

Ownership and Exclusivity: Two Visions, Two Traditions

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Part I: Introduction

The question, ‘what is ownership?’ has been addressed through the ages, although periodically it takes on a new form. Recently, discussion of this question has revolved around the owner's right to exclude others from her property. Many theorists claim that the right to exclude is the *Punctum Archimedis* upon which the concept of ownership rests; beyond the owner's right to possess an object or to use it, the concept of ownership's major significance lies in the owner's right to exclude others and determine the terms under which they could possess or use it.²

In this Article, I seek to re-examine the relations between ownership (more precisely, private ownership) and exclusivity from a different, unusual, vantage point: a comparison between two deeply-rooted legal traditions – Anglo-American law and Jewish law.³ I argue that each of these traditions have developed distinct conceptions

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All translations are the author's own, unless otherwise specified.

² For extensive discussion see *infra*, text accompanying note 15.

³ Jewish law sources originated in the Biblical era, continued developing through the period of the Sages (just prior to and throughout the first centuries CE), and continue expanding through the present. This article does not focus on historical developments that affected the various doctrines during the various periods in which Jewish law was applied, but rather presents the overall principled picture, which is fairly consistent, as evidenced by the sources. The reason for this strategy is twofold. First, as explained below, the focus of this article is conceptual rather than a historical. Second, it seems that the cases under discussion here have resulted in relatively stable longitudinal attitudes throughout the various periods of Jewish law. The similarity in these approaches over time is greater than the differences. Beyond doubt, some changes and developments have occurred, but they lie at the margins of the general principles, which remained intact throughout thousands of years.

of the idea of ownership, including different interpretations of the concept of exclusivity. Generally speaking, while many Anglo-American sources reflect an (almost) *absolute* notion of the concept of private ownership, based on a nearly complete extraction of the idea of exclusivity, main Jewish law sources espouse a *qualified* version of the concepts of ownership and exclusivity.

I base my assessment on the following four test cases: unrequested improvement of another person's property; benefiting from someone else's property unbeknownst to the owner; performing legally binding actions in another person's property without obtaining the owner's consent; and positive duties devolving on a non-owner in favor of the owner. These cases are not of the kind usually discussed as test cases for defining the concept of ownership, which usually involves other public values relevant to the access of non-owners.⁴ In contrast, my intention here is to discuss cases which deal with various non-contractual, harmless usages on the part of non-owners with respect to owners' property (mainly, but not exclusively, related to the field of unjust enrichment), the only value at stake being the meaning of ownership and its boundaries.⁵ Each of these cases involves a kind of a crossroads, a watershed, in respect of which each of the legal traditions being examined adopted its own distinct path. In this context recurring patterns are discernible in each of the legal traditions, which are not generally addressed in legal writing. Indeed, these four doctrinal differences between the two legal traditions are derived from the basic distinct conceptions each of these bodies of law maintain regarding the ideas of ownership and exclusivity.⁶

Thus, my main methodological tool is comparative law. In this context, by "comparative law" I mean conceptual comparison between two legal systems that are

⁴ Current discussions about ownership and exclusivity focus mainly on cases such as the duty of public accommodations to serve all comers, the prohibition of discrimination in the sale or rental of residential dwellings (fair housing), and the upholding of the right to free speech in shopping centers. See *infra* text accompanying note 32.

⁵ Parenthetically, it should be noted, that the implicit assumption here is that marginal legal concepts such as unjust enrichment or agency, exercise considerable influence in defining the basic conceptions of ownership (similar to the way the law of trespass (a tort) contributes to our understanding of the boundaries of the idea of ownership). Elaboration of this assumption is beyond the scope of this article.

⁶ These four cases do not necessarily exhaust the doctrinal differences between the two legal traditions, but rather enable further discussion regarding additional examples.

not necessarily connected, historically or geographically.⁷ I believe that herein lies the real power of conceptual comparative law which enables a fresh rethinking and a reevaluation of accepted conceptions and even fundamental axioms.⁸

The choice of Anglo-American law and Jewish law as two comparable legal systems is not incidental. These legal systems represent approaches that to some extent are diametrically opposed to each other;⁹ the differences between them are principled and fundamental.¹⁰

Obviously, this does not imply that each of these legal traditions speaks in one voice; other marginal voices might be found as well.¹¹ Moreover, even with regard to the mainstream Anglo-American and Jewish approaches, the multiple exceptions developed in both legal traditions make the situation more complex and bring the two bodies of law somewhat closer to each other. Finally, we should not forget that the nature of the property in question plays a role as well.¹² However, taking all this into consideration, the fundamental starting points of both legal traditions clearly differ from one another, and, as well, the two bodies of law usually lead to different conclusions. This is precisely the added value of the conceptual comparison, placing each of the legal traditions as a mirror image of the other, thereby making the

⁷ As distinct from historical comparison between legal systems between which there was a connection in specific contexts of time and place. In its historical context the purpose of comparative law might be quite different, focusing on actual mutual influences, responses to challenges posed at particular points in time etc. Cf. David Ibbetson, *The Challenges of Comparative Legal History*, 1 COMPARATIVE LEGAL HISTORY 1, 3 (2013); 1 BOAZ COHEN, *JEWISH AND ROMAN LAW: A COMPARATIVE STUDY* xxiv (1966).

⁸ Gunter Frankenberg, *Critical Comparisons: Re-Thinking Comparative Law*, 26 HARV. INT'L L. J. 411, 447 (1985); HANOCH DAGAN, *UNJUST ENRICHMENT: A STUDY OF PRIVATE LAW AND PUBLIC VALUES* 9 (1997) [DAGAN, UNJUST ENRICHMENT].

⁹ Cf. ERNEST J. WEINRIB, *Incontrovertible Benefit in Jewish Law*, in: CORRECTIVE JUSTICE 230, 232 (2012) [Weinrib], regarding the comparative role that Jewish law has in this context: "Jewish law [is] the locus for the world's oldest uninterrupted and continuing discussion of unjust enrichment".

¹⁰ Unlike Civilian jurisdictions which, as we shall see later, represent mixed intermediate approaches.

¹¹ For softer descriptions of the Anglo-American approach towards exclusion, see *infra*, notes 33, 34. For an argument regarding a strict Jewish law notion of private property, see JOSEPH ISAAC LIFSHITZ, *JUDAISM, LAW & THE FREE MARKET: AN ANALYSIS* (2012).

¹² The law may vary slightly depending on whether the property at hand is land, chattels, intellectual property or other forms.

fundamental characteristics of each of them more pronounced than they would be if analyzed in isolation.

The expected contribution of this article is threefold. First, it exposes the latent connections between the four test cases under discussion, placing them on a single analytical continuum. The recurrent legal patterns connecting the cases has yet to be addressed (especially with regards to Jewish law which has never operated on the basis of a single clear and accepted code but rather on the basis of a vast collection of sources spanning two thousand years of writing).¹³ Second, it traces the threads that weave the various doctrines into coherent conceptions of ownership and exclusivity. Third, and most important, it presents each of the two legal systems as the reverse, mirror image of the other.

This article opens in formulating the two distinct underlying conceptions of ownership and exclusivity developed by Jewish law and Anglo-American law (Part II). Thereafter, it proceeds to analyze the four test cases, namely unrequested improvement (Part III), benefiting from another's property (Part IV), performing legally effective actions relating to another person's property without obtaining her consent (Part V), and positive duties that apply to a non-owner in favor of the owner (Part VI). Part VII concludes the study, adding some final general insights.

Part II: Two Competing Conceptions of Exclusivity

At the outset, in order to delineate the comprehensive perspective required for the following discussion, I will present the two distinct theoretical notions of ownership and exclusivity developed in Jewish law and Anglo-American law.¹⁴

Generally speaking, the common factor in all of the test cases discussed in the following parts is that they relate to a person who acts in the owner's property – sometimes by its improvement, sometimes by its exploitation, and sometimes by

¹³ For an initial analysis taking that position see R. ISAAC HERZOG, II THE MAIN INSTITUTIONS OF JEWISH LAW 54 (2nd ed. 1967) [R. HERZOG].

¹⁴ While it is true that in terms of research method the move is inductive, from the various test cases to the derivative comprehensive theory, for reasons of clarity and sharpness of my argument I prefer to begin by contrasting the theories, and then demonstrating them through detailed analysis of variety of cases.

changing its legal status – without requesting and receiving the owner’s consent. What make these cases interesting and complex are the two additional facts: a) the non-owner causes no damage to the owner’s property; in some cases he even improves it; b) the owner has not expressed her opposition to the non-owner’s actions; she simply is not aware of them while they are taking place. Some examples are: the non-owner waters his neighbor's field without having been asked to do so; he parks his car in his neighbor's unused parking space; he knows that his neighbor is trying desperately to sell her car, and unauthorizedly succeeds in selling it for her benefit to a buyer who is willing to pay a price that is in excess of its market value.

As demonstrated below, Anglo-American law assumes that every uninvited activity in the owner's property is illegitimate, even if the owner was not damaged at all or even benefitted from the action. Therefore, the stranger who knowingly chooses to act in a property he does not own should bear the costs entailed, in each case according to its unique characteristics. Jewish law, in contrast, does not attribute illegitimacy to every uninvited activity in the owner's property, provided that the owner had not expressed her opposition, and that she sustained no loss (all the more so if she gained some undeniable profit). Therefore, the stranger does not have to bear the costs of his legitimate activity, as specified below.

Further investigation of the two legal systems’ competing basic definitions of the concept of ownership can deepen our understanding of the essential difference between their outlooks.

Traditionally, the notion of ownership is envisioned to consist of (among other rights) the right to use a private asset (*ius utendi*) and the right of possession (*ius possidende*).¹⁵ Extensive recent writings have been dedicated to an additional component of ownership – perhaps the most essential one: the right to exclude, i.e. the right of the owner to decide what will happen on her property in terms of her own actions and, more importantly, the actions of others. A famous definition is Blackstone’s classical formulation of the concept of 'ownership as exclusion' i.e. "that sole and despotic dominion which one man has over the external things of the world,

¹⁵ For a comprehensive list of the various rights that comprise the concept of ownership, see, for example, Tony Honoré, *Ownership*, in *MAKING LAW BIND: ESSAYS LEGAL AND PHILOSOPHICAL* 161 (1987) [Honoré].

in total exclusion of the right of any other individual in the universe".¹⁶ Another sharp expression of the exclusion-centrism¹⁷ conception is that of Merrill: "Give someone the right to exclude others from a valued resource... and you give them property. Deny someone the exclusion right and they do not have property".¹⁸ This conception now seems to be engrained in the conventional narrative of ownership.¹⁹

Property scholars have discussed several basic questions regarding the *status* of the right to exclude.²⁰ I believe that the comparison to Jewish law can significantly enrich the discussion about the *content* of the right to exclude.²¹

¹⁶ WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND 2 (1979). See also Carol Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 604 (1998); MARY ANN GLENDON, RIGHTS TALK: IMPOVERISHMENT OF POLITICAL DISCOURSE 23 (1991); Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 280-283 (1998); Robert P Burns, *Blackstone's Theory of the "Absolute" Rights of Property*, 54 U. CIN. L. REV 67 (1985).

Cf. BGB §903: "The owner of a thing may, to the extent that a statute or third-party rights do not conflict with this, deal with the thing at his discretion and exclude others from every influence".

¹⁷ A term coined by Hanoch Dagan, *Exclusion and Inclusion in Property*, in PROPERTY: VALUES AND INSTITUTIONS 37 (2011) [Dagan, *Exclusion and Inclusion*]. Among those who associated with this approach we should mentioned JAMES E. PENNER, THE IDEA OF PROPERTY IN LAW 71 (1997) [PENNER]; JAMES W HARRIS, PROPERTY AND JUSTICE 31 (1996) [HARRIS]; Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453 (2002); Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730 (1998) [Merrill]; Ernest J. Weinrib, *Poverty and Property in Kant's System of Rights*, in: CORRECTIVE JUSTICE 263 (2012); Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS U. L. REV. 357, 371 (1954); Ripstein, *infra* note 158. See also Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982); THOMAS MERRILL & HENRY SMITH, PROPERTY: PRINCIPLES AND POLICIES I-28ff (2007) ; Henry Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691 (2012).

¹⁸ Merrill, *supra* note 17, at 730.

¹⁹ Dagan, *Exclusion and Inclusion*, *supra* note 17, at 37.

²⁰ Some typical questions are: does ownership consist of a bundle of rights, whereby the right to exclude is at the most one of many, or is the concept of ownership monistic by nature, with the right to exclude forming its key element? Does the right to exclude lie at the heart of the concept of ownership, or perhaps it is only an instrument for realizing the right to use the asset? Is the right to exclude an absolute right, or a relative one? See also Honoré, *supra* note 15; JEREMY WALDRON, *What is Private Property*, in THE RIGHT TO PRIVATE PROPERTY 26 (1988) [WALDRON]; Eric Claeys, *Property 101: Is Property a Thing or a Bundle?*, 32 SEATTLE U. L. REV. 617 (2009); Henry E. Smith, *Property is not Just a Bundle of Rights*, 8 ECON. J. WATCH 279 (2011); Penner, *supra* note 17; Ripstein, *infra* note 158;

The owner's right to exclude others contains also, and maybe especially, the right to exclude arbitrarily, with no objective justification needed other than the owner's will. The right to arbitrary exclusion, with no economic justification, represents the full extraction of the idea of private property. I argue that precisely in this regard, the two legal traditions present distinct interpretations of the right to exclude. Understanding this interpretive crossroad may shed new light on the doctrinal differences discussed below.

Many Anglo-American law sources espouse an absolute notion of the concept of ownership and the right to exclude. According to this version, the default mode is of complete, arbitrary exclusion.²² Undoubtedly, this mode can be changed by the owner's will, as the owner might allow others to act in her property according to the terms she sets. A manifestation of the owner's consent is required, however, for any such legitimate action, so as to change the default mode of complete exclusion. Given

HARRIS, *supra* note 17, at 31, 61. Among the opponents of the attempt to base the concept of ownership on the right to exclude, at least in its absolute version, we should mention C.B. Macpherson, *Liberal-Democracy and Property*, in PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 199, 201 (C.B. Macpherson ed., 1978); Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 622 (1988) [Singer, *Reliance*]; Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1996); Dagan, *Exclusion and Inclusion*, *supra* note 17. See also Avihay Dorfman, *Private Ownership*, 16 LEGAL THEORY 1 (2010); Eric R Claeys, *Exclusion and Exclusivity in Gridlock*, 53 ARIZ. L. REV. 9, 19 (2011).

²¹ Cf. Shyamkrishna Balganesh, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J. L. & PUB. POL'Y 593 (2008) who seeks to examine the content of the right to exclude (as distinct from its legal status).

²² That is not to say that there are no exceptional examples that make the Anglo-American approach somewhat more complex. For example, the public right of recreational hunting and fishing on shorelines and on the water surface by persons other than riparian owners (see 9 RICHARD R POWELL, POWELL ON REAL PROPERTY, §64A.05[3][a] (2000) [POWELL, PROPERTY]). Another example involves a former law in several states that required a landowner who does not want his neighbor's roving cattle to roam on his property, to enclose his land with a fence. Today, however, owners are required to control their own cattle, and a roving cattle indeed could constitute trespass (see POWELL, PROPERTY §64A.01[4]). Such examples are the basis of Larissa Katz' argument. See *infra* text accompanying note 34. Yet, according to many scholars, such exceptions do not change the overall picture. Cf. KEVIN GRAY & SUSAN F GRAY, ELEMENTS OF LAND LAW 1330 [10.6.2] (5th ed, 2009): "Orthodoxy has thus tended to support a fairly universal facility of preemptory and arbitrary exclusion... For some the 'arbitrary exclusion' rule merely effectuates an outdated concept of untrammelled proprietary power".

this default status of exclusion, even if the owner sustains no loss, every uninvited activity of another person in the owner's property is considered trespass, which required its initiator to bear all associated costs. Such an approach strongly emphasizes the characteristic of *control* within the concept of ownership.²³

Jewish law, in contrast, suggests a qualified version of the concept of ownership and the right to exclude. It distinguishes between arbitrary exclusion and exclusion that has a logical reason (such as economically-driven exclusion). As long as the exclusion of the stranger is economically justified, as for instance where the stranger's action is likely to cause damage to the owner or prevent him from profits, the premise is exclusion of the non-owner; the owner does not need to inform the stranger that she activates the right to exclude. On the other hand, when no economic justification exists for excluding the stranger, e.g., when his action is not expected to cause any loss to the owner (and all the more so if it is expected to profit the owner or to improve his asset), then the stranger's activity is legitimate by default. This approach introduces a more toned-down moderate characteristic of *sharing* into the concept of ownership. Yet even in such a case, when the default mode has shifted, the owner can choose to realize her ownership and arbitrarily excluding the stranger with no reason. She has the right to order the unrequested improver to refrain from improving her property or to command the beneficiary to leave the invaded land at once. However, in this case, the owner must act to initiate the arbitrary exclusion of the stranger, thereby altering from the default mode.

It is of value to give a jurisprudential formulation of the fundamental difference between the Anglo-American interpretation of the right to exclude and the Jewish alternative interpretation. From a jurisprudential point of view, it seems that Anglo-American law understands the right to exclude as a *passive* right,²⁴ that is to say the owner has a right that strangers will not intervene with her property. There is no need for the owner to take any special action in order to exclude others, quite similar to the rights of life and integrity of body. However, according to Jewish law, the right to exclude is an *active* right, i.e. it means that the owner has a right to require strangers

²³ See DAGAN, UNJUST ENRICHMENT, *supra* note 8, at 25.

²⁴ For the distinction between active and passive rights see David Lyons, *The Correlativity of Rights and Duties*, 4 NOÛS 45, 48 (1970). This distinction should not be confused with the distinction of positive and negative rights, which discussed below in Part VI.

not to intervene with her property, but this right depends on active demand of the owner just like other privileges and powers which she can actively exercise. Only in a cases of logical exclusion (threat to the owner's interests) does Jewish law assume the obvious objection of the owner to the non-owner's intervention, and therefore does not require additional active exercise of her right to exclude others.²⁵

As will be explained later, these distinct conceptions of ownership and exclusivity illuminate the four doctrinal differences between Anglo-American law and Jewish law as will be analyzed below.

The difference between the two competing understandings of the idea of property is undoubtedly rooted in a much broader difference that relates to the general socio-economic ethos of society. The language of Jewish law consists of values that belong to the semantic field of brotherhood and friendship (“you shall love your neighbor as yourself,”²⁶ “your brother may live beside you”²⁷) collective solidarity, and interpersonal responsibility (“you shall not stand up against the life of your neighbor”²⁸), while emphasizing the role of community.²⁹ One of its implications can be found indeed in the conception of private property, which contains the aforementioned characteristic of *sharing*.³⁰ This outlook differs significantly from the Anglo-American ethos, at the core of which lie bourgeois virtues that include individual negative liberty, independence, entrepreneurship, self-reliance, and of course private property.³¹ The objective of shielding an individual from the power of

²⁵ The *active-passive right* distinction might also be found very productive with regard to many other aspects of the law. Due to space limitations, I had to leave its elaboration for another time.

²⁶ Leviticus 19: 18 (all biblical translations are taken from the English Standard Version).

²⁷ Leviticus 25: 36.

²⁸ Leviticus 19: 16.

²⁹ See, for example, Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J.L. & RELIG 65 (1987).

³⁰ This line of thinking can be further expanded, in a way that exceeds the scope of this paper. For example, the inter-connections between Jewish socio-economic ethos and its theological roots call for more elaboration. An additional question I hope to deal with in a different paper is whether the distinctive features of Jewish property law apply universally, or whether they only apply between members of the Jewish community.

³¹ See JENIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* (1990); HERBERT MCCLOSKEY & JOHN ZALLER, *THE AMERICAN ETHOS: PUBLIC ATTITUDES TOWARD CAPITALISM AND DEMOCRACY* (1984).

other individuals (or the collective) leads the Anglo-American doctrine to concentrate primarily on protecting the owner's *control*.

My argument regarding the Jewish law approach to the right to exclude should be distinguished from another argument raised by several contemporary scholars regarding the right of non-owners to inclusion.³² Today it is well accepted that there are number of situations in which owners must provide strangers with a right of access to their property, even against their own will. Examples include the duty of public accommodations to serve all comers; the notion that fair use of copyrighted work is not an infringement of copyright; the prohibition of discrimination in the sale or rental of residential dwellings (fair housing); the practice of granting non-owners access to property when it is necessary to prevent serious harm; and the upholding of free speech access in shopping centers. Yet, these situations by definition belong to an entirely different category of cases, in contrast to the ones discussed in this paper. These latter situations are characterized by the existence of other external values – like equality, freedom of speech, or sanctity of human life – that prevail over the value of private property.³³ Hence, in these situations, the non-owners can *force* their access to the property even *against* the owner's explicit will. In contrast, in this paper I deal with situations in which the only reason for allowing the non-owners to act in the owner's property is the absence of loss to the owner. Here the discussion is about the meaning of property per se (i.e. its meaning when there is no threat of it being damaged) and not about its relations with other external values.

³² Singer, *Reliance*, *supra* note 20, at 675; Joseph W. Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1995-1996); HARRIS, *supra* note 17, at 33; Dagan, *Exclusion and Inclusion*, *supra* note 17.

³³ Several possible explanations exist for the aforementioned cases in which the right to inclusion is granted to non-owners. There are those who explain these cases as stemming from the considerable weight granted to public law norms (i.e., freedom of speech, equality), which at times surpass private law and the right to ownership. Others, however, argue that such social-constitutional values are part of the concept of ownership itself. See, for example, on the one hand Ripstein, *infra* note 158, at 160: "The public law limitations and permissions to expropriate are instances of the "vertical" relation between the state and citizens, rather than of the "horizontal" relations between private persons," and on the other hand Dagan, *Exclusion and Inclusion*, *supra* note 17, at 55: "Exclusion and exclusivity, therefore, are often limited and at times superseded by the claim of potential entrants to be included... Property turns out to be about both exclusion and inclusion."

An interesting argument, which may further complicate matters, appears in Katz' analysis of the common law conception of ownership. If Katz is right then the two traditions (Jewish law and Anglo-American law) may actually be much closer to one another.³⁴ Based on her distinction between exclusion and exclusivity, Katz argues that the common law conception of ownership relates to the owner's "special authority to set the agenda for a resource",³⁵ rather than her right to exclude non-owners. The owner is not necessarily a gatekeeper but rather an agenda setter. Hence, provided that the non-owner does not interfere with the agenda set by the owner he should not be excluded.³⁶ At first blush, this approach resembles the qualified interpretation Jewish law gives to the right to exclude as described above. However, further examination shows that in fact Katz's claim is more far-reaching than the qualified view of Jewish law. According to Katz, in a case of harmless trespass which does not contradict the owner's agenda for the resource, not only is the exclusion of the non-owner not automatic, but rather it is not even possible, even if the owner explicitly seeks to exclude him.³⁷ Such a position finds no echo in the mainstream approach of Jewish law,³⁸ despite its restricted conception of the right to exclude. Throughout this article I will adhere to the more commonly accepted understanding of ownership in Anglo-American law, which emphasizes, one way or another, the owner's right to exclude.³⁹ This serves to highlight and hone the essential differences between the conceptions developed in the two traditions. However, other scholarly approaches to Anglo-

³⁴ Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275 (2008) [Katz]. See also Larissa Katz, *Spite and Extortion: A Principle of Abuse of Property Right*, 122 YALE L.J. 1444 (2013).

³⁵ Katz, *supra* note 34, at 290.

³⁶ For example see *Dwyer v. Staunton*, [1947] 4 D.L.R. 393 (Where a public road becomes impassable, i.e. due to snow and ice, etc travelers are entitled to pass through adjoining private land). On the other hand cf. *Jackue v. Steenberg Home Inc.*, 209 Wis.2d 605 (1997) (significant punitive damages for harmless trespass). See also *infra* note 119.

³⁷ "Harmless trespass cases do not protect owners where they purely seek vindication of exclusionary rights and where integrity of agenda-setting authority is not also at stake. Where the owner seeks to exclude for no reason at all, she does not advance an agenda worth protecting. Her desire to exclude others cannot, on its own, justify protection against harmless trespass in the form of an injunction or punitive damages" (Katz, *supra* note 34, at 305)

³⁸ But cf. note 107.

³⁹ Katz admits that there is considerable number of cases in this direction. See, for example, Katz, *supra* note 34, at 301 note 78.

American law, which place more weight upon the limits and restrictions of the right to exclude, might find a greater degree of common ground in the consistent and coherent way that Jewish law coped with this issue.

Placing the two theories of ownership opposite each other allows us to proceed to examine them in light of the various relevant test cases.

Part III: Unrequested Improvement

The Case

A person improves another's property – he waters his neighbor's field or installs a new engine in his friend's broken car – without having been asked by the owner to do so; in fact, the owner was not aware of the act while it was taking place. Is the improver entitled to claim remuneration for the expenditures he undertook in the act of improvement? On the one hand, the owner did not ask for the improvement – neither explicitly nor implicitly – and therefore there is no contractual basis for the claim. On the other hand, ultimately, the owner's property was improved at the improver's expense; is it not right to compensate the improver for this outcome?

Such cases highlight the fundamental tension between the owner's freedom to determine the use of her own property independently and the idea of preventing enrichment at someone else's expense. According to Weinrib, at this intersection lies a principled difference between Jewish law and common law.⁴⁰ Generally speaking, Anglo-American law considers the unrequested improver to be a volunteer, and potentially even an "officious intermeddler."⁴¹ As such, he is not entitled to any remuneration.⁴² In contrast, Jewish law emphasizes the prevention of the owner's enrichment at the improver's expense, and hence the latter is entitled to recovery of his expenditures.

⁴⁰ WEINRIB, *supra* note 9. For a comprehensive comparison with civilian jurisdictions see Dirk A.Verse, *Improvements and Enrichment: A Comparative Analysis*, 6 RESTIT. L. REV. 85 (1998) [Verse].

⁴¹ 2 GEORGE E. PALMER, *THE LAW OF RESTITUTION* § 10.1, at 359 (1978) [PALMER, RESTITUTION].

⁴² In this analysis, of course, the nature of the improved property – e.g., whether it is land, chattel, or intellectual or other property – has some impact as well.

Unrequested improvement is a complex and multifaceted issue, replete with a wide range of parameters and considerations. I wish to concentrate on a very specific case that enables us to most substantively refine the principled question, placing aside other subsidiary concerns. The ultimate test case at bar has three main characteristics.

First, we deal with a case of irreversible improvement, such as watering a field or painting a house. The situation might be changed if the improvement is reversible, like planting a tree or constructing a temporary dwelling on the owner's land. If the owner can in principle demand that the improver restore the property to its prior condition, and nonetheless the owner chooses to leave the situation as it is, then one can argue this represents the owner's own retrospective choice to maintain the improvement. Such a free-willed, retrospective acceptance might establish the owner's duty to remunerate the improver. In contrast, in the case of irreversible improvement, the owner cannot be considered to have chosen to maintain the improvement (for she has no option to demand its removal); hence, it is much harder to establish an owner's duty to indemnify the improver.⁴³ As I shall demonstrate later on, the principled difference between Anglo-American law and Jewish law finds its expression in both cases – reversible improvements and irreversible improvements – but the latter case presents the sharpest dilemma regarding whether the owner must pay for improvement she did not ask for, neither *ex ante* nor *ex post*.

Second, we deal with an improver that knowingly takes action in a property that is not his own, without asking for the owner's consent. This is unlike cases where the improver mistakenly and in good faith believes that he owns the property. As we shall see, when the improver honestly believes that he owns the asset, Anglo-American law tends to classify his acts as an exception justifying remuneration. In contrast, the case of an improver who is fully aware of the fact that he improves someone else's property raises a much more complicated question of entitlement to remuneration.

Third, we deal with an improvement that is classified as *incontrovertible benefit*, i.e., subjective devaluation is impossible and the owner cannot claim that for her, subjectively, there has been no improvement. A benefit is considered incontrovertible when it is proven that this particular owner herself probably may have made the same

⁴³ There are intermediate cases in which the improver can return the owner's property to its prior condition, yet through this process the improvement would be destroyed and could not be useful any more by the improver. See *infra* note 65.

improvement at the same costs.⁴⁴ Needless to say, proving a benefit to be incontrovertible is not a simple task.⁴⁵ But the evidential difficulty does not undermine the principled argument regarding unrequested improvement that the owner can neither deny nor refuse to take account of its usefulness.

The following example could illustrate the accumulation of the three characteristics: Two different owners of two adjacent office buildings each pay a cleaning service company to clean the windows of their own respective office building once a month. On one occasion, the owner of one of the buildings discovered that the owner of the neighboring building has left town without ordering the services of the cleaning company. Hence, he paid the company for shining the windows of his neighbor's building as well. This improvement is irreversible, the improver is fully aware that he acts in his fellow's property, and given the owner's habit of ordering the cleaning service every month, window cleaning would apparently be considered an incontrovertible benefit. Is the owner who acted of his own free will to improve his neighbor's property entitled to be recovery by the owner of the building who went out of town?⁴⁶

Anglo-American Law

As mentioned above, English law sees the unrequested improver as a volunteer, and at times even worse: as *mala fide* tortfeasor. If the improver is aware of the fact that he acts in his fellow's property, he should realize that he takes the risk that the owner will not remunerate him for an action or benefit that the owner did not request. Chief

⁴⁴ A more complicated situation arises when it is only proven that a reasonable owner under the same circumstances would have acted in the same manner. For this subtle distinction, see WEINRIB, *supra* note 9, at 253.

⁴⁵ See also Verse, *supra* note 40, at 90.

⁴⁶ Another typical example was discussed a few times in English cases, whereby a trespasser dug up coal in the owner's mine, bringing the coal to the pit's mouth. Ought the owner remunerate the miner for the digging and transportation, which improved his property? See Paul Matthews, *Freedom, Unrequested Improvements, and Lord Denning*, 40 CAMBRIDGE L.J. 340, 341, 351 (1981) [Matthews].

Baron Pollock aptly stated this notion in his famous words: "One cleans another's shoes. What can the other do but put them on?"⁴⁷

Furthermore, early English case law determined that even if the improver mistakenly thought he owned the object improved, he would still not be entitled to remuneration, since "[I]abilities are not to be forced on people behind their backs, any more than you can confer a benefit upon a man against his will."⁴⁸ However, this position was later softened, and with regard to a good faith improver, Lord Denning held that "it is very different when he honestly believes himself to be the owner of the property and does the work in that belief."⁴⁹

A similar structure can be found in American law.⁵⁰ In general, "There is no liability in restitution for an unrequested benefit voluntarily conferred."⁵¹

Some exceptions have been fixed to this rule.⁵² For instance, in rescue cases involving an emergency action undertaken by the intervener in order to save his fellow, the intervener is entitled to recovery for his expenditures.⁵³ Older cases have been hesitant to expand this exception also to cases of actions protecting property, considering the property rescuer as a volunteer who is not entitled to restitution.⁵⁴ Yet recently,

⁴⁷ Taylor v. Laird, 25 LJ Ex 329, 332 (1856). See also Morgan v. Powell, 3 Q.B. 278 (1842); 114 E.R. 513, 515; GRAHAM VIRGO, THE PRINCIPLES OF THE LAW OF RESTITUTION 68 (2nd ed. 2006) [VIRGO]; PETER BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION 113-114 (1989).

⁴⁸ Bowen L.J. in Falcke v. Scottish Imperial Insurance Co., 34 Ch.D. 234, 248 (1886).

⁴⁹ Greenwood v. Bennett, [1972] 3 All E.R. 586 (an owner who got back his stolen car has to indemnify a good faith buyer who, after buying the car, invested a considerable amount in fixing it). For a critical discussion see Matthews, *supra* note 46, at 351. See also Munro v. Willmott [1949] 1 K.B. 295. This distinction was accepted later by English legislation. See TORTS (INTERFERENCE WITH GOODS) ACT 1977, §6(1).

⁵⁰ PALMER, RESTITUTION, *supra* note 41, at 357.

⁵¹ RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 2(3) (2011). Cf. Indiana Lumbermens Mut. Ins. Co. v. Reinsurance Results, Inc., 513 D.3d 652 (7th Cir. 2008).

⁵² See Ariel Porat, *Private Production of Public Goods: Liability for Unrequested Benefits*, 108 MICH. L. REV. 189, 195 (2009-2010) [Porat, *Public Goods*].

⁵³ RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT §20 (2011). Cf. HANOCH DAGAN, THE LAW AND ETHICS OF RESTITUTION 86 (2004) [DAGAN, RESTITUTION].

⁵⁴ Glenn v. Savage, 13 P. 442, 443 (Or. 1887); PALMER, RESTITUTION, *supra* note 41, §10.3 at 369.

restitution claims have expanded, and are now upheld also in regard to protecting property.⁵⁵

The more relevant exception, which overlaps with the aforementioned English distinction, is the case of mistaken improvement. In such cases, the improver is entitled to recovery of the benefits that he had mistakenly transferred.⁵⁶

This Anglo-American distinction – between the improver who acts with intent to improve another’s property and the one who does so mistakenly – might seem a bit odd. It creates a "paradoxical position of aiding one who acted in his own interest [mistaken improvement] while denying aid to one who acted from the generally more laudable motive of protecting the interest of another [intentional improvement]."⁵⁷ However, the resolution of this paradox lies in the insight that the law finds the *intention* of performing an action in another person’s property to be more problematic than the actual act of doing so. The improver's intent to take action with regard to his fellow's property without being asked to do so makes the violation of the owner’s autonomy much more severe than the mere action itself. Therefore, improvement that

⁵⁵ Sparks v. Gustafson, 750 P.2d 339 (Alaska 1988); RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT §21 (2011). A difference seems to exist between English law and American law regarding the question of whether a finder who cares for goods ultimately returned to their owner is entitled to recovery of the value of his services. In American case law, the finder tends to be entitled to recovery (although some dissent has existed from such holdings). See Chase v. Corcoran, 106 Mass. 286 (1871). However, under English law, it seems that the finder cannot recover. See Alfred T. Denning, *Quantum Meruit: The Case of Carven-Ellis v. Canons Ltd.*, 55 L. Q. REV. 54, 58 (1939). See, for example, Nicholson v. Chapman, 2 H. Bl. 254, 126 Eng. Rep. 536 (C.P. 1793): "perhaps it is better for the public that these voluntary acts of benevolence from one man to another, which are charities and moral duties, but not legal duties, should depend altogether for their reward upon the moral duty of gratitude"; Jebara v. Ottoman Ban [1927] 2 K.B. 254, 270-271. See also PALMER, RESTITUTION, *supra* note 41, § 10.3 at 372.

⁵⁶ Challenge Air Transp., Inc. v. Transportes Aereos Nacionales, S.A., 520 So.2d 323, 324-25 (Fla. Dist. Ct. App. 1988); RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT §§ 9-10 (2011); Andrew Kull, *Mistaken Improvements and the Restitution Calculus*, in UNJUSTIFIED ENRICHMENT: KEY ISSUES IN COMPARATIVE PERSPECTIVE 269 (Johnston & Zimmermann eds. 2002); DAGAN, RESTITUTION, *supra* note 53, at 80. Similar to English law (see *supra*, text accompanying note 48), under American law as well, this exception is a result of a late development, while historically, the improver was not entitled to payment – even if he acts mistakenly. See PALMER, RESTITUTION, *supra* note 41, § 10.9 at 435.

⁵⁷ PALMER, RESTITUTION, *supra* note 53, §10.1 at 362

results from a mistake in the property's identification justifies greater protection of the improver's interest than informed improvement of another's property does.

Jewish Law

Such questions were discussed in Jewish law sources ever since the Mishnaic and Talmudic periods.⁵⁸ From a variety of relevant issues, I choose to concentrate on one: whether the owner must remunerate the improver for unrequested improvement, or whether she may leave the improvement in her possession without paying the improver.

The early sources mainly discussed cases of reversible improvement, such as constructing or planting in the owner's land. In this context, it was determined, that "if one enters his neighbor's field and plants it without [asking for] permission," the owners must remunerate the planter.⁵⁹ The complicated questions of how to determine the compensation sum or how to decide of whether the action of planting has truly improved the owner's land are beyond the scope of this article. Generally, however, Halakhic authorities agree that as long as the improvement remains in the owner's possession, she must remunerate the improver.⁶⁰ Among the sages, the option that an owner would benefit from an improvement without paying for it was inconceivable. Yet many Halakhic authorities have pondered the question of whether the owner has

⁵⁸ The Mishnah is a collection of laws compiled by Rabbi Judah the Prince around the end of the second century CE, which codifies the Halakhic work of the sages of the Land of Israel from the first century BCE through the time of Judah the Prince. The Talmud is a commentary on the Mishnah comprised of the discussion of the sages in the centuries following the Mishnah's completion. The Jerusalem Talmud was concluded in the fourth century CE, and the Babylonian Talmud was concluded at the end of the fifth century CE.

⁵⁹ Tosefta, Bava Kamma 10, 6-7; Tosefta, Ketubbot 8, 9-10; Bavli, Bava Metsia 101a. Translations of Mishnaic and Talmudic sources are based on the Soncino Edition with certain modifications. For the final Halakhic ruling, see Mishneh Torah, Law of Robbery and Lost Property 10, 4-11; Shulhan Arukh, Hoshen Mishpat 375, 6. For detailed discussions, see WEINRIB, *supra* note 9; R. HERZOG, *supra* note 13, at 50; JONATHAN BLASS, *Building and Planting on Another's Property*, in UNJUST ENRICHMENT 159 (1991); TALMUDIC ENCYCLOPEDIA, s.v. *yored lenikhsey haveru*, Vol. 23, 416 [TALMUDIC ENCYCLOPEDIA]; SHALOM ALBECK, THE LAW OF PROPERTY AND CONTRACT IN THE TALMUD 179 (1976, Hebrew) [ALBECK].

⁶⁰ The relevant sources discuss how to determine that this is truly an improvement and how to assess the amount of payment owed.

the right to demand that the improver remove the improvement (at his own expense), thereby restoring the *status quo ante*.⁶¹ Ultimately, both Maimonides (1125-1204, Spain – Egypt) and Rabbi Joseph Karo (1488-1575, Spain – Land of Israel) ruled that the owner is not bound to remunerate the improver, for she has the choice of either maintaining the trees planted and paying the planter or requiring the planter to “[p]ull up your trees and go away.”⁶² The reasoning is as follows: "an individual cannot be compelled [to have her land] built or planted."⁶³

In a much later period, Halakhic authorities developed the distinction between reversible improvements – such as those already mentioned in the Talmud discussed just above – and irreversible improvements. According to Rabbi Yaakov Lorberbaum (1760-1832, Poland), the owner may choose not to compensate the improver:

only in such cases that [the planter] can remove the trees... and therefore [the owner] can tell him 'I do not want this benefit...'. But when the thing cannot be removed, as for instance when the owner's wool was dyed and no possibility exists to remove the dye, the owner must pay.⁶⁴

⁶¹ For a comprehensive review of the various approaches, see TALMUDIC ENCYCLOPEDIA (*supra* note 59), at 471-476.

⁶² In the words of Maimonides, Mishneh Torah, The Laws of Robbery and Lost Property 10, 5 (English quotations of Mishneh Torah are taken from the Yale University Press edition, 1954). Cf. Shulhan Arukh, Hoshen Mishpat 375.

⁶³ In the words of Rabbi Menahem Meiri (1249-1315, Provence), Bet Habhira, Bava Metsia 101a s.v. *lo nitpayes*.

⁶⁴ Rabbi Yaakov Lorberbaum of Lissa, Netivot Hamishpat, Be'urim, 375, 2. This distinction could be found already in Rabbi Joseph Trani (1568-1639, Land of Israel-Constantinople), Responsa Maharit, Part 1, 106. It could also be derived from the following ruling of Rabbi Moses Isserles (1520-1572, Poland):

Reuben owned a dilapidated house and left town, and Simeon came in and lived in the house, and spent money to save the house from collapsing, and whitewashed and painted the house. Reuben has to pay Simeon for all what was needed for saving the house from collapse, but he does not have to pay him for whitewashing and painting the house, since he [=the owner] can argue: I do not need that (Rema, Hoshen Mishpat 375, 7).

Whitewashing and painting the house are irreversible improvements. This ruling argues that the owner is not obliged to indemnify the improver for these improvements since he can deny their necessity. We

Later on, one of the prominent authorities of the twentieth century, Rabbi Abraham Yeshaya Karelitz (1878-1953, Belarus-Israel), expressed a similar idea.⁶⁵ Thus, according to major Halakhic authorities, when the improvement is irreversible (as well as incontrovertible), the improver is entitled to restitution.

It goes without saying that the Halakhic authorities must establish limitations for this doctrine, for otherwise every individual might initiate improvements of his neighbor's property and force the neighbor to pay for them against her will.⁶⁶ This may be too severe a blow upon the idea of private property. How, then, can the notion of private property be safeguarded, protecting owners from unrequested interventions?

First, various sages have stated that the owner has a right to oppose in advance any act of improvement. If the owner has warned the improver not to make any change in her assets, and nonetheless the person warned proceeded to make the improvement, the owner is exempt from remunerating the improver.⁶⁷

can therefore conclude that the mere irreversibility of these improvements does not of its own merit exempt the owner from the duty of remuneration.

⁶⁵ Hazon Ish, Bava Kamma 22, 6. But see *ibid* Bava Batra 2, 6. An interesting difference exists between the positions of Netivot Hamishpat and Hazon Ish. Both agree that planting trees is considered a reversible improvement, since the improver can uproot the trees, restoring the *status quo ante*, and plant the trees elsewhere. They also agree that dyeing the owner's wool should be considered an irreversible improvement, since the dye cannot be removed. But what would be the law regarding digging pits for planting? On the one hand, the improver can fill in the pits, thus returning the land to its prior condition, and therefore this act should be considered a reversible improvement. On the other hand, the improver cannot "transfer" the pits to his place; thus, filling in the pits reflects a total loss of the improver's expenditures, which might merit classifying his action as an irreversible improvement. According to Netivot Hamishpat (Be'urim 306, 7), digging pits is considered to be an irreversible improvement, as is dyeing the owner's wool, whereas the Hazon Ish (Bava Kamma 22, 6) considers this act to be a reversible improvement, similar to planting trees.

⁶⁶ "[T]he easiest way to ruin someone is to enrich him" (Verse, *supra* note 40, at 87, quoting G Pacchioni).

⁶⁷ Cf. Responsa Rashba, Part 4, 54: "all the more so when he went and planted after the field's owner warned him [not to do so]. In such a case, certainly everyone agrees that the owner can say: 'remove your trees and stones', so that a person will not be able to force his fellow to build and plant [on his own land]"; Rabbi Aaron Sasson (1550-1626, Constantinople), Responsa Torat Emet 224: "All that was written by the Talmud and Halakhic authorities refers to one who enters his neighbor's field and plant it without [asking for] permission; but if the owner protested and said to his fellow, 'you should not build,' it seems to me obvious that the owner can tell him, 'remove your trees and stones.'"

Moreover, the owner can always argue that the improvement is undesirable from her subjective perspective, either for reasons of personal preference⁶⁸ or given limited economic abilities.⁶⁹ It seems that burden of proof should be imposed on the improver, who will have to prove that the act indeed yielded an improvement for this specific owner under these specific circumstances.

The Source of Difference between the Legal Systems

The practical difference between Jewish law and Anglo-American law is quite clear in the case of an irreversible improvement. It is hard to overlook the profound difference between Rabbi Lorberbaum's ruling, which obligates the owner to indemnify the person who dyed her wool even though she did not ask him to do so, and Pollock's ruling that the owner does not have to indemnify a person who cleaned his shoes since she was not asked to do so.⁷⁰

But this difference finds its expression also in the case of reversible improvement.⁷¹ Jewish law prohibits an owner from enjoying the best of both worlds, i.e. maintaining the improvements without paying for them; the owner must decide whether to demand from the improver to remove the improvement (at his own expense) or to maintain the improvement and indemnify the improver. In other words, Jewish law is committed to ensuring that the owner will not enrich himself at the improver's expense, even though the improver was the one who initiated the improvement. In contrast, under Anglo-American law, the owner owes nothing to the improver, who was acting of his own volition. The owner must neither remunerate the improver, nor must she demand the removal of the improvement. She may simply continue sustaining the new situation, benefiting from the unrequested improvement she received.⁷²

⁶⁸ Cf. Rabbi Menahem Meiri (Bet Habbira, Bava Metsia 101a s.v. *hayored*): "all of the courtyards are suitable for construction... however, [the determination as to whether this specific construction should have taken place] seems to depend upon our assessment of this individual owner. And it may be the case that depending on the place and other circumstances, there may be lots that are not suitable for construction."

⁶⁹ Hazon Ish, Bava Kamma 22, 6.

⁷⁰ Cf. *supra* text accompanying note 47.

⁷¹ WEINRIB, *supra* note 9, at 259.

⁷² It seems that continental legal systems adopted an approach that lies midway between English law and Jewish law. Similar to English law (and unlike Jewish law), also in Italy, Germany and France the

This fundamental difference is summarized by Weinrib:

In the eye of the common law, this solicitude for the improver seems misplaced. By planting trees in what he knew was another's field, the improver was the most unappealing of restitutionary claimants, a mere volunteer or officious intermeddler.⁷³

In contrast, from the perspective of Jewish law, letting the owner become enriched at the improver's expense seems inconceivable.⁷⁴ What could explain such a principled difference between the two legal traditions?

It is tempting to try to explain the Jewish law approach having resort to efficiency considerations. An improvement would be perceived as economically desirable if the value of its result exceeds its costs, and it would be considered undesirable if its performance is more expensive than the value its results yield. How can we motivate the improver to decide to perform efficient improvements and avoid inefficient ones? We can achieve this optimal balance by causing him to internalize the positive externalities of his actions, i.e., by obligating the owner to indemnify the improver, while limiting the maximum amount of payment to the value of the improvement.⁷⁵ In other words, by imposing on the owner a duty of restitution, Jewish law incentivizes potential improvers to perform efficient improvements only.

However, I do not believe that this kind of economic explanation indeed yields a better understanding of the Jewish law approach. Another important premise of the economic analysis is that a voluntary transaction is more efficient, and therefore

distinction between a *mala fide* improver (who made the improvement of another's property knowingly) and a *bona fide* one (who made such an improvement mistakenly) is well accepted, found already in classic Roman law (Celsus D 6, 1, 38). But unlike English law (and similar to Jewish law), in the case of a *mala fide* improver, the owner has the choice of whether to maintain the improvement and pay for it or to demand from the improver to remove the improvement (at his own expense). See CODE CIVILE [C. CIV]. art. 555 (Fr); CODICE CIVILE [C.C]. art. 936 (It). For extensive discussion of German law, see Verse, *supra* note 40, at 90, 101.

⁷³ WEINRIB, *supra* note 9, at 259.

⁷⁴ Cf. R. Herzog, *supra* note 13, at 52: "The underlying principle of Jewish law would seem to be that one must not enjoy the fruits of another man's work or expense without due payment, while English law looks for the contract-element... The important point is not whether I benefit by such work or expense, but whether I meant to be liable for it".

⁷⁵ See Porat, *Public Goods*, *supra* note 52.

desirable, than a forced transaction. From the economic perspective, even if the improvement is indeed efficient, it is much preferable to achieve it through negotiations of both parties rather than a unilateral move of the improver.⁷⁶ Therefore, in the case of improvements that can in principle be based on consensual agreement, it is unnecessary to incentivize the improver to act unilaterally.⁷⁷

Hence, what is the fundamental difference between the two legal traditions? In Weinrib's opinion, both legal systems share a similar *individualistic* starting point, according to which the legitimate expectations of the improver should be legally protected, but they differ regarding the definition of his legitimate expectations.⁷⁸ Under Anglo-American law, individualism resides in the institution of property. Since the improver knows that the owner is the only person who has the right to determine the future of her property, then, from his perspective, improving the owner's property without being asked to do so cannot raise a justified expectation for remuneration (and any such expectations simply comprise wishful thinking). Hence, the improver should be treated as no more than a volunteer. Jewish law, in contrast, focuses on the absence of evidence of a donative intent on the part of the improver. Hence, it avoids ascribing him any altruistic intention, but rather sees him much more realistically as one who expects to be paid for his contribution to the owner's property. According to Rabbi Shlomo ben Aderet's formulation (1235-1310, Barcelona): "Simply because someone entered another's field and planted there without securing the owner's consent cannot lead us to conclude that his intention was to give a gift, in regard to the field owner's obligation to indemnify".⁷⁹ Whereas under English law the improver's

⁷⁶ Cf. *Indiana Lumbermens Mut. Ins. Co. v. Reinsurance Results, Inc.*, 513 D.3d 652 (7th Cir. 2008, Posner J.): "When voluntary transactions are feasible (in economic parlance, when transaction costs are low), it is better and cheaper to require the parties to make their own terms than for a court to try to fix them."

⁷⁷ This differs from cases in which no possibility for a contractual relationship exists between the owner and the improver, such as cases involving public goods, with regard to which Ariel Porat believes we should consider incentivizing the improver to unilaterally perform efficient improvements. See Porat, *Public Goods*, *supra* note 52.

⁷⁸ WEINRIB, *supra* note 9, at 244.

⁷⁹ *Hiddushei ha-Rashba*, Nedarim 33b. Rabbi Moses Isserles advocated a similar approach in *Rema*, *Hoshen Mishpat* 264, 4: "Regarding any person who does an action in favor of his fellow or benefits him, [the owner] cannot say to him 'you did it for me gratuitously because I did not ask you to do it,'

awareness of the fact that the property does not belong to him thwarts his claim for restitution, in Jewish law this awareness actually reinforces it.⁸⁰

However, I doubt if the concept of individualism truly advances us significantly towards a better understanding the root of the difference between these two legal traditions. In order to show how individualism can explain simultaneously both the English and the Jewish approaches, which contradict each other, two distinct understandings of the notion of individualism must be developed; it is insufficient in this regard to merely note two potential implementations of individualism as a result of differing focus (i.e., on the improver's expectation to be remunerated versus the improver's knowledge that the object does not belong to him). Furthermore, the question of what a reasonable improver would expect – to act voluntarily or to be compensated – is not an empirical question that depends on one's perspective, but rather reflects a normative question: is the unrequested improvement action legitimate, hence justifying expectation for remuneration, or rather is it none other than trespass, which at best could be considered a voluntary action? Weinrib's argument therefore highlights the point requiring explanation, but the need remains to clarify the way in which each of the legal traditions interprets the concept of ownership and thus differently evaluates what the improver can legitimately expect.

The differentiated notions of ownership and exclusivity discussed above clarify the contrasting doctrinal approaches to the consequences of unrequested improvement. According to Anglo-American Law, the non-owner's exclusion is the default option (a *passive* right to exclude); accordingly, as long the improver knowingly chooses to act in a property he does not own he violates the owner's proprietary right, and should therefore bear the costs entailed. In other words, he is not entitled to payment for his contribution and has no legal basis for an expectation of remuneration.⁸¹ Jewish law, by contrast, sees the improver's action as legitimate, since the owner was not

but rather [the owner] must give him his remuneration" (both translations are based on WEINRIB, *supra* note 9, at 244, with a few changes).

⁸⁰ See the paradox aforementioned, *supra* text accompanying note 57.

⁸¹ Compare with Matthews, *supra* note 46, at 355 (pinning the Anglo-American doctrine of unsolicited benefit to the idea of "the maximization of freedom of choice: the classic liberal view"); Daniel Friedmann, *Unjust Enrichment, Pursuance of Self-Interest, and the Limits of Free Riding*, 36 LOY. L.A. L. REV. 831, 847 (2003) (highlighting the linkage between the negative aspect of freedom of contract and the exemption of the owner from the duty of remuneration for unsolicited benefit).

damaged (but on the contrary, actually benefitted from the action) and since she did not exercise her right to exclude by expressing her protest (an *active* right to exclude). Therefore, the non-owner does not have to bear the costs of his legitimate activity; the improver's expectation for remuneration is considered reasonable and legitimate and the owner has to indemnify him. The right to exclude is only activated significant if the owner warned the improver not to interfere with her assets, or if the improvement is undesirable from her subjective perspective; in those cases the owner will be exempted from the duty of remunerating the improver.

Part IV: Deriving Benefit Unbeknownst to the Owner

The Case

The second test case involves completely opposite characteristics. This case deals not with a volunteer who seeks to improve his fellow's property, but rather with a squatter who tries to derive benefit from the owner's property, i.e., to exploit her property, without asking for her permission. Is the squatter obliged to retribute the owner for the advantage he derived?

Needless to say, not all situations under this category are equally interesting. I seek to extricate one specific instance that invokes a special problem: deriving benefit from the owner's property without causing her any damage or loss. For instance, a person noticed that his neighbor traveled overseas for a long period, and hence parked his car in her parking space, which was left empty, thus saving himself annual parking fees. Assuming that the owner suffered no loss (she did not even try to rent out her parking space and no damage occurred to the space), should the restitution duty imposed on the invader be measured according to the value of the benefit – the annual parking fee – or according to the sum of the damage, which in this case is zero? Another slightly more complicated example involves adjoining land owners. One land contains the only known entrance to a magnificent cave. After the owner of that piece of land developed the cave as a tourist attraction, the adjoining owner learns that approximately 30 percent of the cave area being exhibited actually lies beneath the surface of his own land. Assuming that he suffered no loss, since he has no

practicable access to the cave, is he entitled to restitution from his neighbor's profits (equivalent to the portion of his land that his neighbor utilized)?⁸²

It is worth sharpening some additional characteristics of the cases at hand. The beneficiaries in question are benefiting from the owners' property without the owners' consent, neither expressed nor implied. Also, no pre-existing contractual relationships exist between the parties that could affect their right and duties. In addition, we deal with invaders who knowingly exploit the owners' properties – conscious wrongdoers (distinct from a *bona fide* beneficiary who mistakenly thinks he owns the property). And finally, we discuss cases where the benefit is achieved through an active action on the part of the beneficiary, unlike an opposite case when the owner is the one who confers the benefit upon the beneficiary (e.g., due to an altruistic motive or a mistake).

In determining the adequate pecuniary remedy, a wide range of relevant options might be considered. Yet for the purpose of this discussion, I will limit myself to two general options: defining the pecuniary remedy as returning the beneficiary's benefit,⁸³ or alternatively calculating it as compensating for the harm the owner suffered, which in the aforementioned cases is a zero sum.

This question was widely reviewed in the contexts of both Anglo-American law and Jewish law.⁸⁴ Dagan's research, upon the proceeding discussion will be based, analyzes the fundamental difference between these legal systems as an expression for

⁸² Following *Edwards v. Lee* 96 S.W.2d 1028 (Ky. 1936).

⁸³ For a detailed discussion of the sub-options of calculating the value of the benefit (based on the benefit the beneficiary received or on the fair market value of the resource involved), see DAGAN, UNJUST ENRICHMENT, *supra* note 8, at 12.

⁸⁴ The relevant Anglo-American literature is mentioned below in the following footnotes. For parallel discussions from the Jewish law perspective, see R. HERZOG, *supra* note 13, at 54; NAHUM RAKOVER, UNJUST ENRICHMENT IN JEWISH LAW (2000); AARON KIRSCHENBAUM, EQUITY IN JEWISH LAW 231 (1991); Bernard Jackson, *Introduction to Symposium: Unjust Enrichment*, 3 THE JEWISH LAW ANNUAL 6 (1980); Norman Solomon, *Concepts of 'Zeh Neheneh...' in the Analytic School*, 3 THE JEWISH LAW ANNUAL 49 (1980); Irwin H. Haut, *Abuse of Rights and Unjust Enrichment: A Proposed Restatement of Jewish Law*, 2 NATIONAL JEWISH LAW REVIEW 31 (1987) [Haut]; Berachyau Lifshitz, *'One Derives a Benefit and the Other Sustains No Loss' — 'The Receipt of the Benefit did not Involve a Loss to the Benefactor'?*, 37 HAPRAKLIT 203 (1987, Hebrew) [Lifshitz].

two competing worldviews: the liberal western heritage on the one hand, and the communitarian Jewish tradition on the other.⁸⁵

Anglo-American Law

American law tends to obligate the trespasser-beneficiary to pay restitution, irrespective of the question of whether the owner suffered loss.⁸⁶ Unjust enrichment is usually defined as being "unjustly enriched *at the expense of another*."⁸⁷ This phrase evokes the dilemma of whether a correspondence between the gain and the loss is necessary for restitution claims. In this context, the case of *Edwards v. Lee*⁸⁸ reads:

[I]n the case at bar, there may be no tangible loss other than the violation of a right. The law, in seeking an adequate remedy for the wrong, has been forced to adopt profits received, rather than damages sustained, as a basis of recovery.

A similar approach can be found in *Olwell v Nye & Nissen Co.*⁸⁹

[T]he appellant cannot be heard to say that its wrongful invasion of the respondent's property right to exclusive use is not a loss compensable in law. To hold otherwise would be subversive of all property rights, since its use was admittedly wrongful and without claim of right. The theory of unjust enrichment is applicable in such a case.

Indeed, it is unsurprising that in order to avoid any implication that the restitution claim is conditioned upon correspondence between one's gain and the other's loss, the Restatement (Third), Restitution and Unjust Enrichment §3 (2011) reads: "A person is

⁸⁵ DAGAN, UNJUST ENRICHMENT, *supra* note 8.

⁸⁶ In principle, one can try arguing that the mere use of the owner's property without her consent should be defined as a loss, regardless of the fact that no real damage has occurred. However, such a statement comprises nothing more than another formulation of the same idea that the invader's obligation in restitution is based on the benefit that he derived and irrespective of the loss he did not cause.

⁸⁷ RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT §1 (2011).

⁸⁸ *Supra* note 82.

⁸⁹ *Olwell v. Nye & Nissen Co.*, 26 Wash.2d 282, 285, 173 P.2d 652 (SC Washington 1946) (the appellant used the respondent's egg-washing machine for a few years without his knowledge. The respondent suffered no loss, since he had no present use for the machine and put it into storage, and the appellant's use did not cause any damage to the machine). See also *Beck v. Northern Natural Gas Company*, 170 F.3d 1018 (10th Cir 1999).

not permitted to profit by his own wrong," omitting the conclusive words "at the expense of another."⁹⁰

The same Restatement explains the disconnected affinity between the owner's entitlement for restitution following the use of her property and the absence of any loss to her interests through the importance of protecting "the owner's right to insist that any use of property by another – whether or not it diminishes the property's value – be made with the owner's consent and on the owner's terms."⁹¹

A similar approach is common in English law as well. Although in order to establish a claim for restitution the plaintiff must show that the defendant was enriched at the plaintiff's expense, no exact correspondence of gain and loss is necessary, nor must any loss be proven whatsoever.⁹² As Peter Birks concludes: "English law appears not to insist that the claimant must have suffered [a loss]."⁹³

⁹⁰ See reporter's note a: "The purpose of this change is to avoid any implication that the defendant's wrongful gain must correspond to a loss on the part of the plaintiff".

⁹¹ RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT §3 cmt. b (2011).

⁹² *Kleinwort Benson Ltd v. Birmingham City Council*, [1996] 4 All ER 733 (regarding unnecessary payments, which due to independent hedging arrangements with third parties caused no significant loss to the payer): "[T]his expression ['at the payer's expense'] does not justify... the importation of concepts of loss or damage with their attendant concepts of mitigation" (*ibid* at 744, Saville LJ.).

For a parallel Australian case, see *Comr of State Revenue v. Royal Insurance Australia Ltd*, (1994) 126 ALR 1, 14 (Mason CJ): "[T]he basis of restitutionary relief in English law was not compensation for loss or damage but restoration of what had been taken or received". Although a Canadian court ruling reads: "Restitutionary principles, however, preclude recovery where the plaintiff has suffered no loss... The law of restitution is not intended to provide windfalls to plaintiffs who have suffered no loss" (*Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161). See PETER BIRKS, UNJUST ENRICHMENT 79 (2nd ed. 2005) [BIRKS, UNJUST ENRICHMENT]; Mitchell McInnes, *The Measure of Restitution*, 52 UTLJ 163 (2002); Mitchell McInnes, *At the Plaintiff's Expense: Quantifying Restitution Relief*, CAMBRIDGE L.J. 471 (1998); Mitchell McInnes, *Interceptive Subtraction, Unjust Enrichment and Wrongs – A Reply to Professor Birks*, CAMBRIDGE L.J. 697, 702 (2003), note 26.

The case of *Phillips v. Homfray*, (1883) 24 Ch D 439 might seem allegedly exceptional, since the court there ruled that a restitutionary claim due to trespass could be constituted only if the defendant had acquired property from the owner, but not if he had only saved money by not paying for the use of the passage. See also *Hambly v. Trott* (1776) 1 Cowp 371, 375, 98 ER 1136, 1138. Yet, this case has been rejected by later cases and even widely criticized. See GOFF AND JONES ON RESTITUTION § 36-003, 806 (7th ed. 2007). Furthermore, it seems that beyond concern with the problem of correspondence of gain and loss, this case addresses whether the definition of gain is limited only to positive gain or, as is

Jewish Law

Jewish law approaches this issue from the diametrically opposite perspective. The famous Talmudic concept of – ‘one benefits and the other does not lose’⁹⁴ (hereinafter: ‘one benefits’) – has yielded extensive deliberation on this question, and opposing positions have been expressed. However, the debate was concluded as later formulated by Maimonides:

If one takes residence in another’s courtyard without his knowledge, the rule is that if the courtyard is not usually rented, the tenant need not to pay the owner any rent even though he does usually rent a place for himself. For he has benefited without the other having lost anything.⁹⁵

That is to say, benefit is not the measure for the compensation sum, but rather loss is; in the absence of loss, the beneficiary is exempt from restitutionary obligation.

The commentators were unable to reach consensus regarding the reason for this rule.⁹⁶ According to some, the owner’s loss is essential for obligating the beneficiary in restitution.⁹⁷ Yet in the majority’s view, it seems that the rationale is completely different – connected instead with another legal principle: ‘one is compelled not to act

currently axiomatic, can include negative benefit as well. Indeed, today it is well accepted that saving of expense can be a benefit just like positive gain.

⁹³ BIRKS, UNJUST ENRICHMENT, *supra* note92, at 79. Cf. ANDREW BURROWS, A RESTATEMENT OF THE ENGLISH LAW OF UNJUST ENRICHMENT 45 (2012).

In fact, some scholars believe that establishing a restitutionary claim under Common Law is conditioned upon the correspondence of gain and loss. See Ross Grantham & Charles Rickett, *Disgorgement for Unjust Enrichment*, 62 CAMBRIDGE L.J. 159 (2003). Cf. VIRGO, *supra* note47, at 112. See also Re BHT (UK) Ltd [2004] EWHC 201 (Ch). But, as Lionel Smith, *Restitution: The Heart of Corrective Justice*, 79 TEX. L. REV. 2115, 2146 (2001) notes, this condition might apply only when the enrichment results from legitimate behavior of the beneficiary, such as a mistaken payment made by the owner. In contrast, when the enrichment is a result of a wrongdoing, such as trespass or unauthorized use of the owner’s equipment, none deny that a restitutionary claim is independent of the owner's absence of loss.

⁹⁴ Bavli, Bava Kamma 20a.

⁹⁵ Maimonides, Mishneh Torah, Laws of Robbery and Lost Property 3, 9.

⁹⁶ For a comprehensive review, see LIFSHITZ, *supra* note84, at 205.

⁹⁷ Several reasons were suggested for the linkage between the owner's loss and the restitution claim. In a nutshell, these explanations are based on ideas such as implied waiver, lack of legal standing and lack of legal cause. See LIFSHITZ, *supra* note84.

in the manner of S'dom⁹⁸ (*Kofin al Midat S'dom*, hereinafter: *kofin*).⁹⁹ This principle is partially similar to the contemporary concept of 'abuse of rights.' According to Jewish law, a person is not allowed to insist in a contrarian manner on his rights when his fellow can derive some benefit from them in a way that does not involve any loss to him.¹⁰⁰ With regard to the case at hand, the owner's insisting on her right to sue the beneficiary for restitution even though she has suffered no damage is considered to be 'the manner of S'dom,' which the law prohibits.¹⁰¹ According to this explanation, indeed, the mere act of benefiting from the owner's property is sufficient to establish a restitution claim against the beneficiary; his ownership was violated and he is entitled for compensation. Yet if the owner suffered no loss, the law prevents her from realizing her right.

What should we derive from the fact that the trespasser who causes no harm is *ex post* exempt from payment? Does this after-the-fact exemption lead to the conclusion that this trespass was permitted even from the start? As far as chattel is involved, when the non-owner is not only about to use it but also to take it out physically, the answer is

⁹⁸ In the biblical literature, S'dom and Gomorrah denote cities that have reached the ultimate state of evil and corruption (see Genesis 19; Ezekiel 16). The Sages transformed this term's meaning, and in their language the 'manner of S'dom' refers to a conduct quite similar to abuse of rights. When applied by the Sages, the term 'manner of S'dom' is devoid of the sexual context of the non-Jewish term 'sodomy.'

⁹⁹ See Rashi, Bava Batra 11b s.v. *al midat s'dom*; Rashi, Ketubbot 103a s.b. *midat s'dom*; Tosafot, Bava Batra 12b s.v. *kegon*; Penei Yehoshua, Bava Kamma 20a s.v. *batosafot*.

¹⁰⁰ For a comprehensive discussion of the rule of *kofin* see Shmuel Shilo, *Kofin Al Midat S'dom: Jewish Law's Concept of Abuse of Rights*, 15 ISRAEL LAW REVIEW 49 (1980).

¹⁰¹ As opposed to the majority view, which bases the rule of 'one benefits' on the rule of *kofin*, there are those who argue against this identification. They draw our attention to a few fundamental differences between these rules. For instance, the rule of *kofin* obligates the owner even against her explicit will, while according to the majority opinion, the rule of 'one benefits' is applied only when the owner did not expressed her will, but not when she expressed her opposition (for a different view, see *infra* note 107). Likewise, the rule of *kofin* is usually applied *ex ante*, whereas the rule of 'one benefits' is applied *ex post*. Cf. HAUT, *supra* note 84, at 41. However, those tying these rules to one another argue that this distinction does not negate the possibility that the rule of 'one benefits' is a particular case of the rule of *kofin*. Moreover, as we shall later see, there are those who believe that even the rule of 'one benefits' is applied also *ex ante* and only *ex post*.

certainly to the negative: an unauthorized borrower is considered a robber,¹⁰² and he will be prohibited *ex ante* to use the owner's chattels without her permission, even if no damage occurs to the owner. But what about an unauthorized use of an owner's land without causing the owner any damage? Here, there are no elements of taking and stealing, but merely of harmless use.¹⁰³ Surprisingly, ancient sources did not deal with this question, which only arose in a relatively late period.¹⁰⁴ Two major Halakhic authorities from the nineteenth century answered this question to the affirmative. In their view, benefiting from another's property, without causing damage to the owner, is legitimate and not considered to be wrongdoing.¹⁰⁵ In Hoefeldian terms, they understand the rule of 'one benefits' as a *privilege*, permitting the harmless invasion *ex ante*. Yet, some Halakhic authorities hesitated to take this step, and ruled that even

¹⁰² Bavli, Bava Metsia 41a, 43,1; Maimonides, Mishneh Torah, Laws of Robbery and Lost Property 3, 15; Shulhan Arukh, Hoshen Mishpat 359, 5.

¹⁰³ For the distinction between an unauthorized use of land and of chattel under Jewish law, see Rabbi Jacob Ettlinger (1798-1871, Germany), Arukh la-Ner, Sukkah 31a *s.v.* *verabanan*; Rabbi Yeruham Perla (1846-1934, Poland), A Commentary to Saadia Gaon's Book of the Commandments, *lo ta'ase* 271.

¹⁰⁴ More precisely, one unconventional opinion from the 13th century held that the harmless invader is allowed to encroach to the property even against the owner's explicit protest (see *infra* note 107). Needless to say, according to this extraordinary opinion, the *ex ante* / *ex post* distinction is meaningless. However, this opinion is considered a minority view, which does not represent the main stream among Halakhic authorities.

¹⁰⁵ According to Rabbi Moses Sofer (1762-1839, Hungary), the Talmudic statement: "one may not benefit from his neighbor's property" (Bavli, Bava Metzia 117b), which forbids a person from benefiting from another's property even when the owner sustains no loss (see Tosafot, *ibid* *s.v.* *bishlosa*), was actually Halakhically rejected. Rabbi Moses Sofer claims that according to the final Halakhic ruling, such benefit is permitted *ex ante* (Responsa Hatam Sofer, Hoshen Mishpat 79). A contemporary of his, Rabbi Ephraim Zalman Magolis (1762-1828, Galicia), arrived at the same conclusion. He was asked: "A craftsman was given wood or silver and gold in order to make of them an article. And the craftsman also has his own similar silver or wood. And now he needs [for his personal needs] what the proprietor gave him. Is he allowed to use the proprietor's materials for his personal needs [and to confer his own materials upon the proprietor]?" In Rabbi Margolis' opinion, such an act is permitted, since (among other reasons) this is quite similar to the rule of 'one benefits': "it is clear from the rule that if one takes residence in another's courtyard and the courtyard is not usually rented, the tenant need not pay the owner any rent, for he has benefited without the other having lost anything... and here also, he is allowed to make the change, giving others things in return, for this falls under 'one benefits and the other does not lose'" (Beit Ephraim, Hoshen Mishpat 49).

though the invader is exempt *post-factum*, the trespass is *a priori* prohibited.¹⁰⁶ It seems that they apply the rule of ‘one benefits’ as an *immunity* which does not confer *ex ante* permission but only *ex post* exemption.

Several important exceptions were added to complement the rule exempting the beneficiary from payment. Under the circumstances of these exceptions, the beneficiary is subjected to restitution set in accordance with the value of the benefit he derived – independently of the owner’s amount of loss. I limit myself to present very briefly three of the major exceptions.

The first exception involves the owner’s protest: once the owner has warned the intruder not to enter her property (it stands to reason that placing a fence, or hanging a ‘no trespass’ sign, should be sufficient), if the latter continues his action despite this warning, the owner is liable to claim restitution even though she sustains no loss. The rule of ‘one benefits’ applies only when the owner was not aware of the beneficiary’s actions, but not when she expressed her protest.¹⁰⁷ In other words, prior to the squatter’s action, the owner has the right to insist on her proprietary prerogative.

The second exception involves the commercialization of the benefit: the Halakhic authorities distinguished between benefiting from the owner’s property by personal use and benefiting by commercial use. An individual who parks his car in his neighbor’s parking space (in a way that does not cause loss to the owner’s interest) will be exempt from paying the parking fee, while an individual who rents out this parking space to a third party for a fee will be bound to retribute the parking fee to the owner.¹⁰⁸ From an economic perspective, no difference exists between a gain resulting

¹⁰⁶ The prominent authority among them is Rabbi Solomon Luria (1510-1573, Poland), who wrote: “although by law he [the invader] is exempt, nevertheless it is prohibited to invade there without the owner’s knowledge, for a borrower that does not ask the owner’s permission is a thief” (Yam Shel Shlomo, Bava Kamma 2, 16). Cf. Responsa Minhat Yitzhak, Part 8, 29.

¹⁰⁷ Shulhan Arukh, Hoshen Mishpat 363, 6. See also, Tosafot, Bava Batra 12b s.v. *kegon*. A different view is expressed by a few Halakhic authorities, according to which if the invasion causes no loss to the owner, then the invader can force himself even against the explicit protest of the owner. See, Mordekhai, Bava Kamma 2, 16. See also, Rema, Hoshen Mishpat 363, 6. However, this opinion was not Halakhically well accepted. See, Responsa Noda Bi’yehuda, Mahadura Tanyana, Hoshen Mishpat 24.

¹⁰⁸ Beit Yosef, Hoshen Mishpat 375. For our purposes here, there is no need to discuss the question of whether the contract of the “lessor” (who is not the true owner) with the third party is valid; whether it

from parking a car in a neighbor's space and thereby saving a parking fee that should have been paid elsewhere, and a gain achieved by renting out the parking space to a third party. Yet although in economic terms these types of profits are identical, Jewish law differentiates between them in assessing restitution.¹⁰⁹ I address this idiosyncrasy below.

The third exception involves cases in which the owner suffered a minor loss – significantly less than the benefit that the beneficiary derived. For instance, this might be the case when over the course of parking his car in the owner's empty parking space for a significant period, on one occasion the beneficiary broke one of the owner's lamps. Should he be liable for a sum corresponding to the value of the benefit he received (parking fees for the whole period), or rather to the value of the damage only? In the opinion of several Halakhic authorities, even here the measure should be the damage itself – namely, the invader will have to compensate the owner no more than the value of the lamp. In contrast, however, the majority holds that once the owner suffered even a minor loss, the invader must return the entire benefit.¹¹⁰ This last opinion calls for explanation. If when the owner sustains no loss the payment is determined based on the amount of the loss (i.e., zero) then why does it change when a minor loss is involved? In other words, had the squatter compensated the owner for the minor damage occurred, then allegedly the situation would revert back to the initial state of 'one benefits and the other does not lose'; why then should we not exempt the beneficiary from the remaining payment? As we shall see later on, clarifying the Jewish law understanding of the notion of ownership might be helpful in solving this puzzle.

The Source of the Difference between the Legal Systems

It is hard to overlook the sharpest, fundamental distinction between the two legal traditions. While the common law sees the mere act of trespassing and benefiting

is valid or not, a question arises regarding the "lessor's" obligation to transfer the payment he received to the owner.

¹⁰⁹ Hence, it seems that regarding the case of *Edwards v. Lee* (*supra* note 82), Jewish law would have arrived at the same conclusion reached by the American court, but based on a different reason. Though according to Jewish law the general rule is that trespass that causes the owner no loss does not constitute a restitution claim, here the exception of commercial use of the owner's property applies.

¹¹⁰ Shulhan Arukh, Hoshen Mishpat 363, 7.

from the owner's property as establishing a restitutionary claim, Jewish law advocates that this act is insufficient to constitute such a claim, unless it is accompanied by a loss suffered by the owner. While exceptions exist in each legal system, which indeed contribute to each system's restraint and balance, the exceptions do not eliminate the fundamental difference between both traditions.

According to Dagan,¹¹¹ this basic difference stems from the unique socio-economic ethos of each legal tradition.¹¹² Jewish law expresses an ethos of soft communitarianism, which Dagan categorizes as "institutionalized limited altruism", namely "derogates fragments of entitlements of individuals in the resources they hold... creates a common pool which others in the community... can utilize."¹¹³

Yet, Jewish law is at risk of slipping down the slippery slope of too deep erosion in the concept of private property, potentially blurring the delicate line between *sharing* and *sacrifice*. The three aforementioned exceptions were designed to moderate the doctrine and balance it. The protest exception ensures that the owner maintains some measure of control over her property, by granting the owner the initial right to exclude others even when she suffers no loss. The commercialization exception seems to play the role of preventing coarse and blatant abuse of the owner's property – as opposed to use for personal enjoyment, which is tolerable in the Jewish law perspective.¹¹⁴ And finally, the exemptive rule of minor damage directs the invader to take precautions to the greatest extent possible, as expected from one who acts in property belongs to another; otherwise, if he causes even minor damage, he will be obligated to retribute the full value of the benefit, thus not only reducing the profits that the invader seeks to achieve but also transforming the whole invasion into an unprofitable and worthless act. These exceptions signal to the invader, reminding him that the property

¹¹¹ DAGAN, UNJUST ENRICHMENT, *supra* note 8, at 60.

¹¹² See above, text accompanying note 27.

¹¹³ DAGAN, UNJUST ENRICHMENT, *supra* note 8, at 25.

¹¹⁴ Typically, commercial use may be more intensive than use for personal needs. In addition, commercial use is generally profit based, whereas use for personal enjoyment is based on personal needs and adversities.

he derives benefit from is not abandoned but rather belongs to his fellow, and thus he must properly respect the other's ownership.¹¹⁵

Anglo-American law, by contrast, in order to emphasize the owner's *control* of his property, imposes an obligation of restitution on the trespasser, amounting to the full value of the benefit he derived, independently of any loss that may or may not occur to the owner.¹¹⁶

I believe that there is much truth in Dagan's explanation regarding the affinity between the socio-economic ethos of these two traditions and the concrete solutions

¹¹⁵ Dagan adds to his argument an additional element. In his view, Jewish law's approach of exempting the beneficiary from restitution is based on the assumption that usually the owner is socio-economically stronger than the beneficiary – with the latter usually being impoverished. Therefore, according to Dagan, the rule 'one benefits' promotes the purpose of distributive justice, that is to say more equitable distribution of use of the owner's resources with weak parts of society. This explanation raises much wider questions regarding the place of distributive considerations within private law. Cf. Anthony K. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980); Peter Benson, *The Basis of Corrective Justice and its Relation to Distributive Justice*, 77 IOWA L. REV. 515 (1992); LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2002); TSACHI KEREN-PAZ, *TORTS, EGALITARIANISM AND DISTRIBUTIVE JUSTICE* (2007). This question stands far beyond the scope of this current article. Moreover, I am not sure that Dagan's assumption regarding the socio-economic status of the owner and the beneficiary under the Halakhic discussion is indeed convincing. For the purpose of my current discussion, Dagan's main argument (regarding the affinity between the question of restitution and the socio-economic ethos) still remains applies even if we assume a priori that the owner and the beneficiary belong to the same socio-economic class.

¹¹⁶ The Talmudic issue that deals with the case of 'one benefits' commences with an unusual introduction. It seems to me that the linkage that Dagan notes between the concrete legal dilemma of the case of 'one profits' and the theoretical question of the socio-economic ethos might shed new light on this surprising Talmudic introduction. The Talmudic phrasing states that the dilemma regarding the case of 'one profits' – of whether the beneficiary is liable or exempt – involves "some specially interesting matters" (Bava Kamma 20a). What makes this particular legal question so unique as to justify such a special characterization? After all, this dilemma is not more complicated or sophisticated than many other Talmudic issues (compare, e.g., with Bavli, Eiruvin 64a: "Whosoever says: 'this ruling is a fine one, and that ruling is not a fine one' – loses the substance of the Torah"). I believe that through this phrase the Talmud expresses, in its own way, the insight that here we deal with a question that is a kind of a watershed, whose social implications are much broader than its concrete particular legal implications.

they formulated.¹¹⁷ However, I believe that the concepts can and should be set in a much broader context. The difference between Jewish law and Anglo-American law should not be minimized to a distinction between a proprietary conception of “institutionalized altruism” versus an individualistic proprietary conception, for this is only a particular case of a broader conceptual distinction.

Dagan indeed argues correctly that the Jewish law approach to the case of deriving benefit without the owner’s knowledge has an altruistic characteristic: due to the absence of loss, the owner is prevented from exercising her legal right for restitution. But if indeed this “institutionalized altruism” were the very fundamental character of the proprietary conception of Jewish law, would we not expect to see its traces also in the opposite case discussed in the previous Part? As described above, when a person improves his fellow’s property without having been asked to do so, Jewish law obligates the owner to remunerate the improver, as opposed to English law, which considers the improver to be a volunteer. It seems to me that an approach that advocates altruism would be more likely to consider the improver a volunteer who helps the owner of his own good will. The Jewish law position, to obligate the owner to reward the unrequested improver, is somewhat anti-altruistic (unexpectedly, it is actually common law that considers the unrequested improver a volunteer, in a way that is allegedly slightly reminiscent of altruism).¹¹⁸

In my opinion, focusing on the differentiated conceptions of the right to exclude may illuminate the profound differences between the two legal traditions in both cases.¹¹⁹

¹¹⁷ Yet, I tend not to agree with Dagan's additional argument regarding the distributive features of the Jewish law rule of 'one profits'. See *supra* note 115.

¹¹⁸ But see DAGAN, RESTITUTION, *supra* note 53, at 101 (attempting to reconcile the duty to retribute the good Samaritan with the concept of altruism).

¹¹⁹ Basically, the default remedy for trespass (if no actual damage has been shown) is nominal damages of a trifling sum only (see POWELL, PROPERTY, §64A.05[2]). Ostensibly, such a default remedy reflects a low commitment to the idea of exclusion, since it fails to deter potential trespassers. However, this is only true from a tort perspective; under the laws of unjust enrichment the trespasser will have to retribute the profits he saved by the trespass. Moreover, the possibility that exists in some states of imposing punitive damages on trespassers (see POWELL, PROPERTY, §64A.05[6]) also strengthens the notion of exclusivity (as does, undoubtedly, the criminal penalty for trespassers). Cf. *Jackue v. Steenberg Home Inc.*, 209 Wis.2d 605, 617 (1997) : "in certain situations of trespass, the actual harm is not in the damage done to the land, which may be minimal, but in the loss of individual's right to

According to Anglo-American interpretation, any uninvited activity of another person in the owner's property is considered trespass, which will require its initiator to bear all associated costs: the unrequested improver is not entitled to remuneration, and the one who derived benefit from the owner's property (without asking her permission) is exposed to a restitution claim.¹²⁰ In Jewish law, on the other hand, when no economic justification exists for excluding the stranger, e.g., when his action is not expected to cause any loss to the owner (and a fortiori, if it is expected to benefit the owner or to improve her asset), then the stranger's activity is legitimate by default and he is not required to bear all associated costs: the unrequested improver is entitled for remuneration, and the harmless trespasser is exempt from the duty of restitution. Therefore, *altruism* in the case of 'one benefit' is only the derivative of the Jewish law conception of ownership, which does not apply in the opposite case; The *Punctum Archimedis* required for understanding the Jewish law approach is therefore *sharing*: a limited conception of the right to exclude.¹²¹ "Institutionalized altruism" is only a secondary (indeed important) derivative of this principled approach, which applies only in some of the cases.

Part V: Performing a Legally Binding Action the Owner's Property without Authorization

As a general rule, in order for a non-owner to have legal capacity to act in another person's private property – sell it, mortgage it, rent it out and so on – he must be preauthorized by the owner. Could there be situations in which actions have been

exclude others from his or her property and the court implied that this right may be punished by a large damage award despite the lack of measurable harm".

¹²⁰ Ripstein clarified the linkage between the right to exclude and the restitutory claim against the one who benefited from another's property even though the owner suffered no loss: "The right to exclude is not, on its face, a protection against harm or loss. Harmless trespasses against land are actionable... The basic structure of the wrong consists in using something that belongs to somebody else" (Ripstein, *supra* note 158, at 159). See also DAGAN, UNJUST ENRICHMENT, *supra* note 8, at 18: "profits are measure of recovery which vindicates the plaintiff's liberty to control the entitlement as part of her private sphere".

¹²¹ Cf. Rabbi Shmuel Rozovski (1913-1979, Israel) Shiurei Rabbi Shmuel, Bava Batra sec. 220-224 (arguing that the rule of *kofin*, which according to many is the basis for the rule of 'one benefits', changes the actual scope of the definition of ownership).

made by a non-owner, with no preauthorization, that will be held valid? For example, an individual knows that his neighbor has been trying to sell her car for a long time. All of a sudden, a buyer willing to pay a fine price appears, and therefore the neighbor sells the car to the buyer on behalf of the owner.¹²² Assuming that the sale is indeed compatible with the owner's interest, except that it was made without the owner's consent, could it be considered valid?¹²³ In this Part, I argue that here again Jewish law and Anglo-American law developed differing doctrines, which derive from their different basic conceptions regarding property and exclusivity.¹²⁴

Both legal traditions share the premise that in certain instances, legally binding actions performed by an unauthorized non-owner should be valid; yet they have formulated conceptually and practically distinct doctrines for this purpose.

Anglo-American law treats this kind of situations under the doctrine of 'ratification.'¹²⁵ According to the laws of agency, a person has the legal capacity to act

¹²² While he informs the buyer that he does so on behalf of the owner – just without getting the owner's prior authorization (hence, no problem of misrepresentation exists). Also, the sum paid by the buyer is transmitted in full to the owner, so no problem of conversion exists.

¹²³ It worth emphasizing that here we deal with the *validity* of legal actions performed in the fellow's property, as distinct from the *permission* to perform material actions in her property. For instance, the question at hand is of whether selling the owner's crops might be valid, under certain circumstances, and not whether permission (or duty) exists to water an owner's drying field. There is some connection between the two questions, for if we assume that in certain instances, legally binding actions in the owner's property might be valid, then we should consider whether these legally effective actions are permitted or even a matter of duty. See also *infra*, Part VI.

¹²⁴ A related question, which lies beyond the scope of the present article, is whether a non-owner has the legal power to grant rights to a potential owner, without getting the actual owner's antecedent authorization. This issue is controlled through the doctrine of contracts for the benefit of third parties.

¹²⁵ See, in general, Francis Reynolds, *Agency and Representation*, in 2 ENGLISH PRIVATE LAW 163, 167 (Peter Birks ed. 2000); Gerald H. L. Fridman, THE LAW OF AGENCY 74 (6th ed., 1990) [Fridman]; Basil S. Markesinis & Roderick J. C. Munday, AN OUTLINE OF THE LAW OF AGENCY 49 (Second ed. 1986) [Markesinis & Munday, AGENCY]; BOWSTEAD & REYNOLDS, ON AGENCY 59 (Eighteenth ed. 2006) [BOWSTEAD & REYNOLDS, AGENCY]; RESTATEMENT (THIRD) OF THE LAW OF AGENCY Ch. 4 at 303 (2006).

This doctrine has ancient roots, dating back to classic Roman law. For a detailed historic review, see, Gualtiero Procaccia, *On the Theory and History of Ratification in the Law of Agency*, 4 TEL AVIV U. STUD. L. 9 (1978-1979) [Procaccia]. Cf. *Dempsey v. Chambers*, 154 Mass. 330, 28 N.E. 279 (1891), Holmes, J.

on behalf of his fellow only if he was preauthorized by the principal. However, as long as the owner ratifies the action (*post-factum*), such ratification is "equivalent to an antecedent authority,"¹²⁶ and the action receives retroactive validity.¹²⁷ "By ratifying an act, a principal triggers the legal consequences that would follow had the act been that of an agent acting with actual authority."¹²⁸ Both actions made by an agent who deviated from his actual authority as well as those made by a stranger who was not an agent at all can be ratified by the principal.¹²⁹

At first glance, it may seem that recognizing the validity of an action made by a non-owner without being authorized to do so contradicts the basic ideas of private property and individual autonomy.¹³⁰ But the contrary is true. The conceptual basis of the Anglo-American doctrine of ratification was and remains "an expression of the autonomy of the individual."¹³¹ Though this doctrine reverses the ideal time sequence between the agent's action and the owner's assent, it preserves and even strengthens

¹²⁶ *Koenigsblatt v. Sweet* [1923] 2 Ch. 314 at 325 per Lord Sterndale MR.

¹²⁷ It is important to distinguish between adoption of actions performed by a non-owner, which applies from on the moment of consent into the future, and ratification, which grants actions retroactive validity. Adoption and ratification are not interchangeable terms, and whereas adoption is a simple manifestation of the idea of the owner's control of the future of her property, the retroactive nature of ratification makes it to be much more complicated. Cf. *Procaccia*, *supra* note 125, at 28; *Schreyer v. Turner Flouring Mills Co.*, 29 Or.1 ; 43 P. 719, 720 (1896).

¹²⁸ RESTATEMENT (THIRD) OF THE LAW OF AGENCY, Ch. 4 introductory note, at 303 (2006).

¹²⁹ RESTATEMENT (THIRD) OF THE LAW OF AGENCY, Ch. 4, introductory note, at 304 (2006): "A person may ratify the act of an actor who was not an agent at the time of acting when the actor purported or assumed to act as the person agent's... Ratification thus may create an agency relationship after the fact". See also, *ibid*, §4.01 Comment b, at 305. At least one exceptional jurisdiction (Arkansas) limits the doctrine of ratification and applies it only where a prior agency relationship is proven. See *Runyan v. Community Fund of Little Rock*, 31 S.W.2d 743 (Ark. 1930); *E.P. Dobson. Inc. v. Richard*, 705 S.W.2d 893, 894 (Ark. App. 1986). Cf. *In re Scholastic Book Clubs, Inc.* 920 P.2d 947, 958 (Kan. 1996). See also Cf. Warren A. Seavey, *Ratification by Silence*, 103 U. PA. L. REV. 30, 37 note 27 (1954-1955) [Seavey].

¹³⁰ Compare with Lord Macnaghten in *Keighley, Maxsted & Co. v. Durant*, [1901] App. Cas. 240: "As a general rule, only persons who are parties to a contract, acting either by themselves or by an authorized agent, can sue or be sued on the contract. A stranger can not enforce the contract, nor can it be enforced against a stranger. That is the rule but there are exceptions. The most remarkable exception, I think, results from the doctrine of ratification as established in English law."

¹³¹ AHARON BARAK, *AGENCY LAW*, 1965, 221 (1975 Hebrew).

the idea that it is impossible to act in the owner's property without getting her authorization, in advance or at least *post-facto*.¹³²

This proposition derives several important implications, some of which are relevant to the present argument. Though ratification might be expressed either explicitly or implicitly (at times, it may even be indicated by the owner's silence), it must manifest in some way the owner's consent.¹³³ Therefore, it is crucial that the owner be aware of the material facts involved in the original act the non-owner has committed, otherwise she could not approve it.¹³⁴ If the owner was not available to be updated regarding the action, and all the more so if she became mentally infirm or passed away not knowing about the action, then the act cannot be considered valid.

Considering ratification as equivalent to antecedent authority bears another important implication regarding the scope of legally binding actions that could be ratified. Generally, every act that can be committed through an authorized agent can be retroactively ratified by the owner.

Could there be other situations in which Anglo-American law might relinquish the requirement of retroactive ratification, validating an unauthorized act committed by a non-owner who was not approved to act in this manner – neither in advance nor *ex-post facto*? It seems that except for a few exceptions, the answer is in the negative.¹³⁵ One of such circumstance relevant in this context involves an emergency,

¹³² Cf. RESTATEMENT (THIRD) OF THE LAW OF AGENCY § 4.01 cmt. d at 307 (2006): "the focal point of ratification is an observable indication that the principal has exercised choice and has consented."

¹³³ See BOWSTEAD & REYNOLDS, AGENCY, *supra* note 125, at 79; Peter Tiersma, *The Language of Silence*, 48 RUTGERS U. L. REV. 1, 37-43 (1995); Seavey, *supra* note 129. Sometimes the legal basis for the retroactive validation is not ratification but rather estoppel. See BOWSTEAD & REYNOLDS, AGENCY, *supra* note 125, at 62; Philip Menchem, *The Rationale of Ratification*, 100 U. PA. L. REV. 649, 658 (1951-1952). However, this does not change the basic notion, by which all depends on the owner's ultimate reaction and on revealing the owner's will. Hence, even the cases that Menchem denotes as "involuntary ratification" (Menchem, *ibid*, at 663) are ultimately based on the owner's willing actions.

¹³⁴ *Booker v. United Am. Ins. Co.*, 700 So. 2d 1333, 1337 (Ala. 1997). Cf. RESTATEMENT (THIRD) OF THE LAW OF AGENCY §4.06 (2006). The owner can also ratify the act knowing that she does not have full knowledge of the relevant material facts, taking on the risk herself. See BOWSTEAD & REYNOLDS, AGENCY, *supra* note 125, at 75.

¹³⁵ Cf. *Falcke v. Scottish Imperial Insurance* (1886) 34 CH D 234. One of the exceptions, which lies beyond the scope of the present discussion, involves an owner who deposits her property for bail and does not take back her property at the end of the bailment period. Under certain circumstances, the

where the property or other interests of the owner are in imminent jeopardy and the only way to preserve the property or interests (or at least their value) is to act for the owner without her authority. For instance, a farmer keeps a large amount of crops in her barn. She left her village temporarily and travelled to a place where no means of communications exists. One of her employees learned that a locust swarm is on its way, threatening to damage all the crops, and the only way to save their value is to sell them immediately. If the employee indeed sells the crops (at a reasonable price), though he was not authorized to do so, could the sale be valid? The doctrine of 'agency of necessity' developed by English law enables validation of a range of legally effective actions that were necessary to save the property under emergency circumstances.¹³⁶

The case of agency of necessity is especially important to the subject at hand, since allegedly here, the authority of the actor could be justified neither by the owner's prior consent nor by his retroactive one. Yet in fact, the situation is a bit more complicated. It is unclear whether the doctrine of agency of necessity applies only to one who was already authorized as an agent – in which case his initial authorization is now extended to include also unexpected legally effective acts required immediately to

bailer is permitted to sell this property. See *Sachs v. Miklos*, LR [1948] 2 KB 23, [1948] 1 ALL ER 67; *Munro v. Wilmott* [1949] 1 KB 295, [1948] 2 All ER 983; TORTS (INTERFERENCE WITH GOODS) ACT 1977 (Eng.), ss 12 and 13 and Sched. 1. The authorization to perform such a sale can be interpreted as derived from the initial bailment agreement between the bailer and the person on bail. Therefore, the question arises whether similar authorization might also be granted where the bailment did not result from an initial agreement, since it is involuntary. According to Palmer, “[I]t seems improbable that the statutory power of sale... would be held applicable to bailments which are involuntary ab initio” (N. E. PALMER, BAILMENT 702, note 44 (2nd ed. 1991)). He notes, however, that under Western Australian legislation, this power of sale is granted also to involuntary bailees (Palmer, *ibid*, at 737).

¹³⁶ BOWSTEAD & REYNOLDS, AGENCY, *supra* note 125, at 139; Markesinis & Munday, AGENCY, *supra* note 125, at 40; FRIDMAN, *supra* note 125, at 120. Historically, the doctrine of 'agency of necessity' stemmed from two particular cases: that of a shipmaster who performs legally binding actions with regard to the ship or the cargo; and that of a person who accepts a bill of exchange for honor and succeeds to the rights of the holder against the person for whom he accepts. However, based on these two cases, a wider concept of 'agency of necessity' has been accepted. Four major conditions must be met to create an agency of necessity: emergency circumstances; inability to obtain the owner's instructions; acting in a *bona fide* manner; and reasonable action.

protect the principal's interest – ¹³⁷ or whether it applies also to strangers, not hitherto appointed as agents, who by necessity become agents for the owner.¹³⁸ The difference between these two options is highly significant. Limiting the 'agency of necessity' doctrine to cases of pre-existing agency means that this doctrine is no more than an extension of prior authorization, by means of implied authority. Whereas applying this doctrine to the case of a stranger, with no preauthorization, turns 'agency of necessity' to be an operation of law. In other words, restricting this doctrine to cases of a pre-existing agency relationship would strengthen the statement that as far as possible, Anglo-American law avoids violating the principle of full autonomy of the individual regarding his property, by refusing to uphold legally binding acts have been taken by complete strangers with no authorization in advance. As mentioned above, English law is equivocal regarding this particular point. American law, in contrast, is defiantly clear in limiting the doctrine of agency of necessity only to cases of pre-existing agency, and does not apply it to a complete stranger.¹³⁹

The Jewish law approach is completely different. Based on the rule 'a right may be conferred in favor of a person in his absence' (*Zakhin Le'Adam Shelo Befanav*, hereinafter: *zakhin*) Jewish law recognizes the validity of particular legally effective actions undertaken by a non-owner who has neither asked for nor received the authorization of the owner for the act – neither in advance nor *post-facto*. A detailed description of this legal doctrine, which is interwoven from many specifications and a

¹³⁷ See, for example, *Jebara v. Ottoman Bank* [1927] 2 KB 254 at 271, Scrutton JL: "The expansion [of the doctrine of agency of necessity] becomes less difficult when the agent of necessity develops from an original and subsisting agency, and only applies itself to unforeseen events not provided for in the original contract. But the position seems quite difficult when there is no pre-existing agency, as in the case of a finder of perishable chattels or animals."

¹³⁸ Cf. *China Pacific SA v. Food Corp of India: The Winson* [1982] AC 639, [1981] 3 All ER 688, at 697, Lord Simon: "One of the ways in which agency of necessity can arise is where A is in possession of goods property of B, and an emergency arises which places those goods in imminent jeopardy. If A cannot obtain instructions from B as to how he should act in such circumstances, A is bound to take without authority such action in relation to the goods as B, as a prudent owner, would himself have taken in the circumstances."

¹³⁹ See, RESTATEMENT (THIRD) OF THE LAW OF AGENCY §2.02 (2006): (1) "An agent has actual authority to take action designated or implied in the principal's manifestations to the agent and acts necessary or incidental to achieving the principal's objectives, as the agent reasonably understands the principal's manifestations and objectives when the agent determines how to act."

variety of justifications, is beyond the scope of this article.¹⁴⁰ Hence, I limit this discussion to just a very few relevant aspects of this rule that are necessary for my current argument.¹⁴¹ This rule determined that every person is authorized to perform legally binding acts on behalf of his fellow, provided that the action he takes is clearly in the other's favor. The most typical example is of accepting and receiving a present in the name of another; as the Mishnah reads: "A right may be conferred in favor of a person in his absence,¹⁴² but disadvantage cannot be conferred upon him in his absence."¹⁴³ As I discuss later on, in the view of most the Halakhic authorities, conferring a right on behalf of the owner is not limited to granting her new possession of a right, but at times it might also include derogation of one of her existing rights in a way that is in her favor.

Two main exceptions accompany this rule. First, the action should be clearly in favor of the owner and not to his detriment. Pre-authorization is always required in order to perform an action that might adversely affect the owner's interest. Only an action clearly in her favor can be validated based on the rule of *zakhin*.¹⁴⁴

According to the second exception, even if the action is clearly in favor of the owner, she has the right to reject it. When the owner is informed about the action and expresses her opposition, the action is retroactively invalid, for "no one can be given a

¹⁴⁰ A comparison of the Jewish law doctrine of *zakhin* and the somewhat similar Roman law doctrine of *negotiorum gestio* is also beyond the scope of this article. For *negotiorum gestio* see ALAN WATSON, THE LAW OF OBLIGATIONS IN THE LATER ROMAN REPUBLIC 193 (1965); ADOLF BERGER, ENCYCLOPEDIA OF ROMAN LAW 597 (1953). For a brief comparison see BOAZ COHEN, JEWISH LAW AND ROMAN LAW: A COMPARATIVE STUDY 489 (1966).

¹⁴¹ No writing in English is devoted to analyzing the rule of *zakhin*. See, in Hebrew, TALMUDIC ENCYCLOPEDIA, s.v. *ein havin le'adam ela befanav*, Vol. 1, 621; *ibid*, s.v. *zakhin le'adam shelo befanav*, Vol. 12 at 135; SHIMSHON ETTINGER, AGENCY IN JEWISH LAW 109 (1999).

¹⁴² "What we have said, 'a right may be conferred in favor of a person in his absence,' means without his knowledge" (Hiddushei ha-Ritva, Kiddushin 23a s.b. *vetanina*).

¹⁴³ Mishnah, Eirubin 7, 11; Mishnah, Gittin 1. 6. Cf. Maimonides, Law of Original Acquisition and Gifts 4, 2. The rule of *zakhin* is well accepted among almost all Jewish law opinions. The exception is the following unique opinion mentioned in the Mishnah, according to which: "a right may be conferred in favor of a minor, but not in favor of [a person who is] of age" (Bava Batra 9, 7).

¹⁴⁴ Extensive writing was devoted to the question of how to define benefit and loss and how to manage intermediate cases involving both aspects of benefit and of loss.

gift against his will.”¹⁴⁵ But critically, as long as the action is clearly in favor of the owner, there is no need for retroactive approval by the owner in order to validate it; it is valid automatically – under the condition that the owner does not reject it *post-facto*, thereby nullify it retroactively.¹⁴⁶

The essential meaning of the *zakhin* rule is that each person bears a kind of automatic authorization to perform legally binding actions to the advantage of others. Rabbi Moshe Feinstein (1895-1986, Belarus-U.S.A) provided one of the sharpest formulations of this insight: "people have power to conduct transactions for their fellows; when the action is to their detriment, then appointment as agency is required, but when it is in their favor, it can be done even without agency."¹⁴⁷

As mentioned, the Halakhic authorities debated whether granting a right is the only action that could be considered to be in favor of the owner, or rather whether under some conditions, also selling a property could be considered an advantage to the owner. Many Halakhic authorities believed the latter. For instance, Rabbi Asher ben Jehiel (1250-1327, Germany-Spain) held that if an individual wished to barter with one of his fellow's property, i.e. to take his fellow's possession and in its place give him something *superior*, he is allowed to do so even without asking for the owner's advance consent, for "it is in his [=the owner's] favor."¹⁴⁸ His son, Rabbi Jacob ben Asher (1269-1343, Germany-Spain), emphasized that this is true providing that "it is well known that it is in his favor, for example when the thing that was taken was up for sale; but he cannot barter with the owner personal household items."¹⁴⁹ Some opposed Rabbi Asher's opinion, arguing: "it is not clear at all. Is it allowed to trade in

¹⁴⁵ Maimonides, Laws of Original Acquisition and Gifts 4, 2.

¹⁴⁶ A single exceptional opinion exists among Halakhic authorities, according to which the rule of *zakhin* conditions the validity of the action with a retroactive approval of the owner, quite similar to the Anglo-American doctrine of ratification. See Hiddushei ha-Ran, Bava Batra 126a s.v. *amar rav huna*.

¹⁴⁷ Responsa Igrot Moshe, Even ha-Ezer, part 4, 6. Cf. Ketsot Hahoshen 105, 1.

¹⁴⁸ Piskei ha-Rosh, Bava Kamma 6, 12. Shulhan Arukh, who followed this ruling of the Rosh, put it in a more acute form: "Stealing is prohibited even in order to pay [the owner] something that is better. And some say that this applies only if the payment is not immediate, for if it is immediate and they [the payments] are better than the thing that was taken, it is to [the owner's] advantage" (Hoshen Mishpat, 359, 2).

¹⁴⁹ Tur, Hoshen Mishpat 359. Cf. Shakh, Hoshen Mishpat 359, 2; Ketsot Hahoshen 359, 1.

a fellow's property without asking for the owner's consent"?¹⁵⁰ However, it seems that the majority of the Halakhic authorities accepted that in principle, the rule of *zakhin* could be applied also to actions a person performs in someone else's existing property – including its sale – and not only to granting a new right.¹⁵¹ It goes without saying, though, that an especially high standard of evidence is required to prove that a sale of the owner's property is in her favor.

This context might clarify the innovative formulation found in the following Mishnah, which may seem surprising from the Anglo-American perspective. This Mishnah discusses the case of bailee who was appointed to the task of safekeeping some fruits. Suddenly, he discovers that the fruits are about to rot, and there is no way of preventing this – the only way to save their value is by selling them for immediate use.¹⁵² Hence, in this case, pre-appointment as a bailee exists, and suddenly emergency circumstances occurred requiring the performance of legally effective acts that exceed the scope of the antecedent authorization. Rabbi Simeon ben Gamliel (second century, land of Israel) justified the permission (or, in fact, duty) of the bailee to sell the fruits, under the grounds that “it is like returning lost property to its owner.”¹⁵³ This reasoning seems surprising, since a bailee operates by virtue of the pre-contract he made with the owner, while one who returns lost property operates unilaterally, without being appointed by the owner. Rabbi Simeon ben Gamliel does not assume that the ‘agency of necessity’ was given to the bailee implicitly through his antecedent bailment agreement, but rather justifies the action by arguing the a bailee is no different from any other person who is obliged to return lost property to its owner – or in this case to perform legally effective actions needed to protect the

¹⁵⁰ Yam Shel Shlomo, Bava Kamma 6, 27. Cf. Taz, Hoshen Mishpat 359, 2; Merkever ha-Mishneh, Laws of Divorce, 6, 3; Ketsot Hahoshen 243, 8. An earlier source reflecting this approach could be found in Or Zarua, Pesahim 224.

¹⁵¹ See Terumat ha-Deshen, Responsa, 288; Magen Avraham, Orakh Hayyim 436, 11. Cf. Beit Ephraim (*supra* note 105); Pit'hei Teshuva, Hoshen Mishpat 359, 3; Responsa Ne'ot Deshe 39; Responsa Da'at Sofer, Orakh Hayyim 52; Responsa Be'er Yitzhak, Orakh Hayyim 1,1.

¹⁵² The Talmud distinguishes between different types and stages of rot in a level of detail that is behind the scope of this discussion.

¹⁵³ Mishnah, Bava Metsia 3, 6. The sale must be conducted “in the presence of a court” that supervises its propriety.

owner's interests.¹⁵⁴ In other words, even in the case of a pre-existing contractual relationship, Jewish law anchors the power of one party to act in another's property through the legal power the law provides every individual to perform legally effective actions in favor of another.

Thus, selling one of the owner's properties, without his antecedent authorization, could be validated by both legal traditions, but for different reasons. Anglo-American law bases such action within the scope of the owner's consent, conditional on expressing *post-facto* ratification. In contrast, under Jewish law, as long as the action clearly benefits the owner, the sale could be immediately valid even in the absence of ratification – but the owner retains the right to reject the sale, thus bringing about its retroactive cancelation.¹⁵⁵

The two legal traditions differ in several respects, both practical and principled. Practically, the differences could be found in cases where the owner did not manage to learn about the action done in her favor before she lost communication or passed away. Under Anglo-American law, validity is conditional on the owner's ratification, and in its absence the action is invalid. Whereas according to Jewish law, as long as the owner does not reject the action, it could be valid immediately.¹⁵⁶

¹⁵⁴ For the broad interpretation Jewish law has given to the commandment of returning lost property, see *infra* text accompanying note 159. Cf. Scrutton JL, *Jebara v. Ottoman Bank* (*supra* note 137).

¹⁵⁵ If the sale is not to the owner's advantage, it will be held invalid. Jewish law does not recognize the doctrine of ratification, and does not offer owners the opportunity to grant retroactive validity to actions performed to their disadvantage without their antecedent authorization. See Responsa Rshbash 79; Mishneh Lamelekh, Laws of Marriage 7, 20; Responsa Divrei Hayyim, Even ha-Ezer 86.

¹⁵⁶ Responsa Oneg Yom Tov 110, s.v. *ule'anyut da'ati*: "this is what distinguishes between complete advantage and partial advantage: in the case of partial advantage, if the owner was not pre-informed and did not explicitly consent, [the action] is invalid [lit. not helpful], whereas in the case of a complete advantage, if the owner was not pre-informed about it, as for instance where the owner passed away before hearing of it, then it is also valid [lit. helpful]. However, if the owner protests, also in the case of complete advantage, it is invalid [lit. not helpful]". See also Avnei Milu'im 37, 12.

There is another possible practical difference between the two legal systems. The following scenario illustrates it: a person knows that his neighbor is trying for a long time to sell her car. He finds a buyer who is willing to pay a special high price, and therefore he sells the car to the buyer on behalf of the owner (intending to transfer the money to the owner). The next day, the owner, who was not aware of the first transaction, sells the car to another buyer, who pays its fair market value. After hearing of the first sale, the owner ratifies it, arguing that the second sale is invalid since at the date of the second

The principled difference is no less interesting. The Anglo-American doctrine of ratification strengthens the idea of the owner's complete control over her property. A non-owner is unauthorized to perform any action without attaining the owner's approval, if not in advance then at least *ex-post facto*. In contrast, the rule of *zakhin* in Jewish law differently interprets the idea of an owner's control over her property. Under this rule, the owner is not the only one can change her property's legal status, but rather non-owners acting in her favor can also operate in a similar way, even in absence of her authorization. Indeed, the owner has the ultimate decision and can reject (thereby canceling) the actions made in her favor. Yet, these actions do not draw their initial validation from the owner's approval.¹⁵⁷

This basic difference fits in well within the two conceptions of ownership described throughout this article. Anglo-American law interprets the right to exclude as activated automatically, applying also regarding actions initially performed by a non-owner in favor of the owner (unless the owner approves of them). On the other hand, Jewish law limits the automatic exclusion of a non-owner to cases where he acts against the interest of the owner; as long as the action is to the owner's advantage, and she did not express her opposition, the action might be valid.

sale, the car already belonged to the first buyer. Now, each of the buyers claims ownership of the car. The solution seems to hinge on the question of whether the validity of the first sale depends on the owner's ratification, or rather enters force automatically (as long as the owner does not reject it). If the validity depends on the owner's ratification, then it stands to reason that as long she did not ratify the first sale, the first sale is invalid. Therefore, it results that when the owner sold the car to the second buyer, the first sale was still invalid, and hence the right of the second buyer prevails. In contrast, if the first sale is automatically valid (provided that the owner will not reject it retroactively), then when the owner sold the car to the second buyer she sold something he no longer owned, hence the first buyer should get title of the car. See *Lissua v. Smith*, 138 A.2d 381, 386 (Md. 1958); FRIDMAN, *supra* note 125, at 74, 89; RESTATEMENT (THIRD) OF THE LAW OF AGENCY § 4.02 cmt. e (2006) ("An affirmation that results in ratification is subject to rights acquired by other persons prior to the affirmation").

¹⁵⁷ It could be that the existence of the rule of *zakhin* explains why Jewish law did not find necessary to develop a doctrine similar to ratification (see *supra* note 155).

Part VI: Is Property a Source for Imposing Positive Duties on Non-Owners?

The uniqueness of Jewish law's conception of ownership and exclusivity can be sharpened from an additional direction: the nature of duties imposed on non-owners in favor of the owner.

In seeking to convince us that exclusion of others (unlike the right to use) lies at the heart of the concept of ownership, Ripstein draws our attention to the fact that the law of property, as it is known to us today, imposes on non-owners only negative duties towards the owners – namely not to intervene in the asset's management and not to act in it – but not any positive requirements, such as duties to protect the thing, to improve it, to find lost properties and return them, or to assist the owner if she faces difficulties in using her property. In Ripstein's opinion, this indicates that property law is more focused on seeking to ensure the exclusion of others than it is on seeking to protect the owner's full ability to utilize her property:

A rule that enjoined non-owners to preserve property that was in peril, or to take low cost or even costless steps to aid and abet others' use of their property would encourage use. The law imposes no such burdens, because it does not value use per se...¹⁵⁸

This argument is highly interesting from comparative perspective because in fact Jewish law, unlike Anglo-American law, does impose such positive requirements on non-owners. For instance, according to Jewish law, the mere sight of lost property obligates a person to take it and return it to its owner.¹⁵⁹ This is completely distinct

¹⁵⁸ Arthur Ripstein, *Possession and Use*, in PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW 156, 173 (James Penner & Henry E. Smith eds., Oxford, 2013) [Ripstein].

¹⁵⁹ "You shall not see your brother's ox or his sheep going astray, and hide yourself from them; you shall certainly bring them back to your brother" (Deuteronomy 22,1); "The return of lost property to an Israelite is a positive commandment, for Scripture says, 'Ye shall surely return them to your brother' (Deuteronomy 22,1). Moreover, if one sees the lost property of an Israelite and ignores it and leaves it, he transgresses a negative commandment in addition to disregarding a positive commandment, for Scriptures says, 'Thou shalt not see thy brother's ox and hide thyself from them' (*ibid*). If he returns it, however, he has fulfilled a positive commandment" (Maimonides, *Mishneh Torah, Laws of Robbery and Lost Property* 11, 1). See also Michael J. Broyde & Michael Hecht, *The Return of Lost Property According to Jewish & Common Law: a Comparison*, 12 J. L. & RELIG. 225, 233 (1995-1996).

from Anglo-American law, according to which the act of returning lost property is considered to be the finder's voluntary decision (the finder can choose not to touch the lost property, leaving it where it is).

Furthermore, the sages interpreted the biblical commandment of returning lost property as applying to any situation in which the owner's property is in danger (not only when it has been lost), imposing a duty on non-owners to assist in rescuing property.¹⁶⁰ Additional examples of other positive duties exist as well under Jewish law.¹⁶¹

Hence, Ripstein's argument might imply that these positive duties imposed by Jewish law on non-owners to protect the owner's property indicate the limited place Jewish law gives to the idea of excluding others under the concept of ownership. As long as the uninvited non-owner's activity actually benefits the owner, his activity is not only legitimate but at times is also legally required. This notion dovetails nicely with the soft Jewish conception of ownership described above.

Part VII: Conclusion

Throughout this article I traced the winding paths of two legal traditions – the Jewish and the Anglo-American ones – regarding the scope of the property concept and the content of the right to exclude. I have discussed how each of the traditions formulated its position regarding four test cases: unrequested improvement, deriving benefit from another's property, performing legally binding acts in another's property without attaining consent and positive duties apply to non-owner in favor of the owner. It stands to reason that the difference between these legal traditions is not empirical but

¹⁶⁰ “If one sees water flooding and threatening to destroy another's building or land, he must place a barrier in its way to stop it, for Scripture says, ‘With every lost thing of thy brother's’ (Deuteronomy 22, 3), including also loss of his land” (Maimonides, Mishneh Torah, Laws of Robbery and Lost Property 11, 20).

¹⁶¹ As for instance, “If on the road, one encounters a person whose animal is crouching under the weight of its burden, he is enjoined to unload the burden from the animal... This is a positive commandment, for Scripture says, ‘Thou shalt surely release it with him’ (exodus 23, 5). The general rule is as follows: In every case where if the animal were his own he would load or unload it, he must load or unload another's” (Maimonides, Mishneh Torah, Law of Murder and Preservation of Life 13, 1-4).

rather normative¹⁶² and relates to the unique socio-economic ethos at the core of each of these legal systems.¹⁶³

As is well known, the sages and the Halakhic authorities did not often articulate the theoretical dimensions of their Halakhic rulings; usually, they avoided expressing their normative positions at high levels of conceptual abstractions. Their language is of doctrines and rules, legal principles and exceptions. Nonetheless, one of the famous paragraphs of the Avot tractate is highly interesting as a conceptual expression of the sages' soft understanding of the ideas of property and exclusivity:

[There are] four types of men:

He that says: 'What is mine is mine and what is yours is yours'; this is a common type, though some say that this is the type of S'dom.

[He who says:] 'What is mine is yours and what is yours is mine'; he is an ignorant man (*'am ha-arets'*).

[He who says:] 'What is mine is yours and what is yours is yours'; he is a saintly man.

[He who says:] "What is yours is mine, and what is mine is mine"; he is a wicked man.¹⁶⁴

Many commentaries have been woven around this Mishnah. According to my reading, the Mishnah indeed engages in classifying human characteristics; nevertheless, through this process, it expresses its position towards a variety of socio-economic approaches to the concept of ownership. The first category represents the view that advocates private property – what is mine is mine and what is yours is yours. I will return to discuss the Mishnah's attitude regarding this view later on below. The second category represents the view of denying private property – what is mine is yours and what is yours is mine – a kind of the idea of no ownership whatsoever, or rather of collective ownership, which the Mishnah attaches to the

¹⁶² That is to say, it does not emerge from disparity of assessments regarding the owner's intentions. For this kind of empirical explanation, see, ALBECK, *supra* note 59, at 179.

¹⁶³ See *supra* text accompanying note 27.

¹⁶⁴ Mishnah, Avot 5, 10.

derogatory category of 'an ignorant man' (*am ha'arets*).¹⁶⁵ The third category represents the altruistic view – what is mine is yours and what is yours is yours. The Mishnah considers this kind of individual behavior to be worthy of admiration, yet does not necessarily see such a standard as an adequate conception for the public in general. And the fourth category is egoism, or rather 'swinish' capitalism – what is yours is mine, and what is mine is mine – which the Mishnah condemns as the attitude of a wicked man.

Let us return to the most interesting category, the first one. Two opinions were expressed in the Mishnah regarding the idea of private property. According to the first perspective, private property is common and normal, a proper foundation stone upon which to establish society. However, the second opinion sees private property as 'the type of S'dom,' which is the worst condemnation that can be found in the sages' language. What wrong did those who hold this second opinion find in the notion of private property, and how can we explain the abyss that was opened between these two views? Furthermore, according to the second opinion, what should be the proper foundation stone for social order, if even the first category is inappropriate? Part of the commentators emphasized that these two opinions are not necessarily in dispute, but rather two complementing aspects characterizing the same phenomenon.¹⁶⁶ Thus, the Mishnah expresses a dual attitude regarding the idea of private property. On the one hand, the sages refer to it as a common, appropriate infrastructure for establishing desirable society. On the other hand, they seek to warn us against the potential dangerous implications that a complete and absolutist realization of the idea of private property could yield, with emphasis on total exclusion of others.¹⁶⁷ In their view, too

¹⁶⁵ Yet, some of the commentators interpreted the idiom '*am ha'arets*' in this context as having a positive connotation. See, for example, Rabbenu Yonah on Pirkei Avot 5, 10; Rashbats, Magen Avot 5, 10. Rabbi Menahem Meiri, Beit ha-Behira, Avot 5, 10. The latter mentioned both interpretations. Exceptional is Rabbi Jacob Emden's attitude (1698-1776, Altona, Hamburg), advocating specifically the type of *am ha'arets* as the basis for constituting the desirable economic system, that is to say a collective system free of private property (Lehem Shamayim, Avot 5, 10).

¹⁶⁶ See Rabbi Menahem Meiri, Beit ha-Behira, Avot 5, 10 ("some say that this is the type of S'dom, and both are true"); Rashbats, Magen Avot 5, 10 ("some say, 'this is the type of S'dom': in this tractate there are no disputes; therefore, I say that this sage added only that this type has badness, close to the manner of S'dom").

¹⁶⁷ For drawing direct line between this Mishnah and the problem of the right to exclude, see, Rabbi Menahem Meiri, Beit ha-Behira, Avot 5, 10.

broad an interpretation of the right to exclude might lead to the deterioration of society into the type of S'dom. Put otherwise, this Mishnah indicates that the appropriate way to establish society requires a position based on the concept of private property, yet ensures a softened form of this notion that does not fully exhaust the idea of exclusivity.

The crossroad where Anglo-American law meets Jewish law does not involve any right-wrong solutions. The differences between the two legal traditions depend, first and foremost, on the weltanschauungs and socio-economic persuasions that stand at their core. There is much in Waldron's assertion that "private property is a *concept* of which many different *conceptions* are possible, and that in each society the detailed incidents of ownership amount to a particular concrete conception of these abstract concepts."¹⁶⁸

When our horizon is limited to only one legal tradition, our way of thinking tends to become fixated. Alternative legal options might seem too simplistic, one-dimensional and unreasonable. I believe that the time-honored experience of Jewish law can expose us to an alternative conception of private property and inter-personal relationships associated with it.

¹⁶⁸ WALDRON, *supra* note 19, at 31.