceable assets, whose market value is ascertainable. Importantly, the findings demonstrate that laypersons and experienced businesspeople share a clear preference for in-kind redress. In fact, in the contract vignette, this preference was stronger among businesspeople than among laypersons. Across all the vignettes tested on businesspeople, the more experienced the businesspeople were, the greater their reluctance was to receive a monetary remedy.

People seem to prefer in-kind redress in two situations. When asked to choose between monetary compensation and getting or restoring *the very thing* that was promised or injured, the participants had a preference for the latter. For example, they elected to receive the sale object rather than either the object or monetary damages, and rejected

17. Anthony Kronman states that the "uniqueness test" in contract law "draws the line between specific performance and money damages in the way that most contracting parties would draw it were they free to make their own rules concerning remedies for breach and had they deliberated about the matter at the time of contracting." Anthony T. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 365 (1978).

18. See Markovits & Schwartz, *supra* note 1, at 1948 ("[A] promisor who fails to deliver the promised goods or services but instead transfers the gain to her promisee *performs* rather than breaches. The promisor breaches only if she *neither delivers nor pays*."); see also Richard A. Posner, *Let Us Never Blame a Contract Breaker*, 107 MICH. L. REV. 1349, 1350 (2009) (arguing that when a contract includes a liquidated damages clause, the promisor does not breach it if she decides to pay the amount specified in the clause instead of performing).

19. Robert L. Birmingham, *Breach of Contract, Damages Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273, 284 (1970).

cash compensation in favor of compensation in the form of development rights to the remainder of a partially expropriated parcel. Dovetailing with this, when facing a choice between monetary compensation and a *substitution in-kind*, the respondents again opted for in-kind redress. They preferred to receive an apology rather than additional damages, and to compensate a neighbor for the occasional use of her lawn with similar use rather than with a cash payment. In-kind redress achieves a better “fit” between an obligation and its fulfillment, between a loss and its correction. In-kind remedies seem to achieve “restoration” where monetary remedies can at best offer “consolation.”

These findings are highly relevant for legal decision making. Admittedly, the fact that people prefer in-kind remedies over monetary ones does not imply that the law should necessarily award this type of redress. The choice of a remedy reflects several, often conflicting, considerations. Yet, the fact that people may derive greater utility from in-kind remedies is an important consideration and one that must not be overlooked. This is obviously true for economic analysis, whose goal is to maximize the extent to which people’s preferences are fulfilled.²⁰ The identification of remedial preferences, however, is important for any theory that regards the satisfaction of preferences as at least one component of human welfare.²¹

Furthermore, awareness of the preference for in-kind redress is essential even if opposing considerations tilt the scales against it. Non-fulfillment of this preference is a cost that should be part of the calculus. The experimental findings indicate that monetary damages are typically undercompensatory, even in the case of generic goods and commercial stock. Systematic undercompensation is unfair and inefficient.²² Arguably, damages can provide adequate compensation and ensure optimal deterrence only if they are supplemented by a premium reflecting the loss from the injured party *not* receiving in-kind redress. The difficulty in

20. Scott Shapiro & Edward F. McClenen, *Law-and-Economics from a Philosophical Perspective*, in 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 460, 461 (Peter Newman ed., 1998).

21. Take, for example, objective theories of well-being. See Daphna Lewinsohn-Zamir, *The Objectivity of Well-Being and the Objectives of Property Law*, 78 N.Y.U. L. REV. 1669, 1701–03 (2003). Such theories hold that certain things—such as autonomy, knowledge, accomplishment, and meaningful social relationships—are good for people, and make for a better life. *Id.* at 1703–07. Although objective theories posit that individuals’ welfare can be judged by an external standard, distinct from their desires and tastes, they acknowledge that fulfillment of people’s preferences is an important factor that affects their well-being. *Id.* at 1710.

22. Thomas S. Ulen, *Specific Performance*, in 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 481, 482 (Peter Newman ed., 1998) (stating that to be an efficient contractual remedy, “the damages must be an amount that makes the innocent party indifferent between receiving this amount and receiving performance”); Daphna Lewinsohn-Zamir, *Compensation for Injuries to Land Caused by Planning Authorities: Towards a Comprehensive Theory*, 46 U. TORONTO L.J. 47, 61–62, 65–66 (1996) (explaining, in the context of takings, why undercompensation of landowners would lead to inefficiency).

quantifying this premium militates against monetary remedies and for in-kind ones.

Part I of this Article presents the experimental study and its findings. Part II discusses various normative implications of the preference for in-kind remedies. It argues, *inter alia*, that contractual obligations should not generally be understood as granting an option to either perform or pay; that courts should consider awarding specific performance more liberally; and that they should be cautious in invalidating liquidated damages clauses. This Part also argues that we should be wary of expanding liability rules (as opposed to property rules); that injunctions should indeed reign supreme in cases of wrongful interference with property; and that planning authorities should consider additional avenues for non-monetary compensation of landowners. Part III addresses possible critiques of the above arguments. It asks whether people's preference for in-kind redress should be ignored or debiased and examines considerations supporting monetary relief, such as the autonomy of the parties involved and the institutional costs of giving in-kind.

I. WHICH TYPE OF REMEDY DO PEOPLE PREFER?

A. *Previous Studies*

The scant experimental literature on people's preferences with regard to legal remedies primarily relates to contractual settings. For example, a psychological study of attitudes toward breach of contract elicited laypersons' beliefs about the morality of a promisor's breach in different scenarios, such as breach motivated by the prospect of making more money versus breach to avoid out-of-pocket losses.²³ Laypeople viewed the former behavior as more objectionable, and thought that the injured party should therefore receive compensation exceeding her losses from the breach.²⁴ The authors focused on the participants' assessments of the magnitude of damages (i.e., whether they should be limited to the injured party's expectation interest), but did not examine the preference between monetary compensation and specific performance or test the hypothesis that businesspeople would prefer to sign a lower-priced contract that grants promisors an option to either perform or pay.²⁵

23. See, e.g., Wilkinson-Ryan & Baron, *supra* note 6, at 406.

24. *Id.* at 413–14, 420–21. Furthermore, the experimenters found that “subjects thought that a person who caused harm via breaking a contractual promise was more immoral and should feel more guilt than a person who caused harm via negligence,” and therefore imposed higher damages on the harm-doer in the former case. *Id.* at 419–20.

25. *Id.* at 412–16. Similarly, another survey revealed that most businesspeople view deliberate breach to obtain greater profits as unethical. David Baumer & Patricia Marschall, *Willful Breach of Contract for the Sale of Goods: Can the Bane of Business Be an Economic Bonanza?*, 65 TEMP. L. REV. 159, 165–66 (1992). Since the respondents were told that a willful breach had occurred, the results cannot shed light on whether businesspeople typically prefer perform-or-pay contracts. *Id.* at 165.

Another study claimed that people's support for damages surpassing the expectation interest and for specific performance is based on the view that breach involves exploitation and betrayal by the breaching party.²⁶ Accordingly, individuals believe that breach makes them "suckers," and, under the sway of the consequent feelings of anger, they endorse inefficient contract remedies.²⁷ Once again, the participants were laypersons,²⁸ and the researchers did not examine whether people have a preference for specific performance independent of their feeling of being exploited.

Finally, an experimental study of eminent domain focused on the expropriation of homes.²⁹ Respondents were asked to indicate the sum of money above market value that would be required for them to sell their home, with the understanding that if negotiations were to fail, the government would be able to exercise its eminent domain powers to compel the transfer.³⁰ The authors found that the length of time the property had been in the family significantly affected the difference between market value and the hypothetical sale price.³¹ The study concentrated on a unique asset, namely, a person's home,³² and did not examine whether people would prefer non-monetary compensation instead (e.g., receiving a substitute parcel of land or compensation in the form of development rights).

The study described below was designed to fill the gap in the literature. It differs from previous experiments in three major respects. First, this study was conducted with both laypersons and experienced businesspeople. It is therefore less susceptible to the criticism that its findings have no relevance to real-life commercial settings.³³ Second, the study elicited both *ex ante* choices between legal entitlements and *ex post* choices between remedies. Thus, it attempted to neutralize the effect of participants' moral judgments on their choices. Finally, previous studies concentrated on a certain remedy in a specific field, such as damages for breach of contract or compensation for expropriation, but did not contrast in-kind and monetary remedies. The present study tested choices between several types of monetary and in-kind remedies in diverse legal fields, including contracts, property, torts, and employment.

26. Tess Wilkinson-Ryan & David A. Hoffman, *Breach Is for Suckers*, 63 VAND. L. REV. 1003, 1017–18 (2010).

27. *Id.* at 1032–34, 1043.

28. *Id.* at 1024 n.100.

29. Janice Nadler & Shari Seidman Diamond, *Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment, and Taker Identity*, 5 J. EMPIRICAL LEGAL STUD. 713, 714 (2008).

30. *Id.* at 729.

31. *Id.* at 743–44.

32. *Id.* at 725.

33. See Markovits & Schwartz, *supra* note 1, at 1954–55 n.32 (stating that previous experiments are irrelevant for their project because "the subjects are individual persons, not firms," and that "[a] firm is more likely to exhibit behavior consistent with the maximization of monetary returns than an individual responding to a questionnaire").

B. Experiment 1: Laypersons

The first experiment aimed to test the hypothesis that individuals are not indifferent between in-kind and monetary redress of equal pecuniary value and would likely opt for the former. The experiment also sought to estimate the strength of the preference for in-kind entitlements and remedies by offering the respondents a choice between in-kind redress and monetary redress of greater value. The experiment did not attempt to identify the psychological mechanisms that explain these choices, an area of inquiry which exceeds the scope of the present study.

Participants. Four hundred and five undergraduate and graduate students at the Hebrew University of Jerusalem (53% men, 47% women), from diverse fields of study,³⁴ voluntarily participated in the experiment. Their ages ranged from 18 to 45, with a mean of 25.

Experimental Design. Participants were randomly allocated one of six questionnaires. Each questionnaire contained a single event which required respondents to choose between two options. The order of the options was counterbalanced between respondents. One option included an in-kind remedy or entitlement; the other featured a monetary remedy or entitlement designed to be as close in value to the in-kind remedy or entitlement as possible. For example, respondents were asked to choose between monetary damages and an injunction against a trespasser to vacant land, or between money and development rights as compensation for a partial expropriation. Respondents who opted for the in-kind alternative were then asked whether they would be willing to opt for the monetary alternative if its value was higher. Those who answered in the affirmative were asked to indicate the sum that would be required for them to choose the monetary option. For instance, Questionnaire 1 read as follows:

34. Seventy-five percent of the participants were undergraduates and 25% were graduate students. Their fields of study were as follows: humanities (24%), economics, statistics, accountancy, and business administration (19%), other social sciences (28%), law (15%), education and social work (5%), natural sciences (4%), and other (5%).

Imagine that you are the owner of a factory which uses iron to manufacture its products. You are negotiating the purchase of a certain quantity of iron from an importer. The price the factory will pay the importer for the iron is \$200,000. A quarter of this sum (\$50,000) will be paid up front, at the time of contracting. The importer has offered you a choice between two contracts for purchasing the iron:

According to Contract I, the iron will be delivered to the factory within two months.

According to Contract M, the iron will be delivered to the factory within two months, but the importer reserves the right to sell the iron to another buyer if after the formation of the contract another buyer offers him a higher price for the iron. In that case, the importer will repay the advance payment (\$50,000) without delay, and will also pay you monetary damages. The damages will fully compensate you for your losses due to the delay in supplying the iron, the inconvenience of purchasing substitute iron from another importer, and the increase (in the event that there is one) in the market price of iron.

A. Which contract would you prefer to sign? (Please mark X beside your chosen answer)

- I would sign Contract I
 I would sign Contract M
 I have no preference between the two contracts

B. If you chose Contract I, would you agree to sign Contract M if the importer offered you a discount in the price of the iron? Yes / No (circle the correct answer)

If yes, what would be the price discount (in dollars) required for you to choose Contract M? \$_____

The other five questionnaires also presented participants with a certain event and examined their preferences for an in-kind or a monetary remedy/entitlement.

Results. The order in which the options were presented and the subjects' gender, age, mother tongue, field of study, and type of degree had no significant effect on their choices.³⁵ Therefore, the analysis collapsed the data across these variables. Table 1 presents the responses to Question A and notes the percentage of respondents who initially expressed a preference for an in-kind remedy or entitlement (Option I) and

35. For all these variables, $p > 0.05$.

No. 1]

MONETARY VS. IN-KIND REMEDIES

161

were unwilling to switch to monetary compensation even for a larger sum of money. Table 2 presents the minimum, mean, median, and maximum monetary addition required to induce those individuals who were willing to consider switching to the monetary option (Option M).

TABLE 1

Questionnaire	In-Kind Option (I)	Monetary Option (M)	No Preference	Statistical Significance	Unwillingness to Opt for Higher M
1. Sale of Iron	74% Delivery In-Kind	22% Delivery or Damages	4%	Yes	66%
2. Trespass to Land	77% Injunction	18% Damages	5%	Yes	50%
3. Defamation	67% Apology & Compensation	27% Higher Compensation	6%	Yes	42%
4. Land Expropriation	67% Development Rights	21% Monetary Compensation	12%	Yes	24%
5. Use of Lawn by Neighbors	96% Reciprocal Use	4% Monetary Arrangement	0%	Yes	N/A ³⁶
6. Wrongful Discharge	36% Reinstatement	61% Damages	3%	Yes	42%
Overall, Across Questionnaires	69%	26%	5%	Yes	46%

36. The possibility of raising the value of the monetary option was irrelevant for event 5. For an explanation, see *infra* note 47.

The participants displayed a clear preference for in-kind remedies and entitlements. Across the six events, 69% preferred the in-kind option and only 26% chose the monetary one. Interestingly, although the in-kind and monetary alternatives were designed to be of equal value, only 5% were indifferent between the two. These choices were highly statistically significant.³⁷ Of those participants who chose the in-kind alternative, 46% indicated that they would not opt for the monetary alternative even for a greater amount of money. Finally, many of those who answered this follow-up question affirmatively conditioned the switch to the monetary alternative on the payment of an unrealistically high additional sum.³⁸ In the real world, this would be tantamount to answering in the negative and rejecting the monetary option. The strong preference for the in-kind option was statistically significant for five of the six events (with a statistically significant preference for the monetary relief in the sixth).³⁹

As discussed above, Questionnaire 1 depicted a commercial transaction for the purchase of iron and presented the buyer with a choice between two contracts. One contract entitled the buyer to delivery of the iron in-kind; the other entitled her to either delivery in-kind or full expectation damages, and emphasized that the monetary award would include not only restitution of the advance payment and compensation for any increase in market price, but also compensation for the delay in supplying the iron and the inconvenience of purchasing substitute iron.

As the contracting parties were both firms and the contract referred to fungible goods, one could have expected that participants would be indifferent between the two contracts.⁴⁰ This hypothesis was bolstered by the fact that the Questionnaire presented participants with an *ex ante* choice between two legitimate contracts, rather than with an *ex post* choice between specific performance and damages following a breach. Thus, the question neutralized the possible effect of the participants' perceptions of the immorality of breach. Still, 74% opted for the contract that required the seller to deliver the iron in-kind and 66% of those indicated that they would not agree to sign the other contract, even for a discount in the price of the iron. These results were highly statistically significant.⁴¹ It seems that people prefer actual performance of contracts even when the promised asset is not unique and its value is easily quantifiable. This preference was often powerful enough to result in an outright rejection of the second contract, even with a discount. Although 34% of those initially choosing the in-kind option were willing to switch

37. $\chi^2(1)=59.321, p<0.001$.

38. The maximum additional sums were many times the value of the monetary option. *See infra* Table 2.

39. The exact statistical significance of the choice between options varied between events 1, 2, 3, 4, and 5, yet in all $p\leq 0.01$.

40. *See also infra* notes 65–67, 73–74 and accompanying text.

41. $\chi^2(1)=15.059, p<0.001$.

to the monetary option for a discount in price,⁴² 30% of them conditioned the switch on an unrealistically high discount, between 20% and 50% of the contract price. It is extremely doubtful that a seller would be willing to offer a reduction of this magnitude (in addition to full expectation damages) to secure the right to sell the iron to another buyer, in the unlikely event that such a buyer would appear.

TABLE 2

Questionnaire	Willingness to Switch from I to Higher M ⁴³	Monetary Add'n: Trimmed Mean ⁴⁴	Monetary Add'n: Untrimmed Mean	Monetary Add'n: Median ⁴⁵	Minimum Required Add'n	Maximum Required Add'n ⁴⁶
1. Sale of Iron	34% (74%)	17%	17%	13%	3%	50%
2. Trespass to Land	50% (77%)	81%	150%	25%	2%	500%
3. Defamation	58% (67%)	89%	129%	25%	10%	625%
4. Land Expropriation	76% (67%)	257%	280%	200%	10%	500%
6. Wrongful Discharge	58% (36%)	159%	493%	106%	4%	417%
Overall, Across Questionnaires	54% (69%)	135%	N/A	50%	2%	625%

The preference for in-kind entitlements was also unequivocal for Questionnaire 5, which dealt with land-use arrangements between neighbors. Participants were informed that they had purchased a single-family home with a backyard, but no fence separating their lawn from their neighbor's lawn. Although the neighbors ordinarily use only their own backyards, they would like to be able to use the entire area behind the two houses for hosting larger events, such as birthday parties. Re-

42. As indicated in *infra* Table 2.

43. The percentage in this column indicates the proportion of respondents who were willing to switch to the monetary option out of those who initially preferred the in-kind option (their proportion of the total number of respondents is indicated in brackets).

44. The mean in this column was calculated by trimming the top 5% of respondents. This included three respondents (out of the 107 who indicated the monetary addition required for them to switch to option M). One respondent in Questionnaire 6, who had demanded an addition of 4167% to switch to option M, was also excluded from the trimmed analysis (this single respondent represented 8% of the respondents who stated their required monetary addition in Questionnaire 6). The discussion below refers to the trimmed results.

45. The median in this column was calculated from the trimmed results. The untrimmed median for events 1, 3, and 4 is the same as the trimmed median. The untrimmed median was 33% for event 2 and 116% for event 6.

46. The maximum additions presented in this column refer to the trimmed results.

spondents were asked to choose between two possible options: (a) the neighbors could agree to allow occasional, reciprocal use of each other's yards for hosting large events, giving each other reasonable advance notice, with no money changing hands, or (b) they could agree that whenever they were interested in using their neighbor's yard, they would give each other reasonable advance notice and provide appropriate monetary compensation. As indicated in Table 1, respondents overwhelmingly opted for the in-kind arrangement: 96% preferred reciprocal use with no payment and not a single respondent was indifferent between the two options. These results were highly statistically significant.⁴⁷ In keeping with Robert Ellickson's argument with respect to participants in a household relationship, neighbors prefer reciprocal, money-free gift exchanges to more formal monetized transactions.⁴⁸

Questionnaire 4 dealt with *ex post* choice of remedies. It asked participants to imagine that they own an undeveloped parcel of land whose market value is \$100,000. After the municipality expropriates 10% of the parcel to widen the adjacent road and sidewalk, the value of the remaining land depreciates by 10% to \$90,000. Participants were informed that the municipality is willing to compensate them for this loss either by paying them \$10,000 or by giving them additional development rights (on top of the original rights), so that the value of the remaining parcel will increase to \$100,000.

Since this scenario dealt with a small reduction in the value of a vacant parcel, rather than a large loss to owner-occupied land, one could have surmised that monetary compensation would be as attractive as in-kind compensation.⁴⁹ In Margaret Radin's terminology, development rights and money are both "fungible property."⁵⁰ Nevertheless, 67% of the respondents preferred to receive development rights on the remain-

47. $\chi^2(1)=57.522, p<0.001$. Since the monetary option in Questionnaire 5 did not specify a sum, there was no point in asking those respondents who chose the in-kind alternative whether they would opt for the monetary one if it were higher. Therefore, this Questionnaire is not included in Table 2.

48. ROBERT C. ELLICKSON, *THE HOUSEHOLD: INFORMAL ORDER AROUND THE HEARTH* 102-06 (2008); see also ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 60-62 (1991) [hereinafter ELLICKSON, *ORDER WITHOUT LAW*] (reporting that residents of rural Shasta County refrain from filing suits for losses caused by trespassing livestock, and that they prefer in-kind payments for the damage caused to monetary relief).

49. One may claim that development rights and cash are not equivalent in terms of their long-term effect on the landowner's wealth, because additional development on the remainder may further increase the value of the land in the future. This claim is not persuasive. Even if the participants took this long-term consideration into account, a cash award may also be invested in real-estate stocks or used to purchase additional land.

50. Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1691-92 (1988); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 1007-08 (1982). The assumption that high subjective valuation is limited to certain types of land occupied by their owners, and in particular to residences, is shared by legislators; condemners in the State of Indiana, for example, are required to pay 150% of fair market value for occupied residences, and Michigan's constitution states that compensation for takings of a principal residence must not be less than 125% of market value. See IND. CODE § 32-24-4.5-8(2)(A) (2006); MICH. CONST. art. X, § 2 (2006).

der rather than monetary compensation. These results were statistically significant.⁵¹ Of those choosing compensation in the form of development rights, 24% were unwilling to switch to a monetary award even if it were higher. Since this scenario dealt with a small (10%) reduction in the value of unoccupied land, it is not surprising that most people initially choosing the in-kind option believed that a larger sum of money could eventually compensate them for their loss. Still, many in this group conditioned the switch to the monetary option on receiving a very high premium. Thirty-one percent of the putative switchers demanded that damages be increased by 200%, and 25% required a 500% increase. Only 12% felt that a relatively “modest” addition of 30-90% would be sufficient. It appears that individuals prefer a remedy which restores the value of the injured asset itself over monetary compensation of equivalent, or even higher value.

In Questionnaire 2, a vacant parcel purchased as an investment was trespassed upon. Participants were instructed to imagine that they were the owners of the parcel and had filed suit against the trespasser. They were asked to choose between an injunction against the trespasser or full monetary damages. The Questionnaire emphasized that the monetary award would not only enable them to purchase a similar parcel in the same area, but would also compensate them for the inconvenience involved. In both cases, the court would order the trespasser to pay the fair value of the use of the land for the period that it was unlawfully possessed and cover the landowner’s litigation costs.

Despite the fact that the vignette referred to undeveloped land purchased for investment, 77% of the respondents opted for in-kind redress in the form of an injunction. Of those choosing an injunction, 50% would not switch to the monetary award even if it were higher.⁵² Fifty-seven percent of the respondents willing to switch demanded that the damages exceed their pecuniary losses by 20–50%, and 19% required an additional sum amounting to between 100% and 500% of their losses. Thus, even absent personal attachment, people manifest a strong preference for in-kind restitution of the wrongfully taken property.

Participants who received Questionnaire 3 were informed that one of the employees in their place of work had spread lies about them and they had considered suing for defamation. Following negotiations for an out-of-court settlement, their lawyer presented two settlement options. According to one, the injuring party would pay NIS 36,000 and apologize in writing for damaging their reputation.⁵³ According to the other, the injuring party would pay NIS 40,000. Sixty-seven percent of the re-

51. $\chi^2(1)=7.896, p<0.01$.

52. This result was highly statistically significant: $\chi^2(1)=18.846, p<0.001$.

53. One New Israeli Shekel (NIS) equals approximately \$0.25. *Currency Converter*, USFOREX, <http://www.usforex.com/currency-converter> (last visited Nov. 18, 2012). The settlement options come out to a bit more than \$9000 and \$10,000 in U.S. dollars.

spondents opted for the settlement agreement that included an apology and only 27% opted for the higher monetary settlement. In the follow-up question, 42% responded that they would not accept purely monetary redress even if it were higher.⁵⁴ Of the 58% who were willing to alter their choice, 50% demanded additional damages of 25–90% in order to forgo an apology (compared to the 11% difference in the monetary compensation in the initial choice). Twenty-seven percent required an additional sum that exceeded the value of the entire monetary remedy by 100% to 625%.

It is highly implausible that requests for exceedingly high additional monetary compensation would be granted. No reasonable expropriating authority could be expected to offer monetary compensation three times higher than the value of development rights. Likewise, a trespasser would sooner relinquish possession of the land than pay twice its market price. Presumably, many respondents were aware of this when specifying the sum required to induce them to forgo the in-kind remedy or entitlement, thus essentially rejecting the monetary substitute.⁵⁵

There may be another reason for the rather small difference between the respondents who rejected outright a switch from an in-kind to a monetary option and those who conditioned this move on an unrealistically high premium. Plausibly, the respondents in the first group did not mean to imply that they would *never* switch to the monetary relief, but rather that they would not be willing to switch for a sum that the other party would reasonably be willing to pay. This said, one should not equate the members of the two groups: those in the former plausibly had a stronger preference for the in-kind option.

Only in Questionnaire 6, which dealt with wrongful discharge in employment relationships, did the participants prefer monetary relief. Participants were asked to imagine that they had been working for many years in a place that employs a large number of people, and that they were satisfied with the job and the conditions. The employer wrongfully discharged them two years prior to their retirement date. They filed suit in a labor court and their lawyer informed them that the court would grant them one of two remedies, whichever they prefer. The court could order the employer to reinstate them (with the same salary and conditions) with back pay for the months that they were unemployed. Alternatively, the court could award them full monetary damages (equal to two years of salary payments) without reinstatement. In both cases, the court would add compensation for the aggravation suffered as a result of

54. This result was statistically significant: $\chi^2(1)=7.333$, $p<0.01$.

55. In the context of contingent valuation questionnaires, scholars have interpreted extremely high monetary demands (under the “willingness to accept” criterion) as “protest” responses, indicating an unwillingness to trade or accept a risk. MARK SAGOFF, *THE ECONOMY OF THE EARTH: PHILOSOPHY, LAW, AND THE ENVIRONMENT* 81–84 (1988); RICHARD H. THALER, *THE WINNER’S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE* 73–74 (1992).

the discharge. Sixty-one percent of the respondents opted for the full damages, whereas 36% opted for the in-kind remedy of reinstatement.⁵⁶

This exception to the general, clear preference for in-kind remedies may be explained by the specific context and particulars of the two options. Reinstatement is unique in that it requires the injured party to resume a close, ongoing relationship with the injuring party. Thus, even if people believe that their rights are better vindicated by reinstatement than with damages, they may still be reluctant to go back to their job for fear of retaliation on the part of the employer and the unpleasantness of being in a hostile working environment.⁵⁷ A workplace is not only the job itself, but also a relationship of trust, mutual respect, and cooperation, a relationship that was permanently destroyed by the wrongful discharge. In essence, there is no workplace to go back to. The respondents' choice of damages, therefore, does not indicate a preference for monetary over in-kind remedies.

Furthermore, while the Questionnaire apprised the subjects that it was highly unlikely that they would be able to find alternative employment at their age, they might still believe that they had a chance of receiving the damages and earning a full salary elsewhere. Even if no alternative were to be found, they may prefer receiving a full salary without working to receiving the same salary while working—an especially attractive option for people nearing the normal retirement age (or so the respondents might have thought). Finally, although the in-kind remedy, reinstatement, was chosen by a minority of the subjects (36%), this minority was substantially larger than that preferring the monetary remedy or entitlement in the five other Questionnaires (ranging from 4% to 27%).

C. *Experiment 2: Businesspeople*

Some have claimed that studies conducted with individual persons are irrelevant to debates regarding firms, as businesspeople hold different preferences than laypersons.⁵⁸ This claim seems particularly relevant to the vignettes used in Experiment 1, which described commercial transactions, fungible assets, and firms. While those who made this claim provided no experimental or empirical support for it, some empirical studies actually indicate that businesspeople and laypersons behave in a similar fashion. Thus, in his seminal article on non-contractual relations in business, Stewart Macaulay shows that businessmen often resort to informal dealings rather than detailed contracts, and rarely resort to using

56. $\chi^2(1)=5.714, p<0.05$.

57. See Susan K. Grebeldinger, *The Role of Workplace Hostility in Determining Prospective Remedies for Employment Discrimination: A Call for Greater Judicial Discretion in Awarding Front Pay*, 1996 U. ILL. L. REV. 319, 340–41 (1996).

58. See *supra* note 33.

legal sanctions to settle disputes.⁵⁹ Macaulay attributes these findings, *inter alia*, to the widely accepted norm that “[c]ommitments are to be honored in almost all situations” and to reputation considerations.⁶⁰ Furthermore, adjustment of the agreement and dispute resolution via litigation or even the threat of litigation is viewed derogatively and may terminate the relationship.⁶¹ Hence, such tactics are utilized only when there is no other choice.⁶² Similar to this, Lisa Bernstein found that members of the cotton industry place tremendous stock in one another’s word, promise, and reputation for actual performance of their commitments, and that personal relations play a key role in these commercial agreements.⁶³ Bernstein reports that merchants in her study viewed even voluntary payment of damages as nonequivalent to actual performance.⁶⁴ Macaulay’s and Bernstein’s research lends support to the hypothesis that even sophisticated businesspeople would prefer in-kind redress to monetary compensation.⁶⁵ Experiment 2 set out to test this hypothesis.

A second aim of Experiment 2 was to examine another claim that could be made in response to the results of Experiment 1, namely that the preference for in-kind entitlements and remedies over monetary ones is actually compatible with indifference between the two. Even if money is a perfect substitute for in-kind redress, the would-be injured party should arguably opt for the in-kind option because it affords her a strategic advantage in future negotiations. If the other party would prefer to pay damages, the injured party could exact additional payment by selling her right to in-kind redress. This argument was primarily relevant to Questionnaire 1.⁶⁶ Regardless of its problematic nature as a matter of theory, Experiment 2 sought to examine this claim experimentally.⁶⁷

59. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 58–62 (1963).

60. *Id.* at 63.

61. *Id.* at 64.

62. *Id.* at 64–65.

63. Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1745–54 (2001).

64. *Id.* at 1755.

65. See also Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 746–49 (2007) (questioning the sharp distinction between the promissory norms of private individuals and those of businesses and organizational actors).

66. This argument is not applicable to (a) the cases in which respondents refused to switch *ex post* from the in-kind to the monetary alternative for an additional payment, or (b) those in which their agreement to switch was conditioned upon an unreasonably high additional payment. Furthermore, the strategic consideration was irrelevant to the initial choice between the in-kind and monetary options in most of the questionnaires. For example, in Questionnaire 3 (Defamation) there was no prospect of future renegotiation, and in Questionnaire 4 (Land Expropriation) there was no reason to assume that the condemning authority would prefer the in-kind relief to the monetary one.

67. The argument is theoretically problematic for the following reason. Questionnaire 1 asked the participants to choose between an unqualified right to the delivery of iron and a right to either delivery or damages. If the respondents did not consider the opportunity for strategic post-contractual negotiations, which was not mentioned in the questionnaire, this advantage was not a factor in their decisions. Cf. Markovits & Schwartz, *supra* note 1, at 1971–72 (acknowledging the existence of naïve buyers who do not realize that they can profit from *ex post* renegotiation). At the same time, if the

Participants. Four groups of businesspeople, totaling 126 participants, took part in Experiment 2 voluntarily. Group 1 was comprised of forty members of the Israeli Chamber of Commerce from diverse fields such as real estate, marketing, finance, hotels and tourism, fashion, and textile. They were Chief Executive Officers (CEOs), business owners, sales and marketing managers, consultants, and the like. Groups 2 (twenty-seven participants) and 3 (thirty-seven participants) consisted of high-ranking executives from international high-tech firms, most from a very large multi-national corporation. They included company chairmen, CEOs, vice presidents, and managers of development, telecom, and information technology. Group 4 consisted of twenty-two businesspeople enrolled in an Executive Masters of Business Administration (MBA) program at the Hebrew University of Jerusalem, specializing in Finance. They came from fields such as high technology, real estate, banking, investment, and commerce, where they served as general directors, vice presidents, and managers of marketing, sales, product development, and operations.

Overall, 71% of the businesspeople were men, and 29% were women. They ranged in age from twenty-two to sixty-nine with a mean of forty-three, and had between one and fifty years of experience in the job with a mean of sixteen. While the participants in Groups 1 and 4 were all Israelis, the members of Groups 2 and 3 were from a number of different countries (and continents): Israel (52% in Group 2 and 64% in Group 3), North America (40% and 19%, respectively), Europe (4% and 3%), and Asia (4% and 14%).

Experimental Design. The participants were presented with one Questionnaire, based on those used in Experiment 1. The members of Group 1 filled in the Questionnaire during meetings of the Tel-Aviv branch of the Chamber of Commerce. The Questionnaires were randomly distributed to Groups 2 and 3 by e-mail. The members of Group 4 answered the Questionnaire during a meeting of their Executive MBA program. Group 1 received Questionnaire 1 (Sale of Iron), Group 2 a modified version of Questionnaire 1, Group 3 received Questionnaire 4 (Land Expropriation), and Group 4 received Questionnaire 2 (Trespass to Land). As in Experiment 1, participants were asked to choose between an in-kind and a monetary option of equal value. The order of the in-kind and monetary options was counterbalanced between subjects.

respondents were sophisticated enough to consider this strategic advantage, presumably they could also figure out that they would not obtain it for free. They would have to pay a higher price or concede to (other) inferior contractual terms. See Paul G. Mahoney, *Options Pricing and Contract Remedies*, in 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW, *supra* note 20, at 715 (explaining that the distribution of the gain from efficient termination would not be affected by the choice between expectation damages and specific performance (when transaction costs are low), and further that the contract price would reflect the additional value to the buyer from specific performance); Markovits & Schwartz, *supra* note 1, at 1950–51. Hence, whether the respondents were aware or unaware of the opportunity for strategic post-contractual negotiations, the conjecture of a strategic preference for the in-kind alternative is questionable.

Those who opted for the in-kind alternative were asked if they would be willing to opt for the monetary alternative if it were larger, and those who answered in the affirmative to this question were asked to indicate the sum that would be required to induce them to switch.

The modified version of Questionnaire 1 offered participants (as buyers) a choice between two contracts for the purchase of iron, one affording them an unqualified entitlement to delivery of the iron, and the other an entitlement to either delivery in-kind or full monetary compensation. In contrast to the original Questionnaire used in Experiment 1, in the modified version of the Questionnaire used in Experiment 2, the participants were informed that under the in-kind contract, if the seller would later want to sell the iron to another buyer, she would first have to negotiate a release from the contract. They were also told that if they opt for the monetary contract, the seller would offer them a reduction in the price of the iron.⁶⁸ The participants who chose the more expensive, in-kind contract were asked whether they would agree to sign the cheaper, monetary contract if the seller would offer them a larger discount. Those answering in the affirmative were asked to indicate the additional discount required.

Results. Neither the order of presentation nor the participants' gender, age, years of experience in the job, or country of residence had a significant effect on their choices.⁶⁹ I therefore collapsed the data across these variables. The results, summarized in Table 3, essentially replicated those of Experiment 1. Like laypersons, experienced businesspeople have a strong preference for in-kind entitlements and remedies. Across all questionnaires, 79% of the businesspeople preferred the in-kind option and only 19% chose the monetary one.⁷⁰ Although the in-kind and monetary options were designed to be of equal pecuniary value, only 2% of the businesspeople were indifferent between the two. These results were highly statistically significant.⁷¹ Furthermore, 40% of the businesspeople who chose the in-kind alternative indicated that they would not agree to switch to the monetary alternative even for a larger amount of

68. Another difference between the two versions related to how the right to receive the iron was phrased. In the original version, both the in-kind and the monetary contract stated that "the iron will be delivered to the factory within two months." In the modified version, the respondents were informed that "the seller undertakes to deliver the iron within two months." This slight modification was intended to allay the (rather improbable) concern that participants in Experiment 1 might have thought that the in-kind contract involved no uncertainty whatsoever as to whether the iron would in fact be delivered by the promisor. In the modified version, it is even more obvious that both the in-kind and the monetary contract involve the same degree of uncertainty with respect to the promisor's future performance.

69. Years of experience did affect the size of the monetary addition required to switch from in-kind to monetary relief. See *infra* note 78 and accompanying text and Figure 1.

70. The percentage of businesspeople choosing the in-kind option was larger than the corresponding percentage of laypersons (69%). This difference, however, in the overall results was only marginally significant: $\chi^2(1)=2.978$, $p=0.084$. Thus, across all Questionnaires, laypersons and businesspeople demonstrated a similarly strong preference for in-kind redress.

71. $\chi^2(1)=43.46$, $p<0.001$.

money, and many of the putative switchers conditioned the switch on the payment of unrealistically high sums, up to five times the total value of the monetary option.

TABLE 3

Questionnaire (Q)	In-Kind Option (I)	Monetary Option (M)	No Preference	Statistical Significance	Unwillingness to Opt for Higher M
<u>Group 1 (Q1)</u> Sale of Iron (Original Version)	82.5% Delivery In-Kind	17.5% Delivery or Damages	0%	Yes	59%
<u>Group 2 (Q1)</u> Sale of Iron (Modified Version)	89% Delivery In-Kind	11% Delivery or Damages	0%	Yes	54%
<u>Group 3 (Q4)</u> Land Expropriation	68% Development Rights	32% Monetary Compensation	0%	Yes	17%
<u>Group 4 (Q2)</u> Trespass to Land	82% Injunction	9% Damages	9%	Yes	18%
Overall, Across Questionnaires	79%	19%	2%	Yes	40%

We begin our discussion with the two versions of Questionnaire 1 (Sale of Iron). The in-kind alternative was chosen by 82.5% of the businesspeople in Group 1 and 89% of those in Group 2. Not a single businessperson in either group was indifferent between the two contracts. These results were highly statistically significant.⁷² The businesspeople's preference for the in-kind contract was stronger than that of the laypersons, as only 74% of the participants in Experiment 1 chose the in-kind contract. This difference was statistically significant.⁷³ Furthermore, the results of the modified version (Group 2) confirm the hypothesis that the preference for the in-kind option cannot be explained by strategic considerations. Even when the respondents were explicitly informed that they would have to pay a higher price for the in-kind contract (which allowed for the possibility of post-contractual renegotiations), they overwhelmingly preferred it to the lower-priced, monetary one. Importantly, there was no statistically significant difference between the modified and original versions of Questionnaire 1 with regard to business people's

72. Group 1: $\chi^2(1)=16,900$; $p<0.001$; Group 2: $\chi^2(1)=16,333$; $p<0.001$.

73. $\chi^2(1)=4.608$; $p=0.032$. In contrast, the tort and expropriation vignettes (Questionnaires 2 and 4) did not yield a significant difference between laypersons' and businesspeople's preference for in-kind remedies.

preference for the in-kind contract.⁷⁴ Most of the businesspeople who participated in Experiment 2 would not agree to sign the monetary contract, even for a larger discount (59% and 54% in Groups 1 and 2, respectively). The results indicate that experienced businesspeople have a preference for unqualified entitlements to receive the promised asset in-kind, even when said asset is not unique.

The businesspeople given the other Questionnaires expressed a similar preference for receiving the in-kind option. Questionnaire 4 (distributed to Group 3) examined the respondents' remedial preferences when part of an undeveloped parcel was expropriated. Sixty-eight percent opted for the in-kind alternative, development rights to the remainder of the parcel.⁷⁵ Questionnaire 2 (given to Group 4) depicted a scenario in which a trespasser invaded a vacant parcel purchased as an investment. Again, a clear majority of the respondents, 82%, preferred an injunction to full monetary damages.⁷⁶

The preference of businesspeople for in-kind entitlements and remedies was manifest not only in the initial choice of this option and unwillingness to switch to a higher monetary compensation; it was also exhibited by many of the respondents who would agree to opt for the monetary alternative if its value were increased. The pertinent results are summarized in Table 4.

TABLE 4

Questionnaire (Q)	Willingness to Switch from I to Higher M ⁷⁷	Monetary Add'n: Mean	Monetary Add'n: Median	Minimum Required Add'n	Maximum Required Add'n
<u>Group 1 (Q1)</u> Sale of Iron (Original Version)	41% (82.5%)	23%	18%	2.5%	90%
<u>Group 2 (Q1)</u> Sale of Iron (Modified Version)	46% (89%)	24%	25%	10%	40%
<u>Group 3 (Q4)</u> Land Expropriation	83% (68%)	270%	225%	50%	500%
<u>Group 4 (Q2)</u> Trespass to Land	82% (82%)	80%	75%	5%	200%
Overall, Across Questionnaires	60% (79%)	126%	50%	2.5%	500%

74. $\chi^2(1)=0.518$; $p=0.472$. The absence of a statistically significant difference refutes the conjecture that the results of Experiment 1 were influenced by the way the two options were described. See *supra* note 68.

75. This result was statistically significant: $\chi^2(1)=4.568$, $p=0.033$. In Experiment 1, 67% opted for the in-kind option.

76. Once again, this result was statistically significant: $\chi^2(1)=8.909$, $p<0.01$. In Experiment 1, 77% chose the in-kind alternative.

77. The percentage in this column indicates the proportion of respondents who were willing to switch to the monetary option out of those who initially preferred the in-kind option (their proportion of the total number of respondents is indicated in brackets).

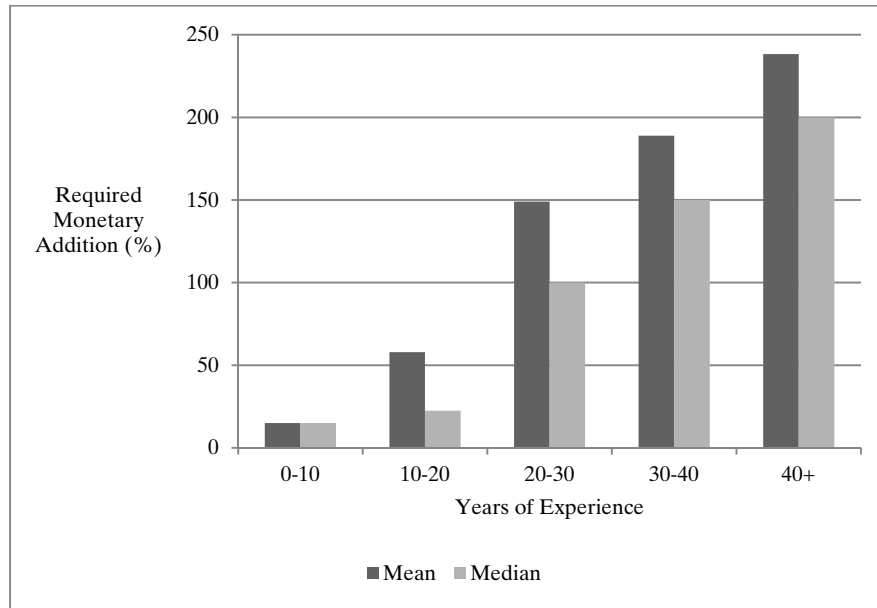
Less than half the respondents given a version of the sale-of-iron Questionnaire were willing to switch from the in-kind to the monetary contract for a larger price discount. In Group 1, 50% of the putative switchers demanded an additional price reduction of 20% to 90% of the price (on top of the discount that the seller initially offered them for choosing the monetary contract). In Group 2, 73% of those who preferred the in-kind contract but would agree to switch to a monetary contract required a further discount of 25% to 40%. It is exceedingly unlikely that a seller would be willing to offer a reduction of this magnitude in exchange for an option to sell the iron to another buyer.

In a similar fashion, while most members of Groups 3 and 4 were willing to switch to the monetary option were its value increased, the increase they required was prohibitive. In Land Expropriation, 50% of the putative switchers required that damages be increased by 200% to 300%, and 30% demanded an increase of 400% to 500%. Likewise, in Trespass to Land, 17% of putative switchers demanded a 50% increase in the damages; 25% required that the damages be doubled; and 25% conditioned the switch on additional damages of 150% or 200%. Once again, this conditioning is virtually tantamount to rejection of the monetary remedies.

Interestingly, a linear regression shows that the size of the monetary request increases with the respondents' years of experience in the job. Not only do businesspeople share the laypersons' reluctance to accept monetary redress, but the more experience they have, the greater their inclination to insist on in-kind redress.⁷⁸ Figure 1 presents the mean and median of the required monetary additions for different years of experience. They range from 15% mean and median for people with zero to ten years of experience to a mean of 238% and median of 200% for people with over forty years of experience.

78. $B=8.059$, $p=0.019$.

FIGURE 1



In sum, Experiment 2 provided no support for the claim that experienced businesspeople are indifferent between in-kind and monetary redress of equal pecuniary value. Quite the contrary, it demonstrates that businesspeople's preference for in-kind entitlements and remedies is either equal to or stronger than that of laypersons.

D. Discussion

The experiments suggest that people generally prefer in-kind entitlements and remedies to monetary substitutes. Both laypersons and businesspeople opted for in-kind redress even when the relevant asset was fungible and its monetary value could be accurately calculated.

Respondents preferred to receive or restore the very thing promised or injured rather than obtain something else. Thus, they elected to receive the contracted for iron, to recover the very parcel held by the trespasser, and to be awarded development rights to the remainder of a partially expropriated parcel. This preference was manifest both in *ex ante* choices between entitlements and *ex post* choices among remedies. It appears that in-kind redress achieves the best fit between an obligation and its fulfillment, a loss and its correction. It seems to satisfy people in a way that monetary substitutes cannot. In-kind relief may achieve "restoration" in cases where monetary remedies afford only "consolation."

When it was not feasible to obtain the thing itself, respondents preferred to receive something *of the same type* rather than a monetary substitute. Thus, in the neighbors scenario (Questionnaire 5), they turned

down a monetary transaction in favor of a cooperative exchange of similar resources in the form of reciprocal, in-kind use of each other's yards.

This explanation does not preclude others, as more than one factor can explain a particular phenomenon. For example, Robert Ellickson found in his study of Shasta County that “[w]hen one ranchette owner’s goat ate his neighbor’s tomatoes, the goat’s owner responded by helping to replant the tomatoes, not by sending a check.”⁷⁹ Ellickson argues that monetary payment is perceived as “cold and impersonal,” befitting strangers rather than neighbors.⁸⁰ In contrast, in-kind exchange signals solidarity and trust, reinforcing neighborly expectations of ongoing cooperative interactions.⁸¹ Note, however, that the remedy chosen by the ranchers was not just any non-monetary form of relief. It was of the *same type* as the injury, and resembled a restoration of the damaged asset itself.⁸² Therefore, anticommodification preferences alone cannot fully explain the chosen form of redress.

A less obvious example of the preference for same-type remedy is the defamation scenario (Questionnaire 3). Respondents preferred a lower monetary settlement that included an in-kind remedy of apology over a larger, wholly monetary settlement.⁸³ Arguably, an injury to one’s dignity cannot be repaired in the manner in which an injunction returns a stolen asset to its owner. In this respect, apologies—like monetary compensation—cannot really restore the status quo. Damages are akin to an apology in the sense that they publicly acknowledge the defamation and penalize the wrongdoer. Nevertheless, it seems that an apology is the preferred remedy for defamation because defamation and apology share the same “currency.” Lies and insults are words that undermine one’s dignity, self-respect, and self-esteem;⁸⁴ apologies are words that boost them.⁸⁵ From the perspective of the wronged individual, even an insincere⁸⁶ or coerced⁸⁷ apology may be preferable to a higher sum of money

79. ELLICKSON, ORDER WITHOUT LAW, *supra* note 48, at 235.

80. *Id.*

81. *Id.* at 61, 235–36.

82. *See id.* at 235–360.

83. *See supra* notes 52–54 and accompanying text.

84. *See* Jeffrie Murphy, *Forgiveness and Resentment*, in FORGIVENESS AND MERCY 14, 28, 43–53 (Jeffrie G. Murphy & Jean Hampton eds., 1988).

85. AARON LAZARE, ON APOLOGY 45 (2004).

86. *Id.* at 117–19, 223–26 (claiming that apologies need not necessarily be sincere to succeed, and that sincerity is less important in public apologies and when the humiliator in turn was humiliated).

87. Apologies can be coerced as a civil remedy in some countries, such as Japan and South Korea. Pierre-Dominique Ollier & Jean-Pierre Le Gall, *Various Damages*, in INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: XI TORTS 63, 91–92 (André Tunc ed., 1986). German Law authorizes judges to order the retraction of defamatory statements. *Id.* at 89, 93. This contrasts with the situation in the United States, where court-ordered apologies are generally unavailable in civil cases. Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1018 (1999). A principal reason for this is the individual’s right not to speak, which is viewed as part of the right to free speech. *Id.* This said, voluntary apologies and retractions can be offered by defendants in mitigation of damages. Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC’Y REV. 461, 479–80 (1986).

sans apology. Although a disingenuous apology may not raise the status of the injured party in the way that a sincere apology would, it can still humble the injuring party.⁸⁸ By lowering the status of the wrongdoer, the remedy has a “measure for measure” characteristic, making it superior to money as a corrective device.⁸⁹ As such, the preference for apology in defamation cases shares a common feature with the preference for reciprocal land uses between neighbors. The positive (neighbors) and negative (defamation) exchange scenarios reveal a similar type of in-kind preference.

The finding that people prefer to receive something of a similar type when it is not feasible for them to receive the thing itself accords with studies in social psychology. “Resource Theory,” developed by Uriel Foa and others,⁹⁰ classifies resources exchanged in interactions between individuals into six categories: love, status, information, money, goods, and services.⁹¹ Scholars found that the more similar two resources are to one another, the greater the likelihood that they would be exchanged⁹² and the greater people’s satisfaction from the exchange.⁹³ Satisfaction from reciprocation is maximized when repayment is with the same resource;⁹⁴ thus, for example, satisfaction was lowest when love and money were exchanged.⁹⁵ This phenomenon was found not only with respect to positive giving exchanges, but also in cases of negative aggression exchanges.⁹⁶ Respondents preferred to retaliate by depriving the injuring party of the resource that was the most similar to the one that had been taken from them.⁹⁷ Those who retaliated with a dissimilar resource

88. LAZARE, *supra* note 85, at 52; Murphy, *supra* note 84, at 28.

89. A comprehensive discussion of apologies is beyond the scope of this Article. The growing literature on apologies includes NICHOLAS TAVUCHIS, *MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION* (1991) (a sociological study of apology); Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460 (2003) (finding that apologies facilitate settlement agreements in civil disputes); Brent T. White, *Say You’re Sorry: Court-Ordered Apologies As a Civil Rights Remedy*, 91 CORNELL L. REV. 1261 (2006) (advocating court-ordered apologies in civil-rights cases against governmental defendants).

90. Uriel G. Foa, *Interpersonal and Economic Resources*, in RESOURCE THEORY: EXPLORATIONS AND APPLICATIONS 13 (Uriel G. Foa et al. eds., 1993); Edna B. Foa & Uriel G. Foa, *Resource Theory of Social Exchange*, in CONTEMPORARY TOPICS IN SOCIAL PSYCHOLOGY 99 (John W. Thibaut et al. eds., 1976).

91. Foa & Foa, *supra* note 90, at 150.

92. David Brinberg & Pat Castell, *A Resource Exchange Theory Approach to Interpersonal Interactions: A Test of Foa’s Theory*, 43 J. PERSONALITY & SOC. PSYCHOL. 260, 261 (1982); Jim L. Turner et al., *Interpersonal Reinforcers: Classification, Interrelationship, and Some Differential Properties*, 19 J. PERSONALITY & SOC. PSYCHOL. 168, 172–73, 176, 178 (1971) (finding, among other things, that love is perceived as closest to status, and money is viewed as closest to goods).

93. John Converse, Jr. & Uriel G. Foa, *Some Principles of Equity in Interpersonal Exchanges*, in RESOURCE THEORY: EXPLORATIONS AND APPLICATIONS, *supra* note 90, at 31, 33.

94. Meir Teichman & Uriel G. Foa, *Effect of Resources Similarity on Satisfaction with Exchange*, 3 SOC. BEHAV. & PERSONALITY 213, 215, 219, 222 (1975).

95. *Id.* at 222.

96. Edna B. Foa et al., *Response Generalization in Aggression*, 25 HUM. REL. 337, 344 (1972).

97. Foa, *supra* note 90, at 20–21. Thus, participants who lost love or status (by being personally rejected or derogated) preferred to retaliate by derogating or expressing dislike of their offenders rather than by making them lose money or goods. Foa et al., *supra* note 96, at 344–45. Participants

“compensated” for their dissatisfaction by increasing the level of retaliation.⁹⁸ Moreover, the reduced effectiveness of the dissimilar resource led not only to a greater measure of retaliation but also to greater residual hostility, namely a desire for further retaliation.⁹⁹

A study by Jane Beattie and Jonathan Baron lends additional support to the preference for in-kind solutions.¹⁰⁰ Beattie and Baron compared what they called “in-kind” and “out-of-kind” penalties.¹⁰¹ Both types could be non-monetary or monetary.¹⁰² For example, when a factory caused a fire that destroyed a nearby forest, Beattie and Baron’s subjects preferred to order the factory to pay for the planting of new trees in a different state than to pay for purchasing land for a national park.¹⁰³ Similarly, when a drug company manufactured a defective drug which caused blindness in children, the respondents preferred to require the company to fund a school for blind children instead of one for epileptic children.¹⁰⁴ Beattie and Baron’s distinction between in-kind and out-of-kind penalties is not the same as the distinction between in-kind and monetary remedies. Their results, however, support the argument that the type of redress matters, and that people generally prefer remedies that resemble what they had lost.¹⁰⁵ We now turn to the policy implications of the experimental results.

who were deprived of money or goods chose to inflict the loss of promised goods or money on their injurers. *Id.*

98. Gregory V. Donnenerwerth & Uriel G. Foa, *Effects of Resource Class on Retaliation to Injustice in Interpersonal Exchange*, 29 J. PERSONALITY & SOC. PSYCHOL. 785, 789–90 (1974).

99. *Id.* at 790–91.

100. Jane Beattie & Jonathan Baron, *In-Kind and Out-of-Kind Penalties: Preference and Valuation*, 1 J. EXPERIMENTAL PSYCHOL. APPLIED 136 (1995).

101. *Id.* at 137.

102. *Id.* at 137–39.

103. *Id.* at 140–41.

104. *Id.* at 141–43. Beattie & Baron view the preference for penalties that are compatible with the harm wrought as a manifestation of the biblical “an eye for an eye.” *Id.* at 136, 149.

105. In contrast, the preference for in-kind entitlements and remedies does not seem to correlate with the Endowment Effect (EE), that is, with people’s tendency to demand a significantly higher price for relinquishing an already-owned entitlement than what they would be willing to pay for the same entitlement. *See, e.g.*, Colin Camerer, *Individual Decision Making*, in THE HANDBOOK OF EXPERIMENTAL ECONOMICS 587, 665–70 (John H. Kagel & Alvin E. Roth eds., 1995). Three points are important in this context. First, Questionnaires 1, 3, and 5 did not involve prior entitlements, but rather instructed the subjects to choose between receiving an in-kind and a monetary remedy or entitlement. Second, contrary to some experimental studies of the EE, the preference for in-kind entitlements and remedies also characterized assets held for investment or resale. *E.g.*, Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325, 1328–32, 1344 (1990). Finally, the EE compares people’s willingness to pay (WTP) for an entitlement they do not yet have and their willingness to accept (WTA) to part with an entitlement they already have. *Id.* at 1325–26. In contrast, my experiments dealt solely with individuals’ WTA, and compared their preferences for two forms of receipt: in money and in-kind.

II. NORMATIVE IMPLICATIONS OF THE PREFERENCE FOR IN-KIND REMEDIES

This Part focuses on three contexts where the preference for in-kind entitlements and remedies seems particularly pertinent: remedies for breach of contract, the choice between property rules and liability rules in cases of wrongful interference with property, and land use and takings of property. First, a few general remarks are in order.

Even if both laypersons and businesspeople prefer in-kind remedies over monetary ones, this does not necessarily entail that the law should award in-kind redress. The choice of a remedy reflects numerous, and sometimes conflicting, considerations. Yet, as promoting individuals' welfare is a major concern,¹⁰⁶ the notion that people derive greater utility from in-kind remedies is an important consideration. Absent overriding considerations, principles of both corrective justice and efficiency support that the legal system accommodate these preferences. In-kind remedies are helpful in realizing the compensatory goal of many legal doctrines. They also enhance efficiency because efficient deterrence requires that injurers internalize the full costs they inflicted on unwilling others.¹⁰⁷

Furthermore, awareness of the prevalent preference for in-kind redress is important even if other considerations tilt the scales in favor of a monetary award. Non-fulfillment of this preference is a cost that should be taken into account. Just compensation and efficient deterrence require that the injured party be properly compensated, and the injurer be compelled to pay for the failure to provide in-kind redress. This may justify an increase in the monetary award (and the difficulty in determining this increase may actually tilt the scales against monetary redress).

A. *Efficient Breach, Specific Performance, and Liquidated Damages*

Damages—rather than specific performance—is the ordinary remedy for breach of contract in Anglo-American legal systems.¹⁰⁸ The in-kind remedy of specific performance is afforded in those exceptional circumstances where monetary redress is deemed inadequate.¹⁰⁹ In particular, specific performance will be granted when the breached contract involves unique goods, such as heirlooms or works of art.¹¹⁰

Admittedly, there may be good reasons to curtail the availability of specific performance. Performance of the very act specified in the con-

106. Albeit not the only concern. Amartya Sen, *Well-Being, Agency and Freedom: The Dewey Lectures 1984*, 82 J. PHIL. 169, 186, 194–95 (1985).

107. See *supra* note 22 and accompanying text.

108. FARNSWORTH, *supra* note 9, § 12.8, at 189.

109. Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 272 (1979).

110. FARNSWORTH, *supra* note 9, § 12.6, at 174.

tract may become impossible or prohibitively expensive;¹¹¹ it may overly burden the state's enforcement mechanisms;¹¹² and it may interfere unduly with the autonomy of the breaching party.¹¹³ The primacy of monetary compensation, however, goes well beyond these cases, and damages are the common remedy even when specific performance is perfectly feasible and would not significantly affect the breacher's autonomy.¹¹⁴ It rests on the assumption that when an injured party's losses are easily ascertainable—as when a market substitute is readily available—damages provide as good a redress as specific performance,¹¹⁵ and thus people would be indifferent as to whether they receive one or the other.¹¹⁶

The same indifference assumption underlies the efficient breach doctrine. In a nutshell, this doctrine holds that a promisor may breach a contract whenever breach is more efficient than performance, i.e., whenever the promisor's profits from the breach exceed the losses to the promisee.¹¹⁷ Thus, if after contracting with *A* for the sale of an asset, the seller finds a second buyer (*B*) willing to pay a higher price, the seller may breach the contract with *A*, transfer the asset to *B*, and compensate *A* for her losses. The breach is presumably efficient because the asset is transferred to the person who values it most while minimizing transaction costs.¹¹⁸ Efficient breach is commonly presented as a Pareto improvement.¹¹⁹ The injured party is indifferent as to whether she is awarded performance or expectation damages, and at least one person is better off thanks to the breach.¹²⁰

The current experimental findings—demonstrating that people have a strong preference for receiving the very thing promised in the contract

111. KONRAD ZWEIGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* 472 (Tony Weir trans., 3d ed. 1998) (citing examples such as a picture destroyed after contracting for its sale and an opera singer whose illness does not allow her to perform).

112. The classic example is a construction contract. DOBBS, *supra* note 9, § 12.8(3), at 206–07.

113. The prime example is a contract for personal services. Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 *YALE L.J.* 763, 778–79 (1983).

114. Stephen Smith claims that although specific performance of a seller's obligation to deliver goods does not raise problems of supervision and autonomy, the possibility of purchasing substitute performance with monetary damages justifies non-grant of the former remedy. Stephen A. Smith, *Substitutionary Damages*, in *JUSTIFYING PRIVATE LAW REMEDIES* 93, 108–09 (Charles EF Rickett ed., 2008). Smith also acknowledges that “courts sometimes give excessive weight to the supervision and servitude concerns, especially where the defendants are corporations.” *Id.* at 109. Alan Schwartz criticizes the claim that specific performance excessively interferes with the promisor's liberty. Schwartz, *supra* note 109, at 296–98. He maintains that this is not the case when a promisor is required to deliver goods he is in the business of selling, or when a sizable corporation rendering services is ordered to perform them. *Id.* at 297.

115. FARNSWORTH, *supra* note 9, § 12.6, at 175.

116. Ulen, *supra* note 22, at 482.

117. ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 262 (5th ed. 2008).

118. Transaction costs are minimized, so the argument goes, because the seller does not have to bargain with buyer *A* for a “release” from her obligation, but rather may directly contract with buyer *B*. *Id.* at 262–63, 266–68. For criticism of this argument, see Daniel Friedmann, *The Efficient Breach Fallacy*, 18 *J. LEGAL STUD.* 1, 6–7, 23–24 (1989).

119. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 120 (7th ed. 2007).

120. *Id.*

rather than its monetary value, however accurately calculated—cast doubt on this crucial assumption of indifference. The preference for in-kind remedies and entitlements, shared by both laypersons and experienced businesspeople,¹²¹ did not depend on the uniqueness of the promised asset. The substitutionary monetary award therefore likely falls short of providing adequate compensation. Given that efficiency requires that damages be high enough to make the injured party indifferent between receiving this sum and receiving performance,¹²² so that promisors internalize the costs of their breach,¹²³ ignoring the preference for performance in-kind may lead to inefficiency.

Granted, scholars have acknowledged that expectation damages may not fully protect the non-breaching party's expectation interest, due to such factors as the foreseeability requirement, the mitigation of damages rule, non-recovery of legal costs under the "American Rule," and the unverifiability of certain losses.¹²⁴ Yet, some of these factors are contingent¹²⁵ and others are avoidable.¹²⁶ In contrast, a preference for in-kind redress likely exists even when there are no obstacles to full monetary redress. The vignette used in Questionnaire 1 (Sale of Iron) did not involve problems of proof or foreseeability, the asset was fungible and easily quantifiable, and participants were assured that the monetary award would cover any financial loss resulting from their having to purchase substitute iron from another seller.¹²⁷ Nevertheless, most respondents preferred the contract that gave them an unqualified right to the delivery of the iron to the lower-priced agreement that afforded them a right to either delivery or full damages.¹²⁸

Moreover, since the choice between the two contracts was made *ex ante*, my experiments are not subject to the critique that by describing non-performance as a breach of contract, they were affected by the respondents' antipathy toward promise-breaking. It has been argued that promisees plausibly prefer to afford promisors an option to perform or pay damages in return for a price reduction,¹²⁹ and therefore a promisor

121. In fact, the findings of the contract vignette (Questionnaire 1) indicate that businesspeople may have a stronger preference for in-kind redress than laypersons do. *See supra* notes 72–74 and accompanying text.

122. Ulen, *supra* note 22, at 482.

123. SMITH, *supra* note 3, at 404.

124. G.H. TREITEL, REMEDIES FOR BREACH OF CONTRACT: A COMPARATIVE ACCOUNT 150–207 (1988).

125. For instance, not all contract infringement cases involve the problem of unforeseeable or unproven losses.

126. The law can be altered such that the losing party will reimburse the winning party for attorney fees and other litigation expenses.

127. *See supra* text of Questionnaire 1 and note 39 and accompanying text.

128. *See supra* notes 39–40, 72–73 and accompanying text.

129. Markovits and Schwartz argue that promisees' expected gross payoff is the *same* under the expectation damages and specific performance remedies. Markovits & Schwartz, *supra* note 1, at 1951. In the former case, the promisee shares in the promisor's gain from not specifically performing through an *ex ante* price reduction. In the latter, the promisee pays a higher contractual price but receives this gain by way of a bribe in *ex post* negotiations to release the promisor from specifically per-

who willingly pays expectation damages¹³⁰ has not breached her contractual obligation at all.¹³¹ This line of reasoning is then used to dismiss experimental studies which found that people view efficient breach as immoral and favor supracompensatory damages and specific performance.¹³² Respondents in these experiments, so the argument goes, were informed that a breach of promise had occurred, which had an influence on their opinions.¹³³ By offering the respondents an *ex ante* choice between two legitimate contractual arrangements, my experiments obviated the possible effect of beliefs about the morality of promise-keeping on the respondents' choices. Because people's moral evaluations can differ from their choices, the focus on choice rather than on morality is significant.¹³⁴ The results of my study support the intuitive re-

forming. The preference for realizing gains through the price mechanism—rather than the renegotiation mechanism—is based on second-order reasons pertaining to the higher costs of creating a specific performance contract. *Id.* at 1950–52, 1957–59, 1965–66, 1973–76, 2006–07. Thus, Markovits and Schwartz assume that, barring transaction costs, promisees would be indifferent as to the choice between in-kind and monetary performance. *Id.* at 1950–51, 1973; *see also* Shavell, *supra* note 2, at 840, 842–44 (arguing that *both* parties to a contract to produce something would prefer expectation damages to specific performance as a remedy for efficient breach: the seller would be able to offer the buyer a reduction in the price, so both would profit from switching to the expectation measure).

130. In reality, breachers of contracts rarely offer to pay damages voluntarily, and damages are typically awarded by court order. EYAL ZAMIR & BARAK MEDINA, *LAW, ECONOMICS, AND MORALITY* 266 (2010). Even if some promisors do offer expectation damages on their own initiative, the Article focuses on the remedy that should be granted by the courts. This question arises only in cases where adequate monetary compensation was not given voluntarily.

131. Markovits & Schwartz, *supra* note 1, at 1948 (advocating a “dual performance hypothesis,” according to which “contracts typically impose alternative obligations on the promisor: *either* to supply goods or services for a specified price *or* to transfer to the promisee the gain the promisee would have made had those goods or services been supplied. . . . a promisor who fails to deliver the promised goods or services but instead transfers the gain to her promisee *performs* rather than breaches”); *see also* ALAN SCHWARTZ & ROBERT E. SCOTT, *SALES LAW AND THE CONTRACTING PROCESS* 389 (2d ed. 1991) (“What contract performance requires is the goods in exchange for the contract price *or* the payment of an appropriate monetary substitute. Thus, the damage remedy is itself a part of the contracted-for performance.”); Shavell, *supra* note 2, at 867 (“In committing [an efficient] breach and paying damages, the promisor would be acting in exactly the way called for by a complete contract. Insisting on specific performance . . . would conflict with the true promissory wishes of the parties . . .”). This statement, in effect, is tantamount to a belief that voluntary payment of expectation damages does not constitute a breach at all.

132. *See* Wilkinson-Ryan & Baron, *supra* note 6, at 413–14, 419–21. These experiments focused on the damages remedy. *Id.* at 413, 415, 417–18. In one study, however, the authors state in brief that most respondents believed that promisors should honor the contract even if they could profit from breach, and that the majority “thought that the law should force the promisor, in many cases, to honor the contract and perform.” *Id.* at 420.

133. Markovits & Schwartz, *supra* note 1, at 1954–55 n.32. Indeed, Wilkinson-Ryan and Baron believe that the perceived immorality of breaking a contractual promise has led respondents to support inefficient remedies that would result in too many contracts being performed. Wilkinson-Ryan & Baron, *supra* note 6, at 422–23 (asserting that “[p]eople’s moral intuitions about contract law may make breach less frequent than is economically efficient,” and concluding that their experiment identified “tensions between intuition and reason”).

134. David M. Messick & Keith P. Sentis, *Fairness and Preference*, 15 J. EXPERIMENTAL SOC. PSYCHOL. 418, 430–34 (1979) (finding that individuals’ fairness judgments can differ from their choices); *see also* Max H. Bazerman et al., *Reversals of Preference in Allocation Decisions: Judging an Alternative Versus Choosing Among Alternatives*, 37 ADMIN. SCI. Q. 220, 237 (1992) (demonstrating that people may rank the desirability of outcomes according to relative payoffs (degree of equality), yet

jection of the Holmesian understanding of contractual obligations.¹³⁵ It appears that the preference for receiving the promised performance itself is not merely a reaction to a subsequent breach, and is in fact stronger than hitherto supposed.

In the same vein, the new findings point to the incompleteness of the argument that people's support for specific performance and for damages surpassing the expectation interest rests on the view that breach involves exploitation and betrayal by the breaching party¹³⁶ or on the non-breaching party's feelings of anger for being treated like a "sucker."¹³⁷ The results in this Article suggest that people's strong preference for performance *in specie* is independent of their perception of breach.

One policy implication of this analysis is that promisees' preference for receiving the promised performance in-kind should receive additional weight in decisions about the contractual remedy. Following the spirit of civil law systems,¹³⁸ Anglo-American courts should consider awarding specific performance more liberally.¹³⁹ Another implication is that when courts award damages in lieu of specific performance, they should take into account that expectation damages are typically undercompensatory, even when the contract involves fungible assets.¹⁴⁰ If damages are to

base their choices on absolute payoffs, which were unequal but higher than under the equitable distribution).

135. See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897) ("The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else."); Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 1504 (2004) ("A promisor who pays expectation damages continues to collaborate with her promisee, in spite of her breach.").

136. Wilkinson-Ryan & Hoffman, *supra* note 26, at 1017–18.

137. *Id.* at 1026, 1032–33, 1043. Indeed, Wilkinson-Ryan and Hoffman stress that these feelings do not arise with respect to all breaches, and thus the authors do not suggest "that specific performance is always a more compensatory kind of remedy than damages." *Id.* at 1045.

138. ZWEIGERT & KÖTZ, *supra* note 111, at 479 (stating that "[i]n both German and French law . . . a contractor is in principle entitled to demand that his contract be performed in specie" and contrasting this position with the primacy of monetary damages in the common law).

139. *But see* Laycock, *supra* note 12, at 691, 726–27, 768. Laycock claims that courts grant specific performance more often than is commonly believed. *Id.* at 691. In particular, the courts do not condition this remedy on proof that damages would cause "irreparable injury." *Id.* Laycock approves, however, of the fact that courts deny specific performance for many other reasons, such as the possibility of purchasing a replacement in the market. *Id.* at 691, 703–07, 710–11. At any rate, the crux of my argument is normative, rather than positive. To the extent that courts circumvent the common-law rule limiting the availability of specific performance, this phenomenon can be justified by my experiments.

140. Another experimental study found additional factors that explain why expectation damages are inherently undercompensatory. See Daphna Lewinsohn-Zamir, *Taking Outcomes Seriously*, 2012 UTAH L. REV. 861. It appears that the value of a thing received depends on whether it was given to the entitled party voluntarily, in a spirit of good will and mutual cooperation. Non-willing giving—such as following a court order—dilutes the value of the thing received in the eyes of the recipient. Furthermore, the badness of an injurious outcome is greater if it was brought about intentionally (though without malice or intent to harm), rather than unintentionally. These phenomena are not limited to unique assets or to private individuals, but also extend to fungibles (including money) and firms. *Id.* at Part II. Consequently, if courts limit damages to promisees' expected benefit from the bargain and do not address the additional losses from unwilling-giving and intentional breach, they are systematically undercompensating them. The findings of the experiments in this Article—that monetary redress is inferior to in-kind redress—exacerbate the undercompensation problem.

place the injured party in as good a position as she would have been in had the contract been performed, then plausibly a sum greater than expectation damages, as commonly calculated,¹⁴¹ must be awarded.¹⁴² The difficulty in quantifying this supplement implies that, contrary to conventional wisdom, damages are *never* easily calculated. This, too, is a consideration in favor of specific performance.¹⁴³

The experimental findings also bear on liquidated damages. According to current doctrine, if a liquidated damages clause is to be upheld, the stipulated amount must be reasonable in light of the anticipated or actual loss caused by the breach.¹⁴⁴ The results of the experiments reported here imply that when courts make this determination, they should take into account that such clauses may incorporate compensation for promisees' interest in receiving the thing itself. Arguably, the law should take more of a hands-off, tolerant approach to liquidated damages clauses.

Finally, the experimental results caution against urging promisors to unilaterally opt for ostensibly efficient breaches.¹⁴⁵ Efficiency may be better served if promisees have a right to specific performance and promisors must negotiate, *ex post*, a release from this obligation. A voluntary agreement between the parties to this effect ensures that the promisee indeed receives sufficient compensation for replacing her in-kind entitlement with a monetary one. The possible failure of such renegotiation need not be due to bilateral monopoly and the promisee's holdout position.¹⁴⁶ As the experiments demonstrated, even *ex ante*, many people re-

141. See Richard Craswell, *Against Fuller and Perdue*, 67 U. CHI. L. REV. 99, 157 (2000) (distinguishing between expectation damages as currently measured by the court and correctly calculated "true" expectation damages, which indeed leave the injured party indifferent between receiving performance and receiving damages).

142. Since the additional damages are justified by both compensatory and deterrence considerations, it is not essential that damages for nonpecuniary losses also serve an insurance function. See STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 242 (2004) ("If damages do not fully reflect nonpecuniary losses, parties' incentives to reduce risks may be inadequate.").

143. The Restatement holds that specific performance would not be granted "if damages would be adequate to protect the expectation interest of the injured party." RESTATEMENT (SECOND) OF CONTRACTS § 359(1) (1981). However, it goes on to say that in determining the adequacy of damages, a significant factor is "the difficulty of proving damages with reasonable certainty," and that this includes a situation where only part—but not all—of the loss can be proven. *Id.* § 360(a) cmt. b. Since it is difficult to estimate the loss from not receiving the promised performance in-kind, this consideration weighs in favor of specific performance.

144. U.C.C. § 2-718(1) cmt. (2007); RESTATEMENT (SECOND) OF CONTRACTS § 356(1) (1981).

145. Birmingham, *supra* note 19, at 284 ("Repudiation of obligations should be encouraged where the promisor is able to profit from his default after placing his promisee in as good a position as he would have occupied had performance been rendered.").

146. Post-contractual bargaining may sometimes fail if parties are strategic bargainers and have asymmetric information. SHAVELL, *supra* note 142, at 87–91. Elsewhere, however, I have relied on behavioral studies to argue that people do not consider themselves entitled to all the gains of the trade and therefore frequently succeed in equitably dividing the potential gains of efficient transactions. See Daphna Lewinsohn-Zamir, *The Choice Between Property Rules and Liability Rules Revisited: Critical Observations from Behavioral Studies*, 80 TEX. L. REV. 219, 226–39 (2001).

ject a monetary substitute *tout court*, or would agree to accept it only for a very high premium.¹⁴⁷

B. Property Rules, Liability Rules, and Wrongful Interference with Property

The experimental results have direct bearing on the property rule/liability rule debate.¹⁴⁸ An entitlement is protected by a “property rule” if no one can appropriate the entitlement without securing the owner’s consent. The entitlement must be transferred through a voluntary transaction, with the owner-seller agreeing to its price.¹⁴⁹ In contrast, “liability rule” protection enables a forced transfer of the entitlement.¹⁵⁰ The coercing party need not seek the owner’s consent, but must only pay her the objectively determined value of the entitlement.¹⁵¹ Guido Calabresi and Douglas Melamed, who introduced this distinction, proposed an elegant criterion for choosing between the two: transaction costs. Property rules should be employed when transaction costs are low and the parties can bargain to achieve desirable outcomes.¹⁵² Liability rules should be employed only when transaction costs are high, such as when numerous parties are involved.¹⁵³

Although the Calabresi-Melamed criterion has garnered a great deal of support,¹⁵⁴ it has also been criticized.¹⁵⁵ Some scholars have claimed that liability rules may be superior to property rules even when transaction costs are low.¹⁵⁶ This argument emphasizes the risk that bargaining under property rules might fail.¹⁵⁷ An advantage of liability rules in this regard is that they remove entitlement owners’ holdout power, thereby ensuring the execution of efficient transfers.¹⁵⁸

Without attempting to resolve this debate, my findings introduce an important, heretofore overlooked, consideration to the discussion. The experiments show that people generally favor property-rule protection.

147. See *supra* Parts I.B–C.

148. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1105–10 (1972).

149. *Id.* at 1092.

150. *Id.* at 1092–93.

151. *Id.* at 1105–07.

152. *Id.* at 1118–19.

153. *Id.* at 1096–1100, 1106–10, 1118–19, 1125–27.

154. See, e.g., Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1, 8–9, 15 (1993); James E. Krier & Stewart J. Schwab, Essay, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. REV. 440, 450–51 (1995).

155. See, e.g., SHAVELL, *supra* note 142, at 87–91, 315; Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 YALE L.J. 1027, 1032–33 (1995); Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 717–18 (1996).

156. See *supra* note 155.

157. Ayres & Talley, *supra* note 155, at 1030, 1039, 1042–44, 1055–56; Kaplow & Shavell, *supra* note 155, at 734, 764.

158. Kaplow & Shavell, *supra* note 155, at 724–37.

It follows that (at least under a preference theory of human welfare) liability rules can afford a redress equivalent to that of property rules only if they include a premium to compensate for this deficiency. Even if courts accurately assess the value of the entitlement itself,¹⁵⁹ as long as they do not address this further loss—inherent to the use of monetary remedies for non-monetary injuries—they are still liable to systematically undercompensate entitlement holders. To the extent that the argument in favor of liability rules relies on there being no systematic valuation errors,¹⁶⁰ the current study lends additional support for employing property rules when transaction costs are not prohibitive.

This can be demonstrated with the example of remedies for wrongful interference with property. The right of property owners to exclude others from using the property without their consent is considered a vital component of ownership.¹⁶¹ Furthermore, this entitlement is often protected with a property rule,¹⁶² with injunctions being the typical remedy against trespassers to land.¹⁶³ The case of personal property does not differ greatly from this. While according to the common law, the remedy for conversion of chattels is damages,¹⁶⁴ U.S. state legislatures have recognized a general action for replevin, which enables the recovery of personal property.¹⁶⁵ It would appear, then, that the uniqueness (or non-uniqueness) of the relevant property does not play a role in deciding whether to grant an injunction against the possessing wrongdoer.¹⁶⁶

Henry Smith has offered an information-costs theory to explain the preeminence of injunctions in this context.¹⁶⁷ Assets commonly have multiple attributes which afford them numerous potential uses.¹⁶⁸ Allocative efficiency requires information about the costs and benefits of these uses, but some uses are presently unknown and others are difficult to prove or quantify in monetary terms.¹⁶⁹ Property rules delegate to owners the function of gathering and acting on information about potential

159. This assumption is dubious. Richard A. Epstein, *Holdouts, Externalities, and the Single Owner: One More Salute to Ronald Coase*, 36 J.L. & ECON. 553, 570–71 (1993).

160. Kaplow & Shavell admit that their argument for liability rules holds only if courts do not systematically underestimate compensation awards to entitlement owners. Kaplow & Shavell, *supra* note 155, at 720, 730–32.

161. Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998).

162. Smith, *supra* note 16, at 1732.

163. WILLIAM B. STOEBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* § 1.3, at 7 (3d ed. 2000).

164. 1 DAN B. DOBBS, *THE LAW OF TORTS* § 67, at 150 (2001).

165. STOEBUCK & WHITMAN, *supra* note 163, § 1.3, at 8.

166. See Smith, *supra* note 114, at 106 (observing that courts award specific performance for failure to deliver land even when its value is easily assessed, “as, for example, where the buyer was purchasing for resale or long-term investment”).

167. Smith, *supra* note 16, at 1753–74.

168. *Id.* at 1755.

169. *Id.* at 1774–76.

uses.¹⁷⁰ This delegation is desirable because owners can typically produce the necessary information more cost-effectively than takers or courts.¹⁷¹

It is not surprising that Smith focuses on the example of land. Parcels of land may indeed vary from one another in their multiple attributes, present and future, known and unknown.¹⁷² Therefore, land is the quintessential asset that requires costly information about potential uses. This problem is considerably less significant when the asset wrongfully taken is a non-unique chattel, such as a family car or a cow. The information-costs theory cannot entirely account for why property rule protection is *generally* available when assets are wrongfully taken. The experimental findings described in this Article, in contrast, do provide such a general justification. Due to the value people place on in-kind redress, *all* assets may be regarded as unique, in the sense that it is difficult to quantify the loss incurred from receiving a monetary substitute rather than the thing itself. Since the use of liability rules unavoidably entails this cost, whenever possible it is prudent to bypass the need for complicated calculations.

C. *Land-Use Planning and Takings of Property*

The respondents who received Questionnaire 4 preferred development rights to money as compensation for a partial expropriation.¹⁷³ A plausible explanation for this result is that development rights restore the value of the injured asset itself, whereas money simply enables the landowner to regain her former level of wealth. Awarding development rights is the closest we can get to repairing the asset itself, because it restores the land's development potential to its pre-condemnation state. Landowners cannot ordinarily use monetary compensation to purchase development rights for the remainder of their acreage. Partial expropriation differs in this respect from contract and tort scenarios, where damages can sometimes be used to repair the injured asset. Note, however, that my respondents preferred that the promisor and the wrongdoer themselves hand over the promised or wrongfully taken asset, even when full damages would have enabled the purchase of a substitute (Questionnaires 1 and 2). The possibility of covering does not necessarily eliminate the preference for in-kind receiving from the original relevant party.

In-kind redress may be superior to monetary redress in the land-use context for another reason. Land-use decisions typically entail both "winners" and "losers." Some property owners face expropriation or

170. *Id.* at 1755–56.

171. *Id.* at 1763–64, 1774–78.

172. *Id.* at 1727 (stating that plots differ from one another in terms of soil nutrients, water, and mineral deposits); *id.* at 1729–30 (describing land containing a rock formation that the owner believes will become a tourist attraction in twenty years' time); *id.* at 1760 (noting that there are multiple uses of a house or a parcel).

173. *See supra* notes 48–51, 75 and accompanying text.

down-zoning, while others see their land increase in value through favorable zoning provisions.¹⁷⁴ Even if the injured landowners receive monetary compensation, they may still feel that they have been treated unequally. Since money is distinct from the land, a financial award may not eliminate the feeling of having been disregarded. In contrast, in-kind redress can approximate a repair of the injured property. Affected landowners may feel that, like their neighbors, they, too, share in the planning benefits. In-kind redress thus has an inclusionary, participatory aspect that monetary redress lacks.

Admittedly, in-kind redress would not be feasible in all circumstances. Compensation by awarding development rights to the remainder of a partially expropriated parcel is a practicable solution only when the original parcel was very large or a relatively small portion was taken. When granting additional development rights, the planning authority must consider the interests of the neighborhood as a whole. From a professional planning perspective, it would likely be problematic to grant large-scale building rights to the owner of a small-scale parcel.¹⁷⁵ At the same time, adding development rights may be particularly appropriate when the authorities expropriate a servitude, such as a public right of way through one's land, rather than ownership. Ordinarily, servitudes do not significantly reduce the value of the burdened land. Hence, the new development rights are likely to be minimal.

The experimental findings are also relevant in those instances when a parcel of land is expropriated in its entirety. Indeed, such expropriation rules out compensation by adding development rights to the remainder of the property. The benefits of in-kind redress are not limited, however, to a narrowly defined restoration of this sort. People tend to derive greater utility from a relief that is of the same type as the injury inflicted¹⁷⁶ and may prefer a substitute for the expropriated parcel rather than money. The in-kind option may be particularly attractive if a suitable plot can be located in the same area as the expropriated parcel. This would promote values like equality and community and enable the injured landowner to share the benefits of the new public use of her land. Other things being equal, when this option is available, it should be offered to the landowner.

174. Julian Conrad Juergensmeyer et al., *Transferable Development Rights and Alternatives After Suitum*, 30 URB. LAW. 441, 444 (1998).

175. In delineating the limits of the acceptable addition to the remainder, one may draw on the vast literature on Transferable Development Rights (TDR). See, e.g., John J. Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574, 590–96 (1972); Sarah J. Stevenson, *Banking on TDRs: The Government's Role as Banker of Transferable Development Rights*, 73 N.Y.U. L. REV. 1329, 1339–41 (1998). To prevent overdevelopment, TDR programs commonly set ceilings on development rights (say, 15%). *Id.* at 1343 n.93.

176. See *supra* notes 79–104 and accompanying text.

In the same spirit, the findings support the introduction of a planning tool that is used in some European and Asian countries¹⁷⁷ but not yet in the United States, namely land readjustment (reparcellation). This tool is particularly useful when the current subdivision of an area does not provide the necessary infrastructure (such as roads, schools, or parks).¹⁷⁸ A readjustment process starts with the consolidation of the parcels in a certain area into a common pool.¹⁷⁹ Later, a decision is made as to where the construction will take place, and the land is redivided.¹⁸⁰ Owners will receive smaller but more valuable parcels, thanks to the new infrastructure and the development potential of the post-readjustment plots.¹⁸¹

Whereas eminent domain procedures single out particular owners to provide the land necessary for the upgraded infrastructure—excluding them from the fruits of the project—readjustment facilitates the sharing of *both* burden and benefit among all owners.¹⁸² Compensation for the reduction in the size of the parcels is primarily given in-kind, through mutual enjoyment of various planning benefits.¹⁸³ The readjustment procedure may require that each new parcel be as close as possible to its pre-readjustment location,¹⁸⁴ and that its value relative to the other parcels be maintained.¹⁸⁵ Land readjustment thus may realize the advantages of in-kind redress without sacrificing sound planning considerations.

177. In Germany and Israel, land readjustment does not require the approval of the affected landowners; in Japan and Taiwan, it requires the consent of a certain majority of the landowners. Rachele Alterman, *Exactions Law and Social Policy in Israel*, in PRIVATE SUPPLY OF PUBLIC SERVICES: EVALUATION OF REAL ESTATE EXACTIONS, LINKAGE, AND ALTERNATIVE LAND POLICIES 182, 194–95 (Rachele Alterman ed., 1988) [hereinafter PRIVATE SUPPLY OF PUBLIC SERVICES]; Yu-Hung Hong, *Assembling Land for Urban Development: Issues and Opportunities*, in ANALYZING LAND READJUSTMENT: ECONOMICS, LAW, AND COLLECTIVE ACTION 3, 19 (Yu-Hung Hong & Barrie Needham eds., 2007) [hereinafter LAND READJUSTMENT].

178. Michael M. Shultz & Frank Schnidman, *The Potential Application of Land Readjustment in the United States*, 22 URB. LAW. 197, 197–98, 200, 224 (1990).

179. Benjamin Davy, *Mandatory Happiness?: Land Readjustment and Property in Germany*, in LAND READJUSTMENT, *supra* note 177, at 37, 41 (illustrating the step in the German Mandatory Land Readjustment).

180. *Id.*

181. Frank Schnidman, *Land Readjustment: An Alternative to Development Exactions*, in PRIVATE SUPPLY OF PUBLIC SERVICES, *supra* note 177, at 250, 250–51.

182. Shultz & Schnidman, *supra* note 178, at 233.

183. See Schnidman, *supra* note 181, at 251.

184. Rachele Alterman, *Much More Than Land Assembly: Land Readjustment for the Supply of Urban Public Services*, in LAND READJUSTMENT, *supra* note 177, at 57, 69; Shultz & Schnidman, *supra* note 178, at 225.

185. In Germany, owners who receive land that has decreased in its relative value are awarded monetary compensation. Davy, *supra* note 179, at 40. In Israel, landowners whose relative share has increased are required to pay a “balancing fee” to those whose relative share has decreased. Alterman, *supra* note 184, at 69.

III. RESPONSES TO POSSIBLE CRITIQUES

The experiments described in Part I found that both laypersons and experienced businesspeople strongly prefer in-kind remedies and entitlements, independent of whether the relevant asset is unique. Part II then argued that the law should take this preference into consideration in various contexts. This Part addresses possible critiques of this Article's claims, asks whether the preference for in-kind redress should be ignored or debiased, and discusses some considerations favoring monetary relief, such as the parties' autonomy and the institutional costs of giving in-kind.

A. *Irrationality or Objectionability of Preferences*

One may accept that people prefer in-kind remedies, yet maintain that this preference should be ignored or modified. This contention seems unwarranted; even if it were true, an attempt to change this preference is doomed to fail.

From the standpoint of standard economic analysis, welfare is maximized by the satisfaction of individuals' actual preferences, whatever they may be.¹⁸⁶ Under this theory of human welfare, there is no reason to disregard or change the preference for in-kind redress. Even under ideal preference theories, however, which discount at least some objectionable or irrational preferences,¹⁸⁷ there is no compelling reason to ignore or try to change current preferences, as there is nothing objectionable or irrational about them. It would be unreasonable to argue that individuals must maximize only wealth and that the state should prevent them from sacrificing any potential profits to secure receipt in-kind.¹⁸⁸

One might interject that the above holds true for private individuals, but not for firms. The latter are expected to exclusively maximize the monetary profits of their shareholders. If businesspeople exhibit the same preference for in-kind entitlements and remedies as private individuals, then, so the argument goes, the indulgence of personal desire is an agency problem, and the desire should be ignored. This argument is not persuasive.¹⁸⁹ The empirical question of whether shareholders expect

186. JOHN BROOME, *ETHICS OUT OF ECONOMICS* 3–4 (1999); JAMES GRIFFIN, *WELL-BEING: ITS MEANING, MEASUREMENT, AND MORAL IMPORTANCE* 10 (1986).

187. According to an ideal-preferences theory, a person's well-being is enhanced to the extent that her ideal preferences—those she *would have had* if she thoroughly, clearly and calmly considered all possible alternatives and their consequences with full information and no errors in reasoning—are fulfilled. SHELLY KAGAN, *NORMATIVE ETHICS* 38 (1998).

188. Cf. Mark D. Spranca, *What Goals Are to Count?*, 17 *BEHAV. BRAIN SCI.* 29, 29 (1994) (asserting that if consequentialism “allows [people] only certain goals, it would seem to change the focus of the theory from rationality to morality”).

189. Note that even if this argument were valid, this Article's findings would still have very broad implications. This Article's policy recommendations mainly relate to court-awarded remedies. See *supra* Part II. Commercial firms—which engage in relational contracts and rely heavily on reputation and other non-legal incentives—may often avoid adjudication. See Marc Galanter, *Commentary, Vi-*

managers to focus solely on narrow profit-maximization has yet to be determined.¹⁹⁰ More importantly, even if profit-maximization should be a firm's only goal, a preference for in-kind redress may actually serve this goal better in the real world. A prime example is Questionnaire 1, which offered a factory owner the choice between an unqualified entitlement to delivery in-kind and an entitlement to either delivery or monetary damages. The Questionnaire emphasized that the monetary award "will fully compensate you for your losses due to the delay in supplying the iron, the inconvenience of purchasing substitute iron from another importer, and the increase (in the event that there is one) in the market price of iron." It is widely acknowledged that in real life, however, some of these losses would not be compensated for.¹⁹¹ To operate smoothly, a factory must be assured that all the materials it requires for production will be delivered on time.¹⁹² Therefore, a higher-priced contract guaranteeing a right to performance in-kind on a certain date plausibly enhances the factory's wealth more than a lower-priced contract that only promises a monetary substitute.¹⁹³

But even assuming, *arguendo*, that one ought to be indifferent between in-kind and monetary remedies of equal value, it is likely that this state of affairs cannot be realized. One reason is that most people rarely, if ever, have to resort to the legal system. Since most contractual promises are not broken¹⁹⁴ and most land is not condemned, it is doubtful that we can educate the general populace to equate different remedies of equal pecuniary value. Moreover, to the extent that the law favors monetary relief, one could claim that it is continuously and unsuccessfully trying to debias us. Consider the case of eminent domain, where the landowner is almost always compensated monetarily for the expropriation of land.¹⁹⁵ Yet, as the experiment found, the respondents were still not indifferent between monetary compensation and development rights.¹⁹⁶ People's preference for in-kind redress should not—and most probably cannot—be altered by the law.

sion and Revision: A Comment on Yngvesson, 1985 WIS. L. REV. 647, 647–50; Macaulay, *supra* note 59, at 60–64.

190. See generally Henry N. Butler & Fred S. McChesney, *Why They Give at the Office: Shareholder Welfare and Corporate Philanthropy in the Contractual Theory of the Corporation*, 84 CORNELL L. REV. 1195 (1999) (explaining why investors would want their firms to make charitable donations); Ronald M. Green, *Shareholders As Stakeholders: Changing Metaphors of Corporate Governance*, 50 WASH. & LEE L. REV. 1409 (1993) (supporting a multi-fiduciary perspective, according to which corporate managers should consider the interests of many constituencies).

191. See *supra* notes 122–26 and accompanying text.

192. Bernstein, *supra* note 63, at 1755 n.135; Eisenberg, *supra* note 3, at 575–76.

193. The higher-priced specific performance contract also gives promisees-managers the bargaining power to share in the profits from future renegotiations.

194. Melvin Aron Eisenberg, *The Principle of Hadley v. Baxendale*, 80 CAL. L. REV. 563, 593 (1992) (stating that observation shows that there is generally a high rate of performance of contracts).

195. NICHOLS, *supra* note 9, § 8.02 [1].

196. See *supra* notes 49–51, 75 and accompanying text.

B. Autonomy of the Receiving Party

Although the majority of respondents revealed a strong preference for in-kind remedies and entitlements, some preferred the monetary option and some were indifferent between the two.¹⁹⁷ Such preferences may be rational and informed. For example, a person may prefer the freedom that monetary relief allows, and instead of having a damaged asset restored to its former state or receiving the performance promised in the contract, she may prefer a sum of money that can be used for a different purpose altogether. Ignoring the minority's preferences would injure their autonomy and force them to bear costs of something that they would rather do without.¹⁹⁸ Moreover, those who preferred in-kind redress may, under specific circumstances, opt for monetary relief. Thus, an owner whose property was damaged by a wrongdoer or a person who purchased a defective apartment might decide against seeking an order requiring the defendant to fix the asset. The plaintiff may doubt the defendant's ability to do the job well or be unwilling to deal with the wrongdoer. In her mind, a better solution is to receive a monetary settlement to be used to hire a third party to do the necessary repairs.

These considerations support the proposition that in-kind redress should ordinarily be optional, that is, available at the request of the plaintiff. Only in exceptional cases should we consider mandating in-kind relief as the sole remedy. A possible example is land readjustment. There are compelling reasons to allow readjustment processes to go forward even without the consent of all the affected landowners (which, if required, would grant each landowner a holdout position). Land readjustment is a particularly useful tool for addressing the needs of the landowners¹⁹⁹ and the consideration that an injured party should not be forced to deal with the person who wronged her is inapplicable here. Therefore, the advantages of bypassing negotiations with multiple landowners outweigh the possible costs to the minority of unwilling landowners.²⁰⁰

197. See *supra* Table 1.

198. For example, an unqualified right to specific performance may raise the price of the contract for the promisee, and this outcome is unjustified when she would have been satisfied with a lower-priced entitlement to expectation damages. Although the parties may negotiate a waiver of the in-kind entitlement, these negotiations also involve costs.

199. For discussion of this planning tool, see *supra* notes 177–85 and accompanying text.

200. Even with no prerequisite of formal contracts, there should not be many cases in which land readjustment would actually conflict with the preferences of the property owners. See also Davy, *supra* note 179, at 42 (asserting that although land readjustment in Germany is compulsory, “[m]ost landowners whose properties have been included in land readjustment are happy with the process”).

C. *Interests of the Giving Party*

One may accept that in-kind redress is preferable from the perspective of plaintiffs, yet contend that this benefit is offset by the excessive costs to defendants. For example, the special gain from receiving an apology in a defamation case is cancelled out, so the argument goes, by the corresponding loss to the wrongdoer who is forced to apologize.²⁰¹ The latter may prefer to pay higher damages instead.²⁰²

Indeed, a careful analysis should heed the benefits and costs to both parties. It is likely that the magnitude of the loss from the in-kind nature of the remedy varies from one case to another. At one end of the spectrum are scenarios in which there are no offsetting adverse effects on the autonomy and dignity of the giving party; at the other, there may be situations in which these adverse effects outweigh the benefits to the receiving party.

In the takings scenarios discussed in Part II.C, since the loss to the landowner results from the legitimate exercise of eminent domain powers by the state, requiring compensation in development rights rather than money involves no injury to autonomy or dignity.²⁰³ Coerced apologies are much closer to the other end of the continuum.²⁰⁴ Yet, the fact that a wrongdoer suffers a unique loss does not necessarily imply that its magnitude outweighs the benefit to the injured party. Apologies vary greatly in the extent of humiliation they involve, depending, among other things, on whether they are made privately or publicly.²⁰⁵ Generally speaking, apologies are a rather “moderate” shaming mechanism, compared to such sanctions as forcing thieves to wear t-shirts broadcasting their crimes²⁰⁶ or ordering people who urinate in public to mop the city streets.²⁰⁷

Specific performance of a contract lies somewhere in between these two extremes. Yet here, too, the degree to which the in-kind remedy conflicts with the autonomy of the breaching promisor varies significantly from case to case. For example, one can distinguish between private individuals and firms and between a contract to supply goods and a contract to render highly personal services.²⁰⁸ Accordingly, issues of auton-

201. See *supra* notes 84–88 and accompanying text.

202. Legal systems differ on the question of whether apologies can be coerced. See *supra* note 87.

203. In a similar vein, considerations of liberty and dignity do not seem material when a trespasser is ordered to return the land to its owner, instead of paying her full monetary damages.

204. See *supra* notes 84–89 and accompanying text.

205. See White, *supra* note 89, at 1297 (giving examples of particularly degrading apology ceremonies, such as “forcing drunk drivers to place their pictures in the newspaper alongside an apology”).

206. See Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 632 (1996).

207. Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 365 (1999).

208. Even legal systems in which specific performance is the primary remedy recognize an exception where a personal service is involved. TREITEL, *supra* note 124, at 47.

omy are immaterial when a merchant is required to provide the goods or services she regularly sells.²⁰⁹

In general, the argument in favor of in-kind redress does not deny the importance of conflicting considerations, such as the various interests and personal autonomy of the defendant. Rather, the aim of this Article is to offer an additional consideration in favor of in-kind remedies. The fact that people have a general preference for in-kind redress should carry weight on the choice-of-remedies scale.

D. Institutional Costs

A different argument against in-kind redress centers on the institutional costs of granting such relief. Arguably, in-kind remedies are frequently more expensive to administer than monetary ones. This important consideration is context-dependent. Consider, for example, breach of contract. While specific performance of a construction project may require very costly supervision, specific performance of a contract for the delivery of goods may actually be cheaper than enforcement of a damages payment, which may involve the seizure and sale of the breacher's assets. Specific performance also saves the court the task of quantifying damages.

The additional costs involved with in-kind redress may sometimes be reduced. For instance, the institutional costs of compensation with development rights can be decreased if the necessary zoning changes to the remainder of the parcel are not dealt with *ex post*, but rather as part of the planned expropriation process. As described above, land readjustment operates precisely in this way. Designating land for public uses (such as infrastructure) and compensating landowners through enhanced development rights are part of the same planning process.²¹⁰ In this case, it stands to reason that the additional administrative costs are at least partially offset by the money saved by not awarding cash compensation for the land taken.

CONCLUSION

This Article presented new experiments that demonstrated an inherent disadvantage of the most common form of legal redress: monetary compensation. Damages might routinely fall short of providing adequate relief even when they pertain to non-unique, easily quantifiable assets. Laypersons and businesspeople alike prefer in-kind remedies and entitlements in diverse contexts, including the choice of contractual terms, takings of property, and trespass to land. It would appear that most people derive greater utility from in-kind relief, which is perceived as re-

209. Schwartz, *supra* note 109, at 297–98.

210. See *supra* notes 178–185 and accompanying text.

addressing the situation in a way that money does not. While these findings do not necessarily outweigh conflicting considerations in the design of legal entitlements and remedies, they must not be discounted.

Many centuries ago, the Babylonian Talmud laid down that anything that is like an egg—an egg is better thereof.²¹¹ This insight is equally germane today.

211. THE BABYLONIAN TALMUD, Seder Zera'im, Berakhot, vol. 2, 44b (Shotenstein ed., 1997) (in Hebrew).