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IDENTIFYING INTENSE PREFERENCES

Daphna Lewinsohn-Zamir†

People's preferences vary in intensity: some are strong while others are weak. Information regarding the strength of preferences is essential to legal policymaking for reasons of both efficiency and fairness. The goal of efficiency maximization requires allocating goods to those who value them most; it seems unfair to grant an entitlement to a person who is comparatively indifferent to receiving it rather than to one who intensely desires it. However, identifying strong preferences is no easy task. Individuals may strategically misrepresent the intensity of their preferences to improve their position. In recent years, the law-and-economics literature has largely focused on one aspect of this issue: the case of owners' subjectively high valuation of land. Several scholars have proposed various techniques, which rely on self-assessments, to detect people's true preferences. These techniques require case-by-case inquiries, involve monetary payments, and employ sanctions to ensure truthfulness.

This Article argues that the land-valuation problem is but a specific manifestation of a much broader concern. The need to identify intense preferences arises in all fields of law, and with respect to all types of entitlements. More importantly, fundamentally different methods can be used to detect strong preferences. Identifiers may be generalized rather than case specific, entail in-kind burdens rather than monetary ones, and adopt nonpenalizing rather than penalizing approaches.

Legal rules, as this Article demonstrates, can employ generalized and nonpenalizing (GNP) devices to identify intense preferences. Such identifiers include use value vs. exchange value, possession, declining marginal utility, redemption, and reasons-requirement. These identifiers tacitly underlie a variety of rules governing such diverse issues as rights of first refusal, takings compensation, self-help remedies, children's adoption, secured transactions, and conscientious objection.

The Article further argues that GNP identifiers are superior to alternative techniques. It compares GNP devices to four other methods: "Mouth" (reliance on people's verbal statements alone); "Mouth and Purse" (verbal statements backed up by monetary sanctions); "Generalized and Penalizing" (generalizations that utilize willingness to bear in-kind sanctions); and

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“Case-Specific and Penalizing” (case-by-case detection via readiness to incur nonmonetary burdens). GNP techniques score highly on all parameters of evaluation. They treat people with dignity and respect, afford equal treatment to their preferences, do not favor the rich, and at the same time, mitigate the risk of lies. In addition, GNP methods entail relatively low administrative costs and can contend with objectionable preference-intensities.

INTRODUCTION	1392
I. OVERCOMING SECRETS AND LIES THROUGH “MOUTH AND PURSE” TECHNIQUES	1398
II. GENERALIZED AND NONPENALIZING IDENTIFIERS OF INTENSE PREFERENCES	1402
A. Use Value vs. Exchange Value	1403
B. Possession	1410
C. Declining Marginal Utility	1414
D. Redemption	1420
E. Reasons	1425
F. General Comments	1431
III. ASSESSMENT OF THE NONPENALIZING APPROACH	1434
A. General	1434
B. Effectiveness	1437
C. Equal and Fair Treatment of Intense Preferences ...	1439
D. Implementation Costs	1447
E. Dealing with Unfair and Objectionable Intensities ..	1449
F. Summary	1454
CONCLUSION AND EXTENSIONS	1454

INTRODUCTION

Young Arthur’s accession to the throne is a well-known and beloved tale. Following the death of King Uther Pendragon, many powerful nobles believed themselves deserving of the crown, and Britain was in danger of being thrown into turmoil.¹ Bloodshed, however, was averted when a miraculous stone appeared with a sword thrust deep into it, bearing the inscription: “WHOSO PULLETH OUT THIS SWORD OF THIS STONE AND ANVIL IS RIGHTWISE KING BORN OF ALL ENGLAND.”² All the mightiest knights failed in the attempt to unsheathe the sword.³ Only Arthur, a mere boy, effortlessly drew the sword from

¹ SIR THOMAS MALORY, *KING ARTHUR AND HIS KNIGHTS* 8 (Eugène Vinaver ed., 1980) (“Then stood the realm in great jeopardy long while, for every lord that was mighty of men made him strong, and many weened to have been king.”).

² *Id.* at 9.

³ ROBERT DE BORON, *MERLIN AND THE GRAIL* 107–09 (Nigel Bryant trans., 2001).

the stone,⁴ thus revealing himself as the true King.⁵ In this legendary history, the sword test, rather than force, wealth, or inheritance was used to identify the rightful sovereign.

The Arthurian legend, as fables are wont to do, illustrates a common, real-life problem: how to identify truth. In the legal context, this difficulty regularly arises when we seek to identify and determine the true strength of people's preferences. Often, there is more than one path to arrive at this goal, which raises the question of the most appropriate method. Should we gauge preference-intensity by verbal statements, monetary payments, willingness to bear sanctions, or some other means? This Article addresses that question.

People hold a multitude of preferences that vary in intensity.⁶ Some are relatively strong, while others are comparatively weak. For instance, although both Guinevere and Lancelot rank vanilla above chocolate ice cream, Guinevere may have only a slight preference for one flavor over the other, while Lancelot may extremely dislike chocolate and greatly favor vanilla.⁷ Consequently, a move up the preference-satisfaction ladder from chocolate to vanilla would substantially enhance Lancelot's welfare. A similar change would have only a small positive effect on Guinevere's well-being.

Information regarding the *strength*—rather than just the content—of preferences is often essential for both efficiency and fair-

⁴ MALORY, *supra* note 1, at 10–11.

⁵ ANDREA HOPKINS, CHRONICLES OF KING ARTHUR 22 (1993) (“The Sword in the Stone can only be drawn by the true king, and is thus instrumental in bringing Arthur to his throne.”).

⁶ See, e.g., JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 125 (1962) (arguing, in the context of voting, that people's preferences “vary in both object and intensity”); Alan Coddington, *Utilitarianism Today*, 4 POL. THEORY 213, 221 (1976) (“Of course, we do have stronger and weaker preferences . . .”). This Article does not address the debate on whether individuals have a single, complete, and transitive set of preferences, or rather dual and even multiple preference orderings. On this issue, see Daphna Lewinsohn-Zamir, *Consumer Preferences, Citizen Preferences, and the Provision of Public Goods*, 108 YALE L.J. 377 (1998).

⁷ An “ordinal” ranking of preferences represents the order of an individual's preferences. Any numbers used in such ranking indicate only the sequence of preferences and do not convey information about the strength of preferences. In a “cardinal” ranking, by contrast, there is meaning to the differences between the numbers attached to rankings. The distances between the ranked preferences designate the intensity with which one alternative is preferred to the other. HANS VAN DEN DOEL & BEN VAN VELTHOVEN, DEMOCRACY AND WELFARE ECONOMICS 23–24 (2d. ed. 1993) (generally explaining the concepts of ordinal and cardinal methods of measurements); Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63, 76–78 (1990) (discussing ordinality and cardinality in the context of voting). In the above example, Guinevere and Lancelot have identical ordinal rankings. Only a cardinal ranking reveals the wide gap between Lancelot's preferences for vanilla and chocolate ice creams, and Guinevere's merely mild preference for one flavor over the other.

ness.⁸ The goal of efficiency maximization requires allocating goods to those who value them most.⁹ Accordingly, when regulators, judges, or other decisionmakers allocate entitlements among competing parties—be it property, babies for adoption, or seminar paper topics—they need to compare the intensity of the preferences for these entitlements.¹⁰ Fairness considerations likewise necessitate such an inquiry. Absent good justifications to the contrary, it seems unfair to grant an entitlement to a person who is comparatively indifferent to receiving it rather than to one who intensely desires it.¹¹ Moreover, even when no direct competition over a resource is involved, ignoring the possibility of intense preferences might lead to inefficient and unjust results. Rules that are perfectly suitable for cases of “ordinary” or average preference-intensity may be inappropriate for situations where exceptionally strong preferences exist. By identifying the latter situations and according them different treatment, we improve the efficiency and fairness of legal rules. For instance, market value may be a reasonable compensation measure for most owners of lost or damaged property. Yet, it will systematically undercompensate owners with unique, subjective valuations of their property, causing demoralization and inefficiency in the long-run.¹² For all these reasons, we frequently engage in judgments and comparisons of preference-intensities.

Identifying intense preferences is clearly crucial when a market for the relevant entitlement does not exist,¹³ or when there is a signifi-

⁸ See Richard J. Arneson, *Liberalism, Distributive Subjectivism, and Equal Opportunity for Welfare*, 19 PHIL. & PUB. AFF. 158, 181 (1990) (“The value of satisfying one or another of an individual’s preferences depends on its relative importance as judged by the individual herself.”).

⁹ Economic analysis of law adopted the Kaldor-Hicks criterion of efficiency. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 13–15 (7th ed. 2007); DAVID L. WEIMER & AIDAN R. VINING, *POLICY ANALYSIS: CONCEPTS AND PRACTICE* 263–64 (2d ed. 1992). Accordingly, a certain change is efficient if those gaining from it could fully compensate the losers and still be better-off. It suffices that an excess of benefits over losses exists; efficiency does not require actual compensation of the losers. ALLAN M. FELDMAN, *WELFARE ECONOMICS AND SOCIAL CHOICE THEORY* 142–44 (1980) (discussing the Kaldor-Hicks criterion). The Kaldor-Hicks criterion is a cardinal measure since it uses the surrogate of money to compare utility or welfare across individuals. See Hovenkamp, *supra* note 7, at 93 (stating that “Kaldor-Hicks assessments of efficiency . . . permit cardinal comparisons”).

¹⁰ I do not claim that promoting preference satisfaction in society should be the state’s only goal. For the purposes of this Article, it suffices that enhancing people’s preference satisfaction is justifiably an important governmental concern.

¹¹ ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 92 (1956) (noting this issue of fairness in relation to an intense minority and an apathetic majority in politics).

¹² Daphna Lewinsohn-Zamir, *Compensation for Injuries to Land Caused by Planning Authorities: Towards a Comprehensive Theory*, 46 U. TORONTO L.J. 47, 61–62, 65–66 (1996). For discussion of this example, see *infra* Part I.

¹³ A good example is an entitlement to conscientious-objector status, which exempts a person from military service. See *infra* Part II.E.

cant risk of market failure.¹⁴ In such cases, we cannot rest assured that voluntary transactions would eventually transfer goods to those who desire them most. Identification is also important, however, in circumstances where functioning markets exist. Rules directly addressing the needs of individuals with strong preferences can economize on transaction costs and increase the resultant efficiency gains, while at the same time avoiding the market's inherent bias against those unable to pay.¹⁵

Detecting intense preferences is a difficult task. For example, people asked to verbally state the strength of their preferences may lie in order to improve their position.¹⁶ The law-and-economics literature has largely focused on a narrow—though important—aspect of this identification issue. It has devoted much attention to the case of owners' subjectively high valuation of land, primarily in the context of compensation for takings.¹⁷ This literature proposes identification techniques that rely on self-assessments by the affected owners and can be characterized by three features: they require *case-by-case* inquiries, involve *monetary* payments, and employ *sanctions* to ensure people's truthfulness.¹⁸ Such sanctions may include, for example, basing property taxes on owners' self-valuations.¹⁹

This Article argues that the land-valuation problem is but a specific manifestation of a much broader concern. The need to identify intense preferences may arise in all fields of law and with respect to all

¹⁴ The market might fail to satisfy individuals' highest-ranking preferences due, for example, to a prisoner's dilemma type of situation. G. PETER PENZ, CONSUMER SOVEREIGNTY AND HUMAN INTERESTS 37–38 (1986); Lewinsohn-Zamir, *supra* note 6, at 386–88, 391–94.

¹⁵ See Lucian A. Bebchuk, *The Pursuit of a Bigger Pie: Can Everyone Expect a Bigger Slice?*, 8 HOFSTRA L. REV. 671, 677–84 (1980) (explaining that willingness to pay depends on ability to pay and hence favors the wealthy over the poor).

¹⁶ See VAN DEN DOEL & VAN VELTHOVEN, *supra* note 7, at 22 (“[R]esults can be less reliable because the respondents have no economic incentive to reveal their true preferences.”); see also JULES L. COLEMAN, MARKETS, MORALS AND THE LAW 91 (1988) (“In the absence of a market in which a person's willingness to pay is expressed through trades and bids, the cost of ascertaining willingness to pay would be enormous and the reliability of that information suspect.”); WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE 99 (1982) (noting that consideration of preference-intensity “might lead people to exaggerate their desires simply to make them count for more”).

¹⁷ See, e.g., Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 STAN. L. REV. 871 (2007). Another discrete context in which the identification of strong preferences was discussed is voting. See BUCHANAN & TULLOCK, *supra* note 6, at 131–69 (demonstrating how vote trading and logrolling enable the consideration of preference-intensities); Saul Levmore, *Voting with Intensity*, 53 STAN. L. REV. 111, 142–61 (2000) (advocating a limited vote market that would reflect the strength of voting preferences). The logrolling method is discussed *infra* Part III.

¹⁸ See, e.g., Bell & Parchomovsky, *supra* note 17, at 890–900 (suggesting a self-assessment model with these features).

¹⁹ *Id.* at 892–94.

types of entitlement. More importantly, additional and fundamentally different methods can be used to discover strong preferences; identifiers can be *generalized* rather than case specific, thus dispensing with the need for ad-hoc examination of individual cases. That is to say, we can generalize about circumstances in which intense preferences are likely to exist and incorporate the relevant proxies—such as “use value” or “declining marginal utility”—into the legal rules themselves. Furthermore, identifiers may entail burdens *in-kind* rather than monetary costs, thereby reducing the bias in favor of the rich. Thus, instead of detecting strong preferences via individuals’ willingness to pay, we may reveal them through their readiness to sacrifice time, effort, or honor. Finally, identifiers may adopt *nonpenalizing*—rather than penalizing—approaches. Sometimes, we can detect intense preferences without taxing the subjective, unique utility that some people derive from entitlements. Individuals need not hand over some (or all) of this special value as proof that strong preferences indeed exist.

The goal of this Article is twofold. First, it demonstrates how legal rules can—and do—employ generalized and nonpenalizing (“GNP”) devices to identify intense preferences. This type of identifier has not received systematic theoretical treatment and has not been sufficiently utilized in practice. Prime examples of nonpenalizing proxies for strong preferences are use value vs. exchange value, possession, declining marginal utility, redemption, and reasons-requirement.²⁰ These proxies can be found in diverse legal fields and contexts. They constitute a hidden common denominator of such dissimilar rules as those governing rights of first refusal, takings compensation, self-help remedies, adoption, bankruptcy exemptions, secured transactions, and conscientious objection. Current law has not exhausted the potential for crafting GNP identifiers, which leaves room to adopt additional rules of this kind.

Second, the Article argues that GNP identifiers enjoy various advantages that other techniques for detecting strong preferences lack (either wholly or in part). The Article compares GNP devices to four alternative methods: “Mouth” (reliance on verbal statements alone, as in public opinion polls and contingent valuation surveys); “Mouth and Purse” (identification through verbal statements backed up by monetary sanctions, as employed in self-assessment mechanisms for land valuation); “Generalized and Penalizing” (generalizations regarding cases of strong preferences, which utilize people’s readiness to bear in-kind sanctions); and “Case-Specific and Penalizing” (case-by-case detection of intense preferences through individuals’ willingness to incur nonmonetary burdens). As this Article will demonstrate,

²⁰ See *infra* Parts II.A–II.E.

the GNP technique is, overall, the superior method because it is the only one that scores highly on *all* parameters of evaluation. GNP identifiers treat people with dignity and respect, afford equal treatment to their preferences, do not favor the wealthy, and at the same time mitigate the risk of lies. In addition, the GNP method entails relatively low administrative costs and is capable of dealing with objectionable preference-intensities. The other four methods fail on more than one of these grounds. The role that GNP identifiers play should thus be expanded and rules utilizing them adopted whenever feasible.

Some important clarifications are in order. The Article focuses on identifying the strength of people's subjective, *actual* preferences.²¹ Although such preferences may sometimes be irrational or offensive, even objective theories of welfare afford them substantial—albeit not conclusive—weight.²² Thus, all theories of well-being share in the quest for detecting intense preferences. Later in the Article, I shall somewhat broaden the perspective by addressing the problem of individuals with unfair or objectionable preference-intensities.²³ Furthermore, for the purposes of this Article, one need not dwell on the distinction between people's preferences and their value judgments.²⁴ To the extent that decisionmakers need to gauge the strength with which values are held, we can extend our discussion of preference-intensity-identification to people's mental states regarding their values.²⁵

The Article proceeds as follows. Part I opens with the technique enjoying the greatest popularity in legal literature, namely, "Mouth and Purse" identifiers. It exposes their shortcomings and establishes the need for identification methods that are not prone to similar problems. Part II discusses several generalized and nonpenalizing identifiers of strongly held preferences. This Part demonstrates the great potential of GNP techniques and their applicability to numerous

²¹ For a critical discussion of subjective and objective theories of welfare, see generally Daphna Lewinsohn-Zamir, *The Objectivity of Well-Being and the Objectives of Property Law*, 78 N.Y.U. L. REV. 1669 (2003).

²² See *id.* at 1677–1700, 1710–13 (discussing ways of dealing with mistaken or objectionable actual preferences and explaining their place in objective theories of well-being).

²³ See *infra* Part III.E.

²⁴ See, e.g., Mark Sagoff, *Values and Preferences*, 96 ETHICS 301 (1986) (drawing a distinction between values and preferences and claiming that public policy should be based on communitarian values, rather than on individuals' preferences); Joseph William Singer, *Critical Normativity*, 20 LAW & CRITIQUE 27 (2009), available at <http://ssrn.com/abstract=1278154> (arguing that values are not the same as preferences and that the former should be employed in rejecting illegitimate preferences from our moral calculus).

²⁵ Take, for example, the issue of conscientious objection. If the state is willing to exempt objectors from military service, it must identify those individuals who would suffer the severest injury to their conscience if forced to bear arms. The methods discussed *infra* Part II.E with respect to identifying strong preferences against military service are equally applicable to the detection of intensely held values in this regard.

issues in various legal fields. Part III elaborates on the many theoretical advantages of GNP identifiers, contrasting them with the relative disadvantages of four alternative methods. Thus, it substantiates the normative superiority of the generalized and nonpenalizing approach. The conclusion points to further theoretical implications of our analysis, including its extension to identification of *low*-intensity preferences.

I

OVERCOMING SECRETS AND LIES THROUGH "MOUTH AND PURSE" TECHNIQUES

When courts and other decisionmakers wish to gauge the strength of people's preferences in a specific case, they face two obstacles: secrets and lies. The first obstacle refers to the difficulty of discovering private information about the intensity of preferences; such information is not reflected in observable behavior. The easy solution—asking people to verbally reveal the crucial information—immediately encounters the second obstacle: the incentive to lie.²⁶ Competition and compensation scenarios may encourage individuals to overstate their valuation. This is the case when the state must allocate a scarce entitlement between one of two (or more) parties, such as for adopting a healthy baby, and when the state is obliged to compensate owners for the expropriation of their land. Exaggerated assessments in both cases increase, respectively, the chance of receiving the entitlement or the ensuing monetary award.²⁷ In contrast, self-assessments for taxation purposes potentially prompt understatements of value in an attempt to reduce subsequent payments to the government.²⁸ Thus, the advantage of simplicity in acquiring the information is offset by the shortcoming of its dubious authenticity. Consequently, writers have expended much energy in devising and perfecting complex lie-proof mechanisms. This literature has largely focused on the valuation of land²⁹—the quintessential asset often val-

²⁶ See Lee Anne Fennell, *Revealing Options*, 118 HARV. L. REV. 1399, 1411 (2005) ("The primary stumbling block to obtaining a truthful valuation statement is a party's knowledge of the way the valuation will affect her fortunes.").

²⁷ See *id.* at 1419 (discussing how parties tailor valuations to maximize value); see also Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1479 (2008) ("Because eminent domain has no reliable mechanism for eliciting the true valuation of landowners, any consideration of subjective valuation would be an invitation to perjury.").

²⁸ See Saul Levmore, *Self-Assessed Valuation Systems for Tort and Other Law*, 68 VA. L. REV. 771, 778 (1982) ("In asking an owner to volunteer information about what his property is worth to him, we face an obvious problem that is at the core of any self-assessment system: unless constrained, an owner will underassess or, more accurately, selfishly announce a dishonest assessment.").

²⁹ See Fennell, *supra* note 26, at 1444–81 (devising self-assessed valuation mechanisms for a variety of multiparty commons situations, including aesthetic controls in neighbor-

ued by its owner above market price³⁰—and, in particular, on the assessment of compensation for its taking by the state.³¹ It was proposed, for instance, that compensation be determined according to owners' self-valuations (declared either in advance, before any conflict has arisen,³² or after the government considers expropriation of the property)³³. Such devices as basing property taxes on self-assessments³⁴ and requiring future sale prices to at least equal self-declared values would achieve truthfulness.³⁵ Alternatively, owners selling their property below their former evaluation would have to pay the difference to the government or to their favored charity.³⁶

hoods and conservation easements); Daniel M. Holland & William M. Vaughn, *An Evaluation of Self-Assessment Under a Property Tax*, in *THE PROPERTY TAX AND ITS ADMINISTRATION* 79 (Arthur D. Lynn, Jr. ed., 1969) (examining various self-assessment schemes for land taxation); Levmore, *supra* note 28, at 771, 778–90 (proposing self-assessed valuation in the context of the property tax); *see also* Michael Abramowicz, *The Law-and-Markets Movement*, 49 AM. U. L. REV. 327, 364–73 (1999) (discussing several self-assessment mechanisms suggested in the literature).

³⁰ *See* DAVID A. DANA & THOMAS W. MERRILL, *PROPERTY: TAKINGS* 173–74 (2002) (listing psychological attachment, customization, and location benefits among the reasons real property is often valued above market price); James E. Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859, 866 (“[Sellers] are not compensated for . . . loss of consumer surplus—which is to say the amount by which an owner values property over and above its fair market value.”).

³¹ *See* Bell & Parchomovsky, *supra* note 17, at 891–900 (discussing the advantages of self-assessment mechanisms for takings compensation); Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 995–1002 (advocating eliciting advance consent for certain takings by allowing self-assessed compensation and providing tax benefits); Thomas S. Ulen, *The Public Use of Private Property: A Dual-Constraint Theory of Efficient Governmental Takings*, in *TAKING PROPERTY AND JUST COMPENSATION: LAW AND ECONOMICS PERSPECTIVES OF THE TAKINGS ISSUE* 163, 182–83 (Nicholas Mercurio ed., 1992) (evaluating a proposal under which owners' self-assessments of the value of their land would determine their taxation liability and eminent-domain compensation).

³² *See* Fennell, *supra* note 31, at 995–99.

³³ Bell & Parchomovsky, *supra* note 17, at 892–93.

³⁴ *See id.* at 892–94. Self-assessments can be used as the basis for taxation if they are reported before any question of expropriation arises, or if the government eventually decides not to take the property. In order to reduce the government's incentive to excessively exercise its eminent domain power, Bell and Parchomovsky suggest that while owners will indeed increase their payments based on their above-market self-assessments, they will pay the additional increment of property tax to a charity of their choice rather than to the government. *Id.* at 894, 901.

³⁵ *Id.* at 892–93.

³⁶ *Id.* at 893, 901. Saul Levmore has proposed that property taxation be based on owners' self-assessments. Levmore, *supra* note 28, at 779, 789. The risk of undervaluation would be mitigated by periodically publicizing these assessments and allowing anyone (including the government) wishing to force a sale of the property against payment of the self-reported value to do so. Holland and Vaughn examined variations on such a taxation scheme, where bids in forced sales must exceed landowners' valuations by twenty percent, and owners can retain their property by revaluing it according to the buyer's offer, or by raising their self-assessment by twenty-five percent. Holland & Vaughn, *supra* note 29, at 81–83, 89–110. In a similar vein, Fennell has suggested that owners allowing the taking of their property for government-sponsored private condemnations choose a price between one hundred percent and two hundred percent of the regulatory-assessed value. Fennell,

These identifiers of intense preferences can be characterized as ad-hoc “Mouth and Purse” (MP) techniques. MP techniques ascertain strong preferences on a case-by-case basis via personal statements of value backed by monetary payments. Willingness to pay higher taxes and refusal to sell below stated values serve as proof of genuinely intense preferences with respect to the asset. The monetary sanction on sales below self-declared values also curbs owners’ incentives to lie.³⁷

MP techniques may indeed discourage owners from intentionally lying about their valuation of entitlements.³⁸ This advantage, however, comes at a heavy price.³⁹ MP mechanisms employ actual monetary payments both to prove the existence of intense preferences and to deter untruthfulness. The use of a “willingness to pay” standard exposes MP to critiques similar to those leveled at the Kaldor-Hicks criterion of efficiency.⁴⁰ People’s willingness to pay depends, at least partially, on their ability to pay, and thus on the existing distribution of wealth in society.⁴¹ Nonaffluent owners may be unable to pay higher taxes that reflect their true, above-market valuation of the property.⁴² Furthermore, the declining marginal utility of money implies that the less well-off a person is, the greater the detrimental impact of the fine on future sales below self-declared values. Because individuals are generally risk averse,⁴³ nonwealthy owners may under-

supra note 31, at 997–98. Volunteering owners would receive a tax rebate but, in order to discourage overvaluation, its size will be inversely related to the percentage that self-assessed value exceeds governmental-assessed value. Owners who self-report 200% would not receive any tax break. *Id.*

³⁷ Note that even MP mechanisms do not entirely eliminate incentives to lie. *See, e.g.,* Bell & Parchomovsky, *supra* note 17, at 897–98 (explaining, with respect to takings compensation, why owners not wishing to sell in the foreseeable future have an incentive to overstate their valuation); Levmore, *supra* note 28, at 781–82 (observing, in the context of property taxation, that owners may report a value that is lower than their true reservation price, yet still higher than their estimation of the price anyone else would be willing to pay for the property).

³⁸ For a critique of the “lie-mitigation” advantage of MP methods, see *infra* Part III.B.

³⁹ For a detailed discussion of the several advantages of generalized and nonmonetary identifiers of intense preferences, see *infra* Part III.

⁴⁰ *See* sources cited *supra* note 16.

⁴¹ *See* GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 32 (1978) (stating that an important problem of market determination of scarce goods’ allocation is its “dependence on the existing distribution of wealth”); Robert E. Goodin, *How to Determine Who Should Get What*, 85 ETHICS 310, 315 (1975) (noting that an individual’s willingness to pay “depends heavily on how much he can afford to pay”).

⁴² Katrina Miriam Wyman, *The Measure of Just Compensation*, 41 U.C. DAVIS L. REV. 239, 272 n.110 (2007).

⁴³ ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 51–52 (4th ed. 2004) (explaining that an attitude of risk aversion—rather than risk neutrality—is the standard economic presumption with respect to individuals); POSNER, *supra* note 9, at 11 (“[E]conomists believe . . . that most people are risk averse most of the time . . .”).

state the value of their property in order to avoid the potential sanction.⁴⁴

Even leaving aside regressivity and wealth effects, MP methods seem unfair and discriminatory. People are not ordinarily compelled to reveal the full extent of their valuation of a good. Market prices reflect the value of the marginal owner, which allows individuals to keep their consumer surplus—both literally and metaphorically—to themselves.⁴⁵ Employing MP devices is advocated only in limited circumstances. Accordingly, owners whose land is considered for expropriation will pay higher taxes than owners who do not face a threat of eminent domain.⁴⁶ Consequently, MP singles out some persons with intense preferences for differential treatment, and taxes their unique, subjective value.⁴⁷ Finally, implementing MP methods is complex and raises the administrative costs of resource-valuation processes. For instance, the requirement that land not be sold for less than its self-declared value necessitates stringent monitoring of real estate transactions and collection of any discrepancies between stated values and (lower) sale prices.⁴⁸

⁴⁴ See Amnon Lehari & Amir N. Licht, *Eminent Domain, Inc.*, 107 COLUM. L. REV. 1704, 1730–31 (2007) (contrasting the risk aversion of individuals whose land is their main asset with the risk-spreading advantages of land speculators who have multiple holdings). A different question is whether people would be able to accurately quantify their subjective valuation of an asset when they do not contemplate selling it on the real market. Elsewhere I have argued that behavioral studies support the claim that people's truthful reservation price (WTA) is not fixed. In particular, reservation prices are expected to be higher for coerced transfers than for voluntary sales. Daphna Lewinsohn-Zamir, *The Choice Between Property Rules and Liability Rules Revisited: Critical Observations from Behavioral Studies*, 80 TEX. L. REV. 219, 253–57 (2001).

⁴⁵ See *infra* notes 243–48 and accompanying text; see also DANA & MERRILL, *supra* note 30, at 174 (stating that fair market value reflects the value of the marginal owner and that many owners are “infra-marginal”).

⁴⁶ See Bell & Parchomovsky, *supra* note 17, at 895 (admitting that their self-assessment proposal cannot apply to land owned by tax-exempt organizations and to personal property that is not periodically taxed according to its value).

⁴⁷ For a brief mention of the horizontal equity problem, see Wyman, *supra* note 42, at 266 n.96. Similarly, although Fennell's tax-break mechanism discourages exaggerated self-assessments (since the higher the self-reported value, the lower the tax rebate), it also penalizes owners with *genuinely* high valuations. Such owners are required to forgo some—or even all—of the economic benefits that individuals without intense preferences receive. Fennell, *supra* note 31. Some scholars advocating MP mechanisms are aware of this difficulty. Levmore, for example, acknowledges the problem that owners with idiosyncratic tastes would face a heavier tax burden and suggests mitigating it by introducing a more complex system of competitive assessment. See Levmore, *supra* note 28, at 780–81, 783–88; see also Fennell, *supra* note 26, at 1469–70 (observing that self-assessments require payment of the entitlement's full value to the assessor, leaving no surplus in her hands, but remaining agnostic about the fairness of this outcome).

⁴⁸ See Lehari & Licht, *supra* note 44, at 1730; Wyman, *supra* note 42, at 266; see also Holland & Vaughn, *supra* note 29, at 85 (“[E]ven with a relatively modest fraction of properties requiring sanctions [for misrepresentation of value by owners], the strain on financial and marketing resources could become prohibitive.”); Ulen, *supra* note 31, at 183

The shortcomings of MP techniques highlight the need for additional and different identifiers of strong preferences. Ideally, we should seek identifiers that do not penalize people with intense preferences, are not biased against those worse off, and do not entail high administrative costs. Furthermore, asking individuals to evaluate entitlements, and then using monetary threats that impliedly assume that they do not tell the truth, is disrespectful of people's honesty and integrity. It is more respectful of individuals either to accept their estimations at face value and take them into consideration,⁴⁹ or forgo reliance on verbal accounts altogether.

Nonpenalizing identifiers exist and are quite prevalent in various legal contexts. Indeed, they are also found in the sphere of takings compensation.⁵⁰ However, the functional similarity of these identifiers has been heretofore overlooked due to the diversity of contexts in which they are used and their unsystematic employment. Nonpenalizing devices detect intense preferences by using several proxies. Mostly, they generalize about circumstances in which strong preferences are likely to exist and incorporate the relevant proxies—such as “use value,” “possession,” and “declining marginal utility”—into the legal rules.⁵¹ Nonpenalizing identifiers base these generalizations on experience or studies of human nature and behavior. Alternatively, legal rules sometimes adopt identifiers that, while case-specific rather than general, do not require monetary payments or impose sanctions on people with intense preferences.⁵²

I do not claim that MP mechanisms should never be used or that GNP identifiers can invariably replace verbal and monetary techniques for detecting intense preferences. I do submit, however, that nonpenalizing identifiers are often superior to alternative identification methods, should be more widely used, and merit close theoretical attention. Let us now turn to examine such devices.

II

GENERALIZED AND NONPENALIZING IDENTIFIERS OF INTENSE PREFERENCES

GNP identifiers of intense preferences may take various forms. The following examples were chosen with an eye for variety. Though

(observing that allowing landowners to change self-assessments frequently would create “overly burdensome administrative costs”).

⁴⁹ For further discussion of this point, see *infra* notes 241, 250–55 and accompanying text.

⁵⁰ See *infra* notes 82–90 and accompanying text.

⁵¹ See *infra* Parts II.A–II.C.

⁵² A prime example is requiring “reasons” for preferences. See *infra* Part II.E.

certainly not exhaustive, they demonstrate the richness of possibilities in this context.

A. Use Value vs. Exchange Value

One proxy for identifying strong preferences is the distinction—supported by behavioral studies—between assets held for use and assets intended for exchange. Generally speaking, preferences regarding property are likely to be more intense when an individual holds it for her own (and continuous) use than when she holds the property for exchange or when she subsequently chooses to part with it, for instance, by sale. A person wishing to trade is a person who intends to participate in the market and who believes that good substitutes for her property exist—otherwise she would not have agreed to sell. In other words, willingness to exchange means that the market price satisfactorily compensates for the asset.⁵³ In contrast, an individual who wishes to continue using her property refuses to enter the market. This is tantamount to a belief that adequate alternatives—in the form of money or other goods—do not exist.

Experimental studies of the endowment effect (EE) confirm the disparity between use value and exchange value. Numerous experiments have shown that people value an entitlement they already possess much more than a similar entitlement they have an opportunity to acquire.⁵⁴ Specifically, individuals demand a significantly higher price to relinquish an already-owned entitlement than they would be willing to pay in order to purchase the same entitlement. The divergence between the former price, often referred to as “willingness to accept” (WTA), and the latter, commonly called “willingness to pay” (WTP), may range up to many times the lower value.⁵⁵ Both WTA and WTP constitute real and true measures of people’s valuations of entitlements, and so neither can be ignored.⁵⁶

⁵³ For our purposes, it is immaterial whether a person initially acquired the asset for resale or for use. Even in the latter case, the subsequent desire to part with the asset transforms it into an exchange good.

⁵⁴ See Colin Camerer, *Individual Decision Making*, in THE HANDBOOK OF EXPERIMENTAL ECONOMICS 587, 665–70 (John H. Kagel & Alvin E. Roth eds., 1995); Elizabeth Hoffman & Matthew L. Spitzer, *Willingness to Pay vs. Willingness to Accept: Legal and Economic Implications*, 71 WASH. U. L.Q. 59 (1993); Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193, 196–97 (1991).

⁵⁵ See Herbert Hovenkamp, *Legal Policy and the Endowment Effect*, 20 J. LEGAL STUD. 225, 228 (1991) (stating that the difference can range from factors of four to sixteen); Daniel S. Levy & David Friedman, *The Revenge of the Redwoods? Reconsidering Property Rights and the Economic Allocation of Natural Resources*, 61 U. CHI. L. REV. 493, 495 n.6, 506–07 (1994) (noting that WTA value can be up to twenty times WTP value).

⁵⁶ RICHARD E. JUST ET AL., APPLIED WELFARE ECONOMICS AND PUBLIC POLICY 10–11, 84–115 (1982).

Scholars agree, however, that the very existence and magnitude of the EE varies from case to case. The available data suggests that the EE is not due to the enhanced attractiveness of an entitlement one owns; rather, it represents the pain of giving it up.⁵⁷ This explanation regards the EE as a manifestation of people's aversion to losses.⁵⁸ If an individual views parting with an entitlement as a loss, she will demand a higher price for it.⁵⁹ Such feelings of loss are not present in every transaction. It seems that the EE is manifested mostly in transfers that involve goods held for use, as opposed to goods held for exchange.⁶⁰ Goods held specifically for sale do not produce an EE, nor do bargaining chips, vouchers, or tokens that are valued only for their trading possibilities. In a similar vein, experiments have shown that the EE is significantly smaller when an adequate substitute for the relevant good is available.⁶¹ Indeed, bargaining chips, vouchers, and tokens are perfect substitutes for any good that their owner wishes to purchase with them. Such is also the case with goods held for exchange and goods that owners willingly offer to sell.

Because "use value" is a good proxy for intense preferences, the law should locate circumstances in which use value exists and where the market would likely fail to protect owners against involuntary injury to this value. I will demonstrate this scenario with two examples: statutory rights of first refusal and compensation for takings of land.

Statutory Rights of First Refusal

Rights of first refusal (RFR) require owners to offer certain property to the right holder for the same price proposed by a third party. Only if the right holder rejects the offer will the owner be allowed to

⁵⁷ Daniel Kahneman, *Reference Points, Anchors, Norms and Mixed Feelings*, 51 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 296, 299–300 (1992).

⁵⁸ On the "loss aversion" explanation for the EE, see Camerer, *supra* note 54, at 668–70; Hoffman & Spitzer, *supra* note 54, at 87–91.

⁵⁹ See Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 265–69, 274 (1979).

⁶⁰ See Hoffman & Spitzer, *supra* note 54, at 78–82, 111, 113; Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325, 1328–32, 1344 (1990).

⁶¹ Wiktor L. Adamowicz et al., *Experiments on the Difference Between Willingness to Pay and Willingness to Accept*, 69 LAND ECON. 416, 421–24 (1993) (finding that differences between WTA and WTP for tickets to a national hockey league game considerably decreased when a substitute for personal attendance—live television and radio broadcasts of the game—existed). W. Michael Hanemann argues theoretically for the claim that adequate substitutes decrease the magnitude of the EE in W. Michael Hanemann, *Willingness to Pay and Willingness to Accept: How Much Can They Differ?*, 81 AM. ECON. REV. 635, 635, 637, 646 (1991).

sell the property to the third party.⁶² RFR are only valuable if the property's worth for the right holder exceeds its worth for potential buyers,⁶³ and where assets are unique for the right holders. Were it not so, there would be no point in having a right to purchase a *specific* asset that entitles an individual to overcome a buyer by matching her price.

It is ordinarily difficult to identify, in advance, the people who would value unique assets more than others. For this reason, individuals are normally left to fend for themselves—that is, to contract for RFR on a case-by-case basis.⁶⁴ There are, however, circumstances in which *ex ante* generalizations are very plausible, while the market is likely to fail. In these clear cases, *statutory* grants of RFR are justifiable on both efficiency and fairness grounds.

A good example is concurrent ownership of assets such as homes and farms. Tenancy in common in nonbusiness contexts often involves family relations. Spouses may jointly own their residence, and siblings may jointly inherit their parents' farm.⁶⁵ Co-owners have vested property rights in the asset and may exercise their rights by selling or mortgaging their share and by applying for partition without the consent of the other owners.⁶⁶ It is highly probable that co-owners of this kind would value the exiting co-owner's share much more highly than any outsider. This is due both to their continuous use of—and subsequent attachment to—the property as a whole, and to the dependency of the value of their own share on the identity of the co-owners. A spouse would not wish to share his or her home, and an heir would not want to cultivate the family farm with a stranger. Nonetheless, in these circumstances, individuals are unlikely to con-

⁶² See Marcel Kahan, *An Economic Analysis of Rights of First Refusal* 5 (N.Y.U. Ctr. for Law & Bus., Working Paper No. CLB-99-009, 1999), available at <http://ssrn.com/abstract=11382>.

⁶³ And, of course, exceeds the property's value for its owner, who otherwise would not sell it at all.

⁶⁴ David I. Walker, *Rethinking Rights of First Refusal*, 5 STAN. J.L. BUS. & FIN. 1, 13 (1999) (“[C]ontract is the primary source of first refusal rights.”).

⁶⁵ Tenancy in common is the most common type of concurrent ownership, and in most jurisdictions there is a presumption in favor of tenancies in common as against other forms of co-ownership. WILLIAM B. STOEBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* 176, 178, 185–87 (3d ed. 2000). See also *infra* note 74 (discussing tenancy by the entirety).

⁶⁶ 7 RICHARD R. POWELL, *POWELL ON REAL PROPERTY* §§ 50.02[9], 50.05[2], 50.07[3][a] (Michael Allan Wolf ed., 2000); STOEBUCK & WHITMAN, *supra* note 65, at 178–79. In the former case, the asset remains in co-ownership and the buyer takes the seller's place as co-owner of the property. In the latter case, concurrent ownership is dissolved by either dividing the asset in-kind between the co-owners, or selling it as a whole and sharing the proceeds. POWELL, *supra*, §§ 50.06[4], 50.07[1]. Note that even if co-ownership originally took the form of a joint tenancy, the sale or mortgage of an individual co-owner's share creates a tenancy in common between the transferee and the other owners. JOHN E. CRIBBET & CORWIN W. JOHNSON, *PRINCIPLES OF THE LAW OF PROPERTY* 109–10 (3d ed. 1989).

tract for RFR. Before a conflict has arisen, relationships within the family are usually informal.⁶⁷ Once the relationships turn sour, however, animosity and spite may obstruct mutually beneficial transactions.⁶⁸ A similar difficulty arises when a co-owner's individual share is involuntarily sold in bankruptcy or other execution proceedings initiated by her creditors.

Statutory RFR can solve this problem. If such rights are limited to situations with high probability of strongly held preferences regarding the property, they can assure its transfer to those who value it most, while at the same time saving on transaction costs and avoiding the risk of bargaining failure.⁶⁹ Furthermore, the fact that RFR suffice with right holders *matching* third-party offers is doubly beneficial. It avoids discriminatorily taxing co-owners with unique subjective value,⁷⁰ and mitigates the detrimental effect of wealth differentials on property allocation.⁷¹ At the same time, the matching requirement averts inefficient allocation because a right holder whose valuation is actually lower than the buyer's offer would not exercise her RFR.⁷²

⁶⁷ See Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 14 (1989) (stating that relatively few couples enter into premarital agreements). This phenomenon is partially due to the prevailing cognitive bias of over-optimism. Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439, 443-47 (1993) (finding that, notwithstanding accurate knowledge about the rate of divorce, individuals about to be married were confident that it would not happen to them).

⁶⁸ See Ward Farnsworth, *Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral*, 66 U. CHI. L. REV. 373, 384-406, 421-23 (1999) (examining twenty nuisance cases and discovering that due, to a large extent, to animosity between the parties involved, no bargaining occurred or would have occurred after judgment).

⁶⁹ See Kahan, *supra* note 62, at 17-18 (discussing how RFR enhance efficiency by preventing sellers' strategic behavior, which may cause either bargaining breakdown or waste of potential efficiency gains).

⁷⁰ See *supra* notes 45-47 and accompanying text.

⁷¹ See *supra* notes 39-44 and accompanying text; Kahan, *supra* note 62, at 7-8 (explaining how RFR adversely affect the bargaining power of sellers vis-à-vis the right holders). RFR reduce wealth effects because the right holder is not required to pay a sum reflecting her high subjective value. In this respect, RFR differ from rights of first offer (RFO). For a comparison between RFR and RFO and the effect of information problems on each one of them, see Kahan, *supra* note 62, at 4, 11-13.

⁷² Arguably, the costs potential buyers incur in bidding on property subject to RFR decrease their offers. Walker, *supra* note 64, at 16-25. Consequently, the potential buyer's valuation of the property may actually be higher than that of the right holder (who does not incur similar costs and has only to match the offer). The fact that statutory RFR apply only to scenarios in which the gap in intensity between the preferences of buyers and right holders is likely large considerably mitigates this risk.

Thus, RFR address the needs of high-valuing holders without overburdening sellers,⁷³ or locking them into unwanted relationships.⁷⁴

Under current law, statutory RFR are sporadically and unsystematically scattered in various fields. American law does not recognize, for instance, a general, reciprocal RFR in favor of co-owning spouses. The Bankruptcy Code contains an isolated RFR,⁷⁵ which deals with the special case where a bankrupt co-owner's trustee sells the property in its entirety, that is, not only the debtor's interest in the property but also the share of the nondebtor co-owner.⁷⁶ The Code provides that before the sale can be carried out, the nonbankrupt co-owner has the right to purchase the property "at the price at which such sale is to be consummated."⁷⁷ It stands to reason that only a nondebtor spouse with intense preferences regarding the property will exercise the RFR since, if the forced sale goes through, she will be entitled to receive her pro rata share in the proceeds.⁷⁸

Although a step in the right direction, this legislative provision addresses only one manifestation of a much broader problem. If one accepts the reasonable assumption that each spouse's preferences regarding jointly held assets are usually much more intense than those

⁷³ Even if the existence of RFR reduce the price offered by potential buyers (as explained *supra* note 72), this cost to exiting owners is (at least partially) offset by the fact that such rights are often reciprocal. Furthermore—and in contrast with options to purchase—RFR are ordinarily triggered when the person subject to them *wishes* to sell for the same price she was willing to accept from a third-party buyer. Walker, *supra* note 64, at 9–10 (comparing RFR and options). Therefore, one may plausibly assume that the gains from protecting the right holder's use value surpass the losses (if any) to the seller's exchange value.

⁷⁴ In this respect, RFR differ from tenancy by the entirety, another technique the law uses to protect co-owners. This form of concurrent ownership has been abolished in all but twenty jurisdictions, and is available only for married couples. STOEUBCK & WHITMAN, *supra* note 65, at 193. Generally speaking, a spouse cannot separately convey or encumber her interest in the property, and it cannot be seized to satisfy the claims of one spouse's creditors alone. CRIBBET & JOHNSON, *supra* note 66, at 103–04. Furthermore, tenancy by the entirety ordinarily terminates only by divorce, and not by regular partition procedures. Hanoch Dagan, *The Craft of Property*, 91 CAL. L. REV. 1517, 1542 (2003). Tenancy by the entirety can be criticized as overly restrictive, infringing upon the autonomy of the co-owner wishing to exit or use her property as collateral for a loan. Moreover, and in contrast to RFR, tenancy by the entirety prevents alienation of an individual co-owner's share even in cases where the other spouse *does not* value the property more than potential buyers. Comparable criticism can be leveled at the restrictions on alienation in a community property regime, adopted by nine states. For discussion of these restrictions, see JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY 408–09 (2d ed. 2005).

⁷⁵ 11 U.S.C. § 363(i) (2006).

⁷⁶ The Bankruptcy Code limits this power to certain circumstances. The trustee must prove, for instance, that partition in-kind of the property is impracticable, and that the sale of the debtor's interest alone would realize significantly less for the estate than the sale of the whole. *Id.* § 363(h).

⁷⁷ *Id.* § 363(i); 3 COLLIER ON BANKRUPTCY § 363.08[8] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. 2005).

⁷⁸ 11 U.S.C. § 363(j); COLLIER ON BANKRUPTCY, *supra* note 77, § 363.08[9][a].

of potential buyers, then RFR are equally justified in other situations as well. There is no reason to limit RFR to cases where the trustee sells the co-owned property as a whole rather than only the debtor-spouse's interest. Moreover, RFR should not be restricted to non-voluntary bankruptcy proceedings against one of the spouses, but should apply also where a spouse's share is about to be sold voluntarily, through mortgage foreclosure, or in the course of probate proceedings.⁷⁹ From the protected spouse's point of view, the type of procedure by which the property's transfer is realized is immaterial.⁸⁰ Plausibly, statutory RFR should not apply to *all* assets jointly owned by spouses, but only to property held for use, which is, therefore, likely to generate intense preferences. Prime examples of this kind are the spouse's joint place of residence, their jointly operated business, and their jointly tended farm.⁸¹ Moreover, one may argue that statutory RFR in these cases should not depend on formal title at all: they should be granted whenever such assets are jointly held and used by spouses, even if one of them is the sole formal owner of the property.

Compensation for Takings of Land

Compensation awards for the taking of land for public use are generally based on fair-market value.⁸² However, some legislators—aware that market value under-compensates owners with high subjective valuation of their land⁸³—have adopted alternative compensation

⁷⁹ Only the "tenancy in common" form of concurrent ownership is subject to probate proceedings. Joint tenancy and tenancy by the entirety include a right of survivorship. STOEBCUK & WHITMAN, *supra* note 65, at 176–79, 182–83, 193.

⁸⁰ Similar criticism applies to statutes extending RFR to former owners-mortgagors upon lenders' resale of foreclosed land, but only with respect to farms and agricultural homesteads. These RFR are exercisable after statutory redemption periods for mortgages have lapsed. Thomas J. Houser, *A Comparative Study of the Former Owner's Right of First Refusal upon a Lender's Resale of Foreclosed Agricultural Land: A New Form of State Mortgagor Relief Legislation*, 13 J. CORP. L. 895, 900–07 (1988) (analyzing various rules). Comparable protection is not afforded to nonagricultural homesteads. For a discussion of redemption rights, see *infra* Part II.D.

⁸¹ Under Israeli law, spouses' statutory RFR are restricted to these assets. Land Law, 5729–1969, 23 LSI 283, § 101, at 300 (1968–69) (Isr.). Alternatively, one may argue that such a limitation is unnecessary, since only co-owning spouses with high subjective valuation of the property will exercise RFR. An interim solution is to extend the statutory RFR to "mixed value" assets, such as vacation homes, which typically combine use value and exchange (investment) value. My inclination is to restrict the application of statutory RFR to assets that are *primarily* held for personal and continuous use. Because GNP identifiers rely on generalizations about circumstances where strong preferences exist, and because statutory RFR entail costs (see *supra* notes 72–73 and accompanying text), it is "safer" to limit them to cases in which the gap in intensity between the preferences of potential buyers and right holders is likely to be particularly large.

⁸² See DANA & MERRILL, *supra* note 30, at 169–71.

⁸³ See *id.* at 173–74 (listing the reasons that land is often valued above market value); see also Krier & Serkin, *supra* note 30, at 866 (noting the limits of fair market value compensation).

formulas.⁸⁴ They require the state to add some fixed percentage above market prices for condemnation of certain kinds of land that owners continuously use. In these cases, the type of property or the length of time its owner used it gives rise to the assumption that, were it not for the expropriation, the owner would have continued holding the land for her use.

Condemnors in the state of Indiana, for example, are required to pay 150% of fair market value for parcels that are “occupied by the owner as a residence.”⁸⁵ Michigan’s constitution states that when an individual’s “principal residence” is taken for public use, the compensation award must not be less than 125% of its market value.⁸⁶ In the same vein, Missouri awards market value multiplied by 125% for a “homestead taking,”⁸⁷ and sets a multiplier of 150% for “heritage” property, defined as “property owned within the same family for fifty or more years.”⁸⁸ Scholars also suggest length of use as a factor in takings law reform, advocating a rising-percentage-scale according to the number of years that the land was used.⁸⁹

As these rules demonstrate, generalized and nonpenalizing identifiers of intense preferences can be—and are—used in the sphere of takings compensation. Admittedly, employing fixed percentages may result in over- or undercompensation.⁹⁰ The risk of undercompensation is, however, smaller than it is under the fair market value formula, and the risk of overcompensation is mitigated by limiting this method to cases in which the likelihood of above-market valuation is particularly high. In fact, given the aptness of the “use value” proxy,

⁸⁴ These legislative reforms have followed in the wake of the *Kelo* case, *Kelo v. City of New London*, 545 U.S. 469 (2005), which kindled a heated debate of the takings issue. For discussion of this case and the legislative and scholarly reactions to it, see Wyman, *supra* note 42.

⁸⁵ IND. CODE ANN. § 32-244.5-8(2)(A) (West 2008).

⁸⁶ MICH. CONST. ART. X, § 2.

⁸⁷ MO. ANN. STAT. §§ 523.039(2), 523.001(3) (West 2009).

⁸⁸ MO. ANN. STAT. §§ 523.039(3), 523.001(2) (West 2009).

⁸⁹ See *The Kelo Decision: Investigating Takings of Homes and Other Private Property: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 122 (2005) (testimony of Thomas A. Merrill, Professor, Colum. Univ. L. School) (“Congress could require that when occupied homes, businesses or farms are taken, the owner is entitled to a percentage bonus above fair market value, equal to one percentage point for each year the owner has continuously occupied the property.”); John Fee, *Eminent Domain and the Sanctity of Home*, 81 NOTRE DAME L. REV. 783, 814–17 & App. (2006) (suggesting that the government pay homeowners market value plus an additional two percent per year for each year lived in the home, up to a total of sixty percent above market value); see also Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 735–37 (1973) (proposing, in the context of compensation for nuisances, that owners of a single-family home would receive a bonus above market value according to length of use, through legislated schedules).

⁹⁰ See Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 90–92 (1986); Ulen, *supra* note 31, at 180–81.

lawmakers should extend this method to other kinds of property held for personal use, such as businesses and farms. Once the likelihood of high subjective valuation is apparent, a varying-percentage scale based on the number of years the owner has used the property seems somewhat rigid. I doubt that the injury to a person who has used her residence or place of business for twenty years is significantly smaller than the injury to a person who used such property for fifty years. At the same time, recourse to preset scales or multipliers considerably reduces administrative costs as compared to flexible standards.

Note, as well, that compensation rules can utilize the “use value” identifier in more than one way. In the context of takings, this proxy is employed to grant landowners *additional*, or higher compensation. Contract law, however, sometimes employs “use value” to provide a solution that *avoids* the need to quantify strong preferences. For instance, when a promisor renders defective performance—such as constructing an apartment in deviance from the agreed specifications—calculating damages according to the diminution in the apartment’s market value due to the nonconformity might under-compensate the buyer. This is likely to occur when a party purchases an apartment for personal or family use rather than for investment or resale.⁹¹ In the “use value” identifier, damages are calculated according to the costs of completion, that is, the costs of fixing the defects or removing the nonconformity, even if completion damages considerably surpass diminution in (objective) market value.⁹² The law protects strong preferences by placing the injured party in the same position she would have subjectively occupied had the contract been fully performed, without trying to directly quantify the strength of her intense preference.

B. Possession

A different way to contend with intense preferences is to condition the exercise of a right on a factual requirement that is generally believed—through observation and experience—to be a good proxy for intense preferences. By incorporating this proxy into the legal rule, one assures that only people with strong preferences will be entitled to use the right. A central example of such proxy is “possession,” as the case of the right to self-help demonstrates below.

⁹¹ See Eyal Zamir, *The Missing Interest: Restoration of the Contractual Equivalence*, 93 VA. L. REV. 59, 120 (2007) (explaining the gap between objective market value and subjective value of entitlements for the promisee, with respect to goods purchased for self-use).

⁹² See Timothy J. Muris, *Cost of Completion or Diminution in Market Value: The Relevance of Subjective Value*, 12 J. LEGAL STUD. 379, 384–99 (1983) (discussing the choice between “diminution in market value” and “completion costs” measures of damages from both normative and doctrinal perspectives, and highlighting the difference between consumers and commercial purchasers).

Ordinarily, a person whose proprietary rights have been violated must turn to the state for redress. The state does not permit self-enforcement even in cases where a property rule protects the entitlement⁹³ and does not require calculation of monetary compensation. Thus, for instance, a buyer entitled to specific performance of a contract cannot obtain the promised asset from the seller by herself, and an owner of a vacant parcel cannot forcibly expel a wrongful possessor. Both must resort to the state judicial and enforcement systems. In the transition from a “state of nature” to a state, individuals have surrendered their power to take their due by force and delegated it to the state.⁹⁴ This rule is perfectly justifiable, as it prevents breaches of the peace, which may result in grave consequences for many.⁹⁵

Nevertheless, the law sometimes allows individuals to forcefully reclaim their property. This privilege of self-help often operates as a defense against what would otherwise be a tort of assault or battery.⁹⁶ Self-help is limited to the use of reasonable force,⁹⁷ and can be exercised only as an immediate response to an attempted—or very recent—invasion of property rights.⁹⁸ The main prerequisite is that the

⁹³ A “property rule” protects an entitlement if no one can appropriate it without securing the owner’s consent. Parties must transfer the entitlement through a voluntary transaction. “Liability rule” protection, in contrast, enables a forced transfer of the entitlement. The coercing party need not seek the owner’s permission, but only pay her the objectively determined value of the entitlement. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092, 1105–07 (1972).

⁹⁴ See also 1 DAN B. DOBBS, *THE LAW OF TORTS* 185 (2001) (stating, with respect to repossession by owners, that “it is better to preserve the government’s ‘monopoly on force’ than to permit this form of self-help”).

⁹⁵ See *id.* (“[R]etaking property could lead to bloodshed.”); THOMAS HOBBS, *LEVIATHAN* 89 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651) (claiming that in a state of nature, life would be “solitary, poore, nasty, brutish, and short”).

⁹⁶ W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 21, at 131 (5th ed. 1984). In other countries, such as Israel, a direct right to self-help is acknowledged in the property legislation itself. See Land Law, 5729–1969, 23 LSI 283, § 18, 285 (1968–69) (Isr.).

⁹⁷ See RESTATEMENT (SECOND) OF TORTS, §§ 77, 81, 94, 106 (1965); KEETON ET AL., *supra* note 96, at § 21, 132–34.

⁹⁸ See RESTATEMENT (SECOND) OF TORTS, §§ 91, 103 (holding that forceful re-entry to land or reception of chattels is allowed only if the possessor “acts promptly after his dispossession or after his timely discovery of it”); DOBBS, *supra* note 94, at 182 (“The privilege [of the owner-possessor to use force] continues as long as the owner continues to resist the intruder and contest his right to be there, even if, for the moment, the owner is literally off the land. In such a case, the intruder has not acquired a peaceable possession [T]he owner is viewed as defending his own possession.”); KEETON ET AL., *supra* note 96, § 21, at 131, § 22, at 137–40 (explaining that self-help is available not only when resisting dispossession in the first instance but also when acting promptly to discover and recapture assets following dispossession).

force-user be the lawful and actual *possessor* of the property.⁹⁹ Mere ownership or right to gain possession does not suffice.¹⁰⁰

The most persuasive rationale for this requirement is that “possession” serves as a good proxy for intense preferences. Although all owners (and persons entitled to possession) may prefer quick self-recovery of assets from wrongdoers to a lengthier judicial process, the preferences of the *freshly dispossessed* for a self-help remedy are likely to be much stronger. Compare, for example, an owner who learns of an invasion of her vacant parcel with an owner who returns from a movie to discover a trespasser in her home. It is very reasonable to assume that the strength of the latter’s preference for immediately ousting the intruder is significantly greater than that of the former.¹⁰¹ This unique intensity is both understandable and acceptable. Society cannot reasonably expect individuals to successfully curb their spontaneous, powerful inclination to prevent dispossession by force. As Justice Holmes famously stated:

Law, being a practical thing, must found itself on actual forces. It is quite enough, therefore, for the law, that man, by an instinct which he shares with the domestic dog . . . will not allow himself to be dispossessed . . . of what he holds, without trying to get it back again. Philosophy may find a hundred reasons to justify the instinct, but it would be totally immaterial if it should condemn it and bid us surrender without a murmur. As long as the instinct remains, it will be more comfortable for the law to satisfy it in an orderly manner, than to leave people to themselves. If it should do otherwise, it would become a matter for pedagogues, wholly devoid of reality.¹⁰²

Nonpossessors, in contrast, will normally have significantly weaker preferences to obtain immediate possession. For this very reason, educating nonpossessors to control their urge to seize their property by

⁹⁹ See RESTATEMENT (SECOND) OF TORTS, ch. 4, nn.2, 3 (stating that the privilege is available only when the actor “is in possession of land or chattels” at the time of the other’s dispossessory acts); KEETON ET AL., *supra* note 96, § 21, at 131 (“The privilege [of self-help] may be exercised by anyone in possession of property who has, as against the invader, the better right to it.”).

¹⁰⁰ DOBBS, *supra* note 94, at 182 (“To repossess land in firm possession of another, the owner must ordinarily resort to judicial process. . . . [I]f the owner uses force to repossess his own property, the wrongful possessor may have a tort claim.”).

¹⁰¹ True, another distinction between the two cases may be that the possessing owner suffers greater economic injury from the trespass than the nonpossessing owner. This difference, however, cannot account for limiting self-help to actual possessors. Larger compensation awards for the temporary possession of the wrongdoer can adequately address the extent of the harm. Possession does not justify, in itself, a remedy of self-help. Furthermore, there may very well be cases in which the economic damages to a nonpossessing owner surpass those of a dispossessed owner.

¹⁰² O.W. HOLMES, JR., *THE COMMON LAW* 213 (The Lawbook Exch., Ltd. 2005) (1881) (citation omitted).

force is much more likely to be successful. Therefore, the general advantages of preventing violence override nonpossessors' desire to get back their property, and the usual rule that aggrieved parties should go to court applies.

There are arguably other reasons that explain the existence of self-help remedies. Scholars have justified it, for instance, by the slowness of court proceedings,¹⁰³ or by the fear that chattels will eventually disappear if owners cannot reclaim them by force.¹⁰⁴ These considerations, however, equally apply to *nonpossessing* owners.¹⁰⁵ Yet, the privilege of self-help is not available to the latter. This state of affairs thus supports the "intensity of preferences" rationale for the differential treatment of dispossessed and nondispossessed owners.¹⁰⁶

The law limits self-help to takings that are wrongful from the outset, denying use of force against people whose possession was initially lawful.¹⁰⁷ Landlords usually cannot evict defaulting tenants by force,¹⁰⁸ and sellers cannot forcefully retake possession from nonpaying buyers.¹⁰⁹ This limitation makes perfect sense. When owners have voluntarily parted with their assets, their preferences for instantaneous redress upon default are less urgent and relatively weaker than

¹⁰³ KEETON ET AL., *supra* note 96, § 22, at 137–38.

¹⁰⁴ JOHN G. FLEMING, *THE LAW OF TORTS* 100 (9th ed. 1998) ("[F]ailure promptly to regain control of a chattel may result in its complete loss because it may become untraceable . . .").

¹⁰⁵ Furthermore, the risk of disappearance does not apply to real property and thus cannot justify self-help with respect to land.

¹⁰⁶ Note that the self-help example demonstrates the difference between the "possession" and "use value" identifiers discussed above. While the former proxy is relevant to intense preferences of possessors of any property, the latter applies to property held for self- or family-use only.

¹⁰⁷ See RESTATEMENT (SECOND) OF TORTS §§ 89, 101 (1965) (providing that using force against another for repossessing land or recaption of chattels is not privileged, unless, inter alia, the other has tortiously dispossessed the actor without claim of right or has gained possession by use of force, fraud, or duress). The Restatement further emphasizes that "[i]f the other has obtained possession of the property with the consent of the actor, there is no tortious dispossession. Therefore, there is no privilege to use force to effect an entry upon land wrongfully withheld by an overstaying tenant Nor is a remainderman privileged to enter forcibly after the expiration of a preceding term or life estate." *Id.* § 89 cmt. a. See also FLEMING, *supra* note 104, at 100 ("[F]orce is not justified unless the plaintiff's adverse possession was wrongful from its inception."); KEETON ET AL., *supra* note 96, § 22, at 139 ("If the plaintiff has come into possession rightfully in the first instance, no force may be used against him. A defendant who has consented, in the absence of fraud, to part with his possession, must look to his legal remedy to recover it." (citation omitted)).

¹⁰⁸ See 2 RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 14.1 (1977); 2 MILTON R. FRIEDMAN, *FRIEDMAN ON LEASES* 1246–47 (4th ed. 1997); ROBERT S. SCHOSHINSKI, *AMERICAN LAW OF LANDLORD AND TENANT* § 6:9, at 407–08 (1980). Some states hold that the tenant's right to a judicial eviction proceeding cannot be contractually waived, whereas other states permit such waivers. FRIEDMAN, *supra*, at 1248–49; SCHOSHINSKI, *supra*, § 6:6, at 403.

¹⁰⁹ DOBBS, *supra* note 94, at 188–89. This rule is usually mandatory. KEETON ET AL., *supra* note 96, § 22, at 139.

those of possessing owners. Even if landlords are a heterogeneous group, with private landlords exhibiting stronger preferences than commercial ones, it is still generally true that *possessing* owners have more intense preferences for a self-help remedy than nonpossessing owners. Landlords are normally not dependant on the occupied apartment, and sellers do not need the purchased goods for their own immediate use. Therefore, their welfare loss from denial of a self-help remedy is likely to be much smaller than that of possessing owners.¹¹⁰

C. Declining Marginal Utility

Yet another method of identifying intense preferences relies on the well-known economic rule of diminishing marginal utility. When a person consumes more of a good, she derives additional utility from the extra units.¹¹¹ However, the rule of declining marginal utility (DMU) holds that the amount of extra utility enjoyed from every incremental unit of a good usually declines as a person consumes more and more of the good.¹¹² This rule may apply to any good, be it money,¹¹³ ice-cream,¹¹⁴ or pet gerbils.¹¹⁵ The DMU rule applies also to interpersonal comparisons of utility. Thus, it is frequently used to justify redistribution of income: the utility gain to the poor from receiving the additional income presumably outweighs the utility loss to the rich.¹¹⁶

Admittedly, the move from intra- to interpersonal assessments is not without difficulties. Individuals can diverge in their capacity to extract utility from money and other goods.¹¹⁷ It may be the case that although both A and B experience declining marginal utility, A's welfare enhancement from receiving a *seventh* unit of a good is larger

¹¹⁰ One can justify a mandatory rule prohibiting self-help eviction of tenants with an additional reason: it prevents the grave, negative effects on tenants' welfare that immediate eviction would cause. Individuals' self-respect, ability to act autonomously, and ability to successfully pursue worthwhile goals are severely diminished if the landlord can dispossess them overnight and can throw their belongings into the street. For elaboration see Daphna Lewinsohn-Zamir, *In Defense of Redistribution Through Private Law*, 91 MINN. L. REV. 326, 382–83 (2006). Thus, concern for the tenants' well-being can explain the rejection of a default rule in this context, which might otherwise cater to the idiosyncratically high preferences of *some* landlords for a self-help remedy.

¹¹¹ ABBA P. LERNER, *THE ECONOMICS OF CONTROL: PRINCIPLES OF WELFARE ECONOMICS* 26 (1944); PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 84–85 (18th ed. 2005).

¹¹² SAMUELSON & NORDHAUS, *supra* note 111, at 84; WEIMER & VINING, *supra* note 9, at 31.

¹¹³ See ROBERT SUGDEN & ALAN WILLIAMS, *THE PRINCIPLES OF PRACTICAL COST-BENEFIT ANALYSIS* 205–06 (1978).

¹¹⁴ See SAMUELSON & NORDHAUS, *supra* note 111.

¹¹⁵ POSNER, *supra* note 9, at 11.

¹¹⁶ See, e.g., JEAN HAMPTON, *POLITICAL PHILOSOPHY* 128 (1997); SUGDEN & WILLIAMS, *supra* note 113.

¹¹⁷ LERNER, *supra* note 111, at 28–29; POSNER, *supra* note 9, at 494.

than B's welfare gains from receiving a *fifth* unit of the same good. Nonetheless, it is ordinarily assumed that since we have no way of ascertaining whether this is actually the case, the most plausible general assumption is that people's marginal utility curves are similar.¹¹⁸

The DMU rule, then, can serve as a proxy for intense preferences. When allocating goods, we may sometimes reasonably assume that the incremental utility from having the good would be *larger* for the person with the *fewer* units of the good. As with comparable generalizations, one should rely upon this assumption cautiously. Thus, legal rules should aim at the relatively extreme cases: those in which the marginal utility to the recipients is likely to be especially large since they have no, or very little, of the (re)allocated good. In such cases, one may quite confidently assume that the marginal utility gain to the receivers is large enough to outweigh the possibility that nonreceivers of the good would extract greater utility from it. In what follows, I discuss two examples that employ the DMU rule: property exempted in bankruptcy and selection of parents for adoption.

Bankruptcy Exemptions

Personal bankruptcy law strives to ensure orderly payment of multiple creditors when there are not enough assets to satisfy fully these claims.¹¹⁹ Another important goal is to guarantee debtors sufficient resources to be able to start afresh and rehabilitate in reasonable living conditions.¹²⁰ Accordingly, both federal and state laws protect some of the debtor's property from the reach of her creditors. Such rules are known as "exemptions" in bankruptcy.¹²¹ Nonexempt assets are sold and their proceeds are used to pay the debts.¹²²

Federal and state exemptions share some common features. For instance, exemptions identify certain types of protected property,

¹¹⁸ LERNER, *supra* note 111, at 26–32, 35–36 (explaining why equal division of income would maximize probable total utility in society). Philosophical literature has addressed the extreme problem of "utility monsters" who possess extraordinary capacity to distill utility from every unit of a good. Such people may experience steady increases in utility that do not decline—or diminish very slowly—with quantity. See *infra* note 277 and accompanying text. Even assuming that "utility monsters" exist, the crafting of generalized legal rules should be based on the ordinary—rather than the exceptional—case.

¹¹⁹ DAVID G. EPSTEIN ET AL., *BANKRUPTCY* 2–3 (1993); THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 4–5 (1986).

¹²⁰ Richard E. Mendales, *Rethinking Exemptions in Bankruptcy*, 40 B.C. L. REV. 851, 853 (1999).

¹²¹ EPSTEIN ET AL., *supra* note 119, at 593–97.

¹²² Barty Adler et al., *Regulating Consumer Bankruptcy: A Theoretical Inquiry*, 29 J. LEGAL STUD. 585, 587 (2000); Michelle J. White, *Why It Pays to File for Bankruptcy: A Critical Look at the Incentives Under U.S. Personal Bankruptcy Law and a Proposal for Change*, 65 U. CHI. L. REV. 685, 687 (1998).

such as the debtor's home,¹²³ household goods and furnishings,¹²⁴ personal items like books and pets,¹²⁵ and tools and implements of business or trade.¹²⁶ In addition, the law limits exemptions by value.¹²⁷ Any item on the exemption list surpassing the fixed maximum value can be sold, and creditors may usually capture only the excess value above the exemption amount.¹²⁸

Scholars have acknowledged that efficiency considerations can support the exemption of some of a debtor's wealth. Such protection provides insurance (unavailable in the market) to risk-averse borrowers against the inability to repay loans subsequent to sharp income fluctuations.¹²⁹ At the same time, law-and-economics literature has criticized prevailing exemption rules for creating a detailed list of types of protected assets instead of employing a single exemption based on a fixed monetary amount.¹³⁰ The latter, so the argument goes, would allow debtors to choose which assets they wish to exempt (up to the limited statutory ceiling),¹³¹ and reduce incentives to convert assets from nonexempt to exempt categories—a costly and wasteful practice.¹³²

Rather than generally discussing the appropriate structure, content, and mandatory nature of the bankruptcy exemptions,¹³³ I wish to highlight a justification for exempted wealth, *in whichever form it takes*. Exemptions aim to ensure that people retain an amount or assortment of resources deemed essential for their decent physical and mental existence. Without any exemptions, individuals would face the catastrophic prospect of having “zero property.” Exemptions guarantee debtors a state of “minimal property.” At the same time, allowing creditors to foreclose the protected property would ordinarily have a

¹²³ See, e.g., 11 U.S.C. § 522(d)(1) (2006); CAL. CIV. PROC. CODE § 704.730 (West 2007); N.Y. C.P.L.R. § 5206 (McKinney 2008).

¹²⁴ 11 U.S.C. § 522(d)(3); CAL. CIV. PROC. CODE § 704.020; N.Y. C.P.L.R. § 5205.

¹²⁵ 11 U.S.C. § 522(d)(3)–(4); CAL. CIV. PROC. CODE § 704.040.

¹²⁶ 11 U.S.C. § 522(d)(6); 735 ILL. COMP. STAT. ANN. § 5/12-1001(d) (West 2008); N.Y. C.P.L.R. § 5205(a)(7).

¹²⁷ 11 U.S.C. § 522(d); EPSTEIN ET AL., *supra* note 119, at 603, 607–08.

¹²⁸ EPSTEIN ET AL., *supra* note 119, at 607, 612, 614.

¹²⁹ See Hung-Jen Wang & Michelle J. White, *An Optimal Personal Bankruptcy Procedure and Proposed Reforms*, 29 J. LEGAL STUD. 255, 256–59 (2000); White, *supra* note 122, at 692.

¹³⁰ White, *supra* note 122, at 700.

¹³¹ See Wells M. Engledow, *Cleaning up the Pigsty: Approaching a Consensus on Exemption Laws*, 74 AM. BANKR. L.J. 275, 315–17 (2000); Mendales, *supra* note 120, at 867.

¹³² White, *supra* note 122, at 713. In addition, some writers have argued that most exemptions should be waivable, except those pertaining to assets necessary to generate income. See, e.g., Adler et al., *supra* note 122, at 591, 599–601, 609.

¹³³ Elsewhere I have argued that an objective theory of well-being can justify the three characteristics of current exemption rules: protection of a plurality of types of property (in lieu of some global amount of wealth), placement of value limitations on each category of exempted property, and non-enforcement of waivers in favor of unsecured creditors. See Lewinsohn-Zamir, *supra* note 21, at 1726–30.

much smaller effect on their welfare, moving them from a position of “some property” (or even “a great deal of property”) to that of “somewhat more property.”¹³⁴ According to the DMU rule, the resources’ value in the hands of the debtor is significantly higher than in the hands of the creditors.¹³⁵ Therefore, debtors should retain this minimal amount of wealth.

Adoption

The use of the DMU rule in dealing with intense preferences is not limited to market contexts. Take, for instance, the selection of adoptive parents. In Western countries it is a well-known fact that the demand for healthy babies for adoption greatly surpasses the supply.¹³⁶ Matching children and parents is a complex and sensitive issue, involving various considerations, paramount of which is the child’s interest.¹³⁷ To this end, rules regulating adoption commonly require that adopters be of a certain age, in good physical and mental health, and possess minimal levels of education and stable income.¹³⁸ These important prerequisites, however, only narrow—but do not eliminate—the competition over each healthy baby.

At this juncture, the law may reasonably consider the potential adopters and seek to identify those whose preferences for adopting a child are the most intense. A plausible proxy in this respect is the

¹³⁴ The phrase “somewhat” is especially fitting in the bankruptcy context. Since there are typically numerous creditors and insufficient assets to satisfy their claims, creditors would have received, in any case, only a small fraction of the minimal-exempted wealth.

¹³⁵ This argument is strongest with respect to institutional and voluntary creditors. The DMU rationale is not always applicable to non-voluntary tort creditors, or to employees of a bankrupt employer. Furthermore, the DMU logic is based on the rule, adopted in almost all states, which limits the maximum value of exempted property. *See supra* notes 127–28 and accompanying text. The logic does not apply to the laws of Florida and Texas, which place no monetary cap on the value of an exempted homestead. FLA. CONST. art. X, § 4; TEX. CONST. art. 16, § 50.

¹³⁶ *See* JON ELSTER, *LOCAL JUSTICE: HOW INSTITUTIONS ALLOCATE SCARCE GOODS AND NECESSARY BURDENS* 48 (1992) (citing empirical findings that for every healthy, white baby there are forty couples waiting to adopt it); *see also* Donald Brieland, *Selection of Adoptive Parents*, in *ADOPTION: CURRENT ISSUES AND TRENDS* 65, 78 (Paul Sachdev ed., 1984) (explaining the shortage of infants for adoption with three factors: “improved methods of contraception, the availability of abortion, and the increasing desires of mothers to keep their babies”).

¹³⁷ *See* European Convention on the Adoption of Children art. 8(1), Apr. 24, 1967, Europ. T.S. No. 58 [hereinafter *European Convention on Adoption*] (“The competent authority shall not grant an adoption unless it is satisfied that the adoption will be in the interest of the child.”).

¹³⁸ *See* ELSTER, *supra* note 136, at 48–49 (noting that the eligibility criteria of adoption agencies often exclude people above the age of forty and low-income families, and that social workers examine the emotional and personality characteristics of applicants); *see also* European Convention on Adoption, *supra* note 137, art. 9(2)(a) (requiring an examination of “the personality, health and means of the adopter, particulars of his home and household and his ability to bring up the child”).

number of children that applicants have and their ability to procreate. It stands to reason that infertile people with no other children (either biological or adopted) have the strongest preferences. According to the DMU rule, the shift from having no children to having one child would increase adopters' welfare to a larger extent than the shift from one child to two, or from two children to three.¹³⁹ In fact, adoption rules in some countries implicitly acknowledge this phenomenon. They limit the adoption of babies to infertile, childless couples,¹⁴⁰ or control the number of babies that any one couple can adopt.¹⁴¹ Interestingly, such restrictions have been criticized on the ground that there is neither evidence that infertile couples make better adoptive parents,¹⁴² nor proof that the presence of biological children detrimentally affects the adopted ones.¹⁴³ Had adoption rules been evaluated solely through the lens of the children's well-being, this critique would have been decisive. I believe, however, that the welfare of the potential adopters should not be excluded from the decision process. Although infertility or childlessness should not constitute rigid pre-

¹³⁹ Arguably, individuals vary in the strength of their preferences for children. Although some people desire children very strongly, others' desire (if it exists at all) is much weaker. Possibly, one person's move from one child to two could increase her welfare to a greater extent than another person's move from no children to one. However, as explained above, employing the logic of DMU inevitably involves some generalizations. *Supra* notes 117–18 and accompanying text. Such generalizations seem particularly plausible in the present context because people seeking adoption presumably have strong preferences for having children and are, therefore, a more homogeneous group than the general population of potential parents.

¹⁴⁰ AMNON BEN-DROR, ADOPTION AND SURROGACY IN ISRAEL 54 (1994, in Hebrew) (reporting that the Israeli adoption agency does not grant adoption of healthy babies to parents with a biological child); JONATHAN HERRING, FAMILY LAW 587 (2d ed. 2004) (discussing the law in England and noting that it is common to require that applicant couples be infertile); Marianne Berry, *Adoption Disruption*, in ADOPTION POLICY AND SPECIAL NEEDS CHILDREN 83 (Rosemary J. Avery ed., 1997) (noting that "some agencies have required that the adoptive couple be infertile and that no other biological children be present in the home").

¹⁴¹ BEN-DROR, *supra* note 140, at 54 (stating that the Israeli agency does not allow the adoption of more than two healthy babies); see also Elizabeth S. Cole, *Societal Influences on Adoption Practice*, in ADOPTION: CURRENT ISSUES AND TRENDS, *supra* note 136, at 15, 21 (observing that the shortage in infants for adoption results in a "dim chance that a second or third baby will be placed" with the same couple).

¹⁴² NEW SOUTH WALES LAW REFORM COMM'N, REVIEW OF THE ADOPTION OF CHILDREN ACT 1965 (NSW), DISCUSSION PAPER 34, 126–27 (1994). See also JANE ROWE, PARENTS, CHILDREN AND ADOPTION: A HANDBOOK FOR ADOPTION WORKERS 172–73 (1966) (explaining that people who have had biological children may be more experienced and relaxed parents).

¹⁴³ NEW SOUTH WALES LAW REFORM COMM'N, REVIEW OF THE ADOPTION OF CHILDREN ACT 1965 (NSW), REPORT 81, 213 (1997); see e.g., Robin Fretwell Wilson, *Uncovering the Rationale for Requiring Infertility in Surrogacy Arrangements*, 29 AM. J.L. & MED. 337, 341 (2003) (quoting JUDITH AREEN, FAMILY LAW: CASES AND MATERIALS 1434 (4th ed. 1999) (noting that a "darker explanation" for the infertility requirement was that some agencies "feared that a fertile couple giving birth to a child after adoption may lead to the neglect of the adopted child")); cf. Berry, *supra* note 140, at 84 (citing conflicting sources as to whether placement into families with children disrupts the family unit).

conditions to adoption,¹⁴⁴ they are legitimate considerations in choosing among similarly qualified prospective adopters.¹⁴⁵ This is so not only for obvious fairness reasons,¹⁴⁶ but for the above efficiency reason as well. Note that this proxy for strong preferences is preferable to the “willingness to pay” proxy advocated by proponents of “a market in babies”¹⁴⁷ because it does not discriminate on the basis of affluence,¹⁴⁸ and is not prone to the commodification critique.¹⁴⁹

¹⁴⁴ Wilson, *supra* note 143, at 341–42 (stating that a growing number of adoption agencies have done away with requiring adoptive parents to be infertile).

¹⁴⁵ The European Convention on the Adoption of Children rejects placing a rigid legal restriction on the number of children that a person may adopt, but does not deny that “numbers” may be a factor in allocation decisions. European Convention on Adoption, *supra* note 137, art. 12(1). The number of children that a prospective adopter already has may be relevant in many circumstances, for instance, when allocating healthy babies, where demand overwhelmingly surpasses the supply. See *supra* note 136 and accompanying text. In contrast, this consideration may be unwarranted with respect to older or handicapped children where, in practice, the reverse holds true. See ELSTER, *supra* note 136, at 49; Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 324–25, 328 (1978). Similarly, although Article 12(2) of the European Convention on the Adoption of Children states that “[a] person who has, or is able to have, a child born in lawful wedlock, shall not on that account be prohibited by law from adopting a child,” it does not preclude consideration of this matter in adoption decisions. Furthermore, Article 24 of the Convention allows states to exclude the application of Article 12(2). European Convention on Adoption, *supra* note 137.

¹⁴⁶ NEW SOUTH WALES LAW REFORM COMM’N, *supra* note 142, at 127 (citing the view that “it is ‘only just’ that the relatively few available children should be made available to people who cannot have biological children of their own”).

¹⁴⁷ Landes & Posner, *supra* note 145, at 336–37, 343, 347–48 (arguing that a free market would increase the supply of babies by encouraging women—through monetary payments—to put their infants up for adoption instead of aborting them at the fetus stage).

¹⁴⁸ True, even guidelines of public adoption agencies require prospective parents to have an adequate, stable income. Consequently, the applications of the very poor would be denied, notwithstanding the strength of their preferences. Nevertheless, there is still an important difference between the outcomes of such guidelines and the free market. Adoption regulations address the *minimum* level of income necessary for the provision of a child’s basic needs. ROWE, *supra* note 142, at 169 (stating that individuals with “a standard of living too low for the safety, health and normal development of the child” should be disqualified for adoptive parenthood). People with modest, though sufficient, means would qualify for adoption on par with affluent people. The market, in contrast, would grant adoption to the highest bidder and place no limitations on the number of infants that any one family can adopt, thus affording wealth differentials a much larger role.

¹⁴⁹ See, e.g., Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1925–28 (1987) (arguing that commodification of babies greatly injures people’s conceptions of personhood and flourishing). Admittedly, even the rule of DMU would not eliminate all competition for healthy babies. For every available baby there is likely to be more than one infertile couple with no previously adopted children, that equally conforms to all the formal prerequisites. The only appropriate solution to this problem may very well be “queuing”: babies would be allocated to similarly eligible couples according to a waiting list. See Landes & Posner, *supra* note 145, at 326, 342 (noting the existence of waiting lists in this context). The length of a childless couple’s wait for an infant can serve as a proxy for both their desire and the intensity of their preferences.

D. Redemption

Another way to detect strong preferences is to create legal rights that only (or mainly) people with intense preferences would wish to use. Although, theoretically, any person is free to exercise the right, in practice only individuals with intense preferences will bother to do so. In these cases, behavior—through actual use of a right—both identifies the strong preference and caters to its needs. A prime example is a right of redemption.

Secured Transactions

Rights of redemption are commonly found in the field of secured transactions. When lenders advance money to borrowers, they usually secure its return by acquiring a security interest in the debtor's property. Ordinarily, the debtor retains title in the property serving as collateral for the loan.¹⁵⁰ Upon default, the creditor files suit to foreclose on the property and the court orders its sale.¹⁵¹ The proceeds of the sale are then used to pay off the debt, and any excess funds are transferred to the debtor.¹⁵²

Right of redemption (RR) in secured transactions law affords debtors a major protection. An RR gives defaulting debtors the opportunity to redeem the property subject to the security interest by late payment of the balance owed.¹⁵³ The RR can be exercised until the property is sold in foreclosure proceedings,¹⁵⁴ and the debtor can-

¹⁵⁰ RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 4.1(a) (1997) ("A mortgage creates only a security interest in real estate . . ."); SINGER, *supra* note 74, at 564. Sometimes, however, the title to the property is given to the creditor during the repayment period, and the debtor obtains or regains title upon payment of the debt. In the past, mortgages in land always took this form. See 4 POWELL, *supra* note 66, at § 37.03. Secured transactions law covers these situations as well, since it applies to any transaction that creates a security interest, regardless of its outward form or the name given to it by the parties. UNIF. COM. CODE §§ 9-109(a)(1), 3 U.L.A. 105-11 (2009) [hereinafter U.C.C.]; 1 U.C.C. § 1-201(37), at 69 (defining "security interest"); RESTATEMENT (THIRD) OF PROP.: MORTGAGES §§ 3.2-3.3 (holding that absolute deeds and conditional sales intended as security for an obligation should be deemed a mortgage); GEORGE E. OSBORNE, HANDBOOK ON THE LAW OF MORTGAGES 145-46 (2d ed. 1970) (explaining the maxim "once a mortgage, always a mortgage," which regards creditors with title to the property as mortgagees). For discussion of the role of rights of redemption in such cases, see *infra* notes 161-68 and accompanying text.

¹⁵¹ F.H. LAWSON & BERNARD RUDDEN, THE LAW OF PROPERTY 132-33, 136 (3d ed. 2002); see also OSBORNE, *supra* note 150, at 661-62 (judicial sale "is the exclusive or generally used method of foreclosure in a substantial majority of states and is available in all by virtue of express statutory enactment").

¹⁵² 3 U.C.C. § 9-615(d), at 532; 30 ROGER A. CUNNINGHAM & SAUL TISCHLER, NEW JERSEY PRACTICE: LAW OF MORTGAGES § 202, at 54-55 (1975).

¹⁵³ 3 U.C.C. § 9-623, at 554-55; RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 3.1(a) (1997); OSBORNE, *supra* note 150, at 624.

¹⁵⁴ CUNNINGHAM & TISCHLER, *supra* note 152, § 184, at 17; see also 3 U.C.C. § 9-623(c)(2), at 555 (RR ends when the secured party has disposed of the collateral or entered into a contract for its disposition). Some states, however, have adopted a statutory right of redemption, which grants mortgagors an additional designated period (typically

not waive it at the time the security interest is created.¹⁵⁵ Consequently, debtors are afforded a “last chance” to retain their property, free of the security right.

RR can be viewed as a technique for identifying intense preferences because only people with strong preferences regarding their property would employ it. When the property in question has no unique subjective value for the debtor, why would she bother to exercise her RR? If the amount owed equals or exceeds the property's value, she may leave it in the hands of the secured creditor,¹⁵⁶ and use the money she now holds to purchase a substitute in the market. Alternatively, if the outstanding debt is lower than the market value of the asset, allowing a foreclosure sale to go forward should achieve similar results. Since the debtor is entitled to the difference between the sale's proceeds and the debt, she can add this sum to the other funds she currently has, and likewise purchase an adequate replacement.¹⁵⁷

Therefore, an RR is valuable precisely because it allows debtors to retain ownership of a *particular* asset, one that has—subjectively—no

from six to eighteen months) to regain their former land—*after* it was sold—by paying the new owner the price bid at the foreclosure sale (plus interest and reimbursement for the costs of the sale). 5 POWELL, *supra* note 66, § 37.46; Michael H. Schill, *An Economic Analysis of Mortgagor Protection Laws*, 77 VA. L. REV. 489, 495 (1991). *See also infra* note 168 and accompanying text.

¹⁵⁵ 3 U.C.C. §§ 9-602(11), at 496 & 9-624(c), at 556 (providing that in a consumer goods transaction, the RR may not be waived at all, and that with respect to other goods, a waiver is valid only if included in an agreement entered into and authenticated after default); RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 3.1(b) (incorporating the same rule); CUNNINGHAM & TISCHLER, *supra* note 152, § 184, at 14–15 (“The equitable right of redemption is an incident of every mortgage, regardless of the form the mortgage may take; and the right to redeem cannot be waived or released by a stipulation to that effect in the mortgage itself, or even by a separate contemporaneous agreement to that effect.”).

¹⁵⁶ Waiver of foreclosure sales and RR are valid if embodied in a written agreement entered into at a date later than the date of the security interest's creation. Such valid agreements are usually formed after the debtor's default. 5 POWELL, *supra* note 66, § 37.44[1]; *see also* 3 U.C.C. § 9-620, at 546–49 (giving effect to the debtor's consent for a creditor to accept the collateral in full or partial satisfaction of the obligation it secures, only if the debtor includes the consent in a record authenticated after default). Thus, a defaulting debtor who does not value the collateral beyond its market value can simply avoid the costs of both a foreclosure sale and a redemption process by leaving the asset to the secured creditor.

¹⁵⁷ True, foreclosure sales involve costs, which are deducted from the debtor's share of the proceeds. 3 U.C.C. § 9-615, at 531–33; CUNNINGHAM & TISCHLER, *supra* note 152, §§ 331–334, at 250–58. RR, however, also entails costs that are likewise borne by the debtor. *See* 3 U.C.C. § 9-623(b)(2), at 554–55 (redeemers must pay all the obligations secured by the collateral, plus the creditor's reasonable expenses and attorney's fees); CUNNINGHAM & TISCHLER, *supra* note 152, § 183, at 7–8 (noting that a redeemer must pay not only the entire debt secured by the mortgage and her own costs in the redemption action but also the costs of the mortgagee in this action, plus any costs the latter incurred in enforcing the mortgage). Furthermore, debtors financially able to redeem but who choose not to will bear the additional costs of purchasing an alternative good in the market. Therefore, one cannot persuasively argue that debtors would exercise RR mainly to avoid the costs of foreclosure sales.

substitute. By exercising the right and favoring redemption of the collateral over alternative uses of the money, debtors prove—through behavior—the strength of their preferences for the property. At the same time, an RR protects people with intense preferences without taxing their high subjective valuation. Once the debt is paid, they are allowed to hold on to the property and fully enjoy this surplus. Consequently, this identifier of strong preferences is much less prone to the wealth effects and fairness problems that plague MP techniques.¹⁵⁸

One may interject, at this point, that an RR serves additional goals that are equally beneficial for debtors who do not value the collateral above its market price. A common justification for RR is that it curbs creditors' ability to acquire or sell the property for less than its fair market value and to unjustly enrich themselves at the expense of debtors. Thus, for instance, if the secured creditor is the only bidder at the foreclosure sale,¹⁵⁹ she might submit a bid below market value and so decrease the excess proceeds that are subsequently transferred to the debtor.¹⁶⁰ Moreover, in the cases where security interests were created by transferring title in the property to the creditor,¹⁶¹ the debtor's default may result in the former owning property whose market value significantly surpasses the amount owed.¹⁶² The exercise of an RR staves off these problems, and its very existence may prompt secured creditors, of their own accord, to bid or sell the property for its fair market value.¹⁶³

This argument is not wholly convincing. True, an RR can sometimes (indirectly) protect debtors without intense preferences regarding the property. There are, however, superior ways to safeguard the interests of this group. If, indeed, our only fear is monetary loss of market value, this risk can be addressed by publicizing foreclosure

¹⁵⁸ See *supra* notes 39–48 and accompanying text. Admittedly, not all debtors with strong preferences would have the financial means to redeem the collateral. Nonetheless, wealth effects play a much smaller role in RR than in MP mechanisms, because the former only requires the redeemer to pay the outstanding debt and not any of her subjectively high valuation of the asset. For example, if a house with a market price of \$100,000 is valued by its owner at \$200,000 and serves as collateral for a \$20,000 loan, paying off the debt leaves the owner's surplus value intact.

¹⁵⁹ OSBORNE, *supra* note 150, at 18 (noting that the mortgagee is "usually the chief if not the only bidder").

¹⁶⁰ SINGER, *supra* note 74, at 567. A similar problem arises if the secured creditor sells the property to a third party for a low price that covers the outstanding debt, but leaves no—or an unfairly low—surplus for the debtor.

¹⁶¹ See sources cited *supra* note 150.

¹⁶² SINGER, *supra* note 74, at 565.

¹⁶³ 5 POWELL, *supra* note 66, § 37.46 (asserting that redemption statutes offer "strong inducement to the mortgagee to bid a price more commensurate with the value of the land"); Schill, *supra* note 154, at 496 (noting that RR can encourage purchasers "to bid up the price to fair market value").

sales,¹⁶⁴ requiring judicially supervised sales,¹⁶⁵ or compelling such sales even when the contract creating the security interest provides that the creditor unconditionally retains (or immediately gains) title to the property upon default.¹⁶⁶ These alternative rules are better than RR for debtors lacking intense preferences because they safeguard the debtors' financial interest in receiving market value, even when they cannot get the money to redeem the collateral.¹⁶⁷ In contrast, these measures cannot protect debtors with high subjective valuation of the property because they assure, at most, the payment of *market value by others*. This state of affairs supports the contention that the unique, main role of RR is to identify—and cater to—the special needs of people with intense preferences.¹⁶⁸

Lost Property

Once the ability of RR to deal with intense preferences is acknowledged, its application may be extended beyond the law of secured transactions. One possible extension is granting an RR to original owners of lost property.

¹⁶⁴ Thereby increasing the chances of multiple bidders for the property. SINGER, *supra* note 74, at 567.

¹⁶⁵ CUNNINGHAM & TISCHLER, *supra* note 152, § 202, at 55 (legislatures can require judicial sales to determine “the fair market value of the mortgaged premises at the time of the sale”) (quoting N.J. STAT. ANN. § 2A:50-3 (2000)); 4 POWELL, *supra* note 66, § 37.40 (discussing statutes that require an appraisal in advance of the sale or permit courts to determine a minimum sale price).

¹⁶⁶ 5 POWELL, *supra* note 66, § 37.44[3] (stating that when an absolute conveyance is declared to be a mortgage, the debtor may be entitled to a statutory foreclosure by judicial sale). As explained in note 156, *supra*, such stipulations are valid only if agreed upon after the formation of the security interest or the debtor's default.

¹⁶⁷ Furthermore, an RR, in itself, would not prevent a secured creditor from making a low bid for the property if she estimates that the debtor would not be able to redeem it. See 5 POWELL, *supra* note 66, § 37.46 (“[I]n times of economic depression the financial resources to redeem are usually beyond the grasp of the mortgagor.”).

¹⁶⁸ Some scholars claim that statutes permitting redemption *after* foreclosure, see *supra* note 154, deter potential buyers from bidding on the property since such statutes do not guarantee the buyer indefeasible title. Consequently, such an RR injures mortgagors by raising the costs of credit and reducing the revenue from the sale of collateral. 5 POWELL, *supra* note 66, § 37.46; James Geoffrey Durham, *In Defense of Strict Foreclosure: A Legal and Economic Analysis of Mortgage Foreclosure*, 36 S.C. L. REV. 461, 484, 485–86 (1985). Other writers contend that this detrimental effect is much smaller than the critiques assume. Schill, *supra* note 154, at 498–500, 505–15 (asserting that mortgagor protections only modestly affect loan interest rates and promote economic efficiency by insuring debtors against adverse effects of default and foreclosure). Be that as it may, to the extent that such adverse effects exist, RR works to the advantage of potential redeemers, at the expense of debtors who do not wish to redeem, and who are only interested in ensuring that the collateral will be sold for its fair market value. This state of affairs supports my argument that RR is mainly addressed to people with intense preferences, by securing the return of a *particular* asset to the person who values it most. Even if RR raises borrowing costs and prevent some people from purchasing assets in the first place, this regrettable effect does not detract from my argument, to the extent that strong preferences in this context are formed gradually, through subsequent possession or use of the assets.

Lost property statutes commonly encourage finders to report lost goods and search for their owners by granting them title to the property if the owners have not been located within a short period of time.¹⁶⁹ An RR, if legislated, could grant original owners an additional period (say, of one year) to reclaim their lost asset by paying the finder its market value.¹⁷⁰ Although applicable in theory to all owners of lost property, only original owners who have strong preferences regarding the asset—a person who lost a necklace of great sentimental value, for instance—would likely exercise redemption. Owners lacking above-market valuation will not bother to redeem from finders, but will rather buy a substitute in the marketplace.¹⁷¹ Absent an RR, finders would be aware that only owners with intense preferences would wish to buy back the property. Consequently, finders would charge a supra-competitive price. An RR fulfills intense preferences without taxing their holders' special valuation: the original owner is only required to pay the ordinary, market price of the asset. At the same time, the award of the property's market value to finders is a sufficiently high windfall, creating ample incentives to report lost property and search for its owners.¹⁷² Restricting the RR to a rela-

¹⁶⁹ Typically, between three months and one year. See CAL. CIV. CODE § 2080.3 (West 2009); FLA. STAT. ANN. § 705.104 (West 2009); 765 ILL. COMP. STAT. ANN. 1020/28 (West 2008); MASS. ANN. LAWS ch. 134, § 4 (LeixNexis 2008); N.Y. PERS. PROP. LAW § 257 (McKinney 2009); *Fisher v. Klingenberger*, 576 N.Y.S.2d 476, 478 (N.Y. Cit. Ct. 1991) (stating that if the time limits in New York's statute for the owner's retention of the property have expired, "then the true owner has forfeited his original title to the property, and the property belongs to the finder"). This outcome deviates from the original position of the common law, which does not confer title upon the finder. Rather, the common law regards the finder as bailee for the true owner, and gives the finder the right to possess and enjoy the property against all others. RAY ANDREWS BROWN, *THE LAW OF PERSONAL PROPERTY* 24, 30 (Walter B. Raushenbush ed., 3d ed. 1975). Since, according to the common law, the original owner has never lost title to the property, she does not need an RR to ensure its repossession.

¹⁷⁰ Such an RR exists in Israeli law. *Restoration of Lost Property Law, 5733-1973*, 27 LSI 187, § 5, at 188 (1972-73) (Isr.).

¹⁷¹ The existence of owners with strong preferences regarding lost property is realistic because we are dealing with people who have recently and involuntarily been parted from their personal property. Therefore, an RR is appropriate. The case of land, however, is different. As an immovable, it cannot be lost in the same sense as movable property. Although we may speak of land as involuntarily "lost" to an adverse possessor, there is no justification for granting an RR to the original owner. This is because we cannot assume that landowners have typically more intense preferences regarding the land than adverse possessors. On the contrary, adverse possession can arise, in the first place, only if the original owner was an absentee owner for a long period of time or was unaware of her ownership in the land. In such circumstances, it is unlikely that she had developed high subjective valuation of the land. Consequently, an original owner wishing to regain title to the land must purchase it from the adverse possessor through an ordinary market transaction.

¹⁷² This argument is particularly strong as regards *casually* found lost property, rather than *deliberately* sought-after lost property, because in the former case, incentivizing finders is less of a concern. Cf. Anthony T. Kronman, *Mistakes, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1, 13-18 (1978) (famously distinguishing between "casually"

tively short period also reduces finders' uncertainty regarding their future enjoyment of the property. Moreover, such limitation is necessary to avert the possibility that the finders themselves would develop over-market valuation of the asset.

E. Reasons

Our last example of a method for identifying intense preferences is requiring people to provide reasons for their preferences. When a person merely states a preference for good X over good Y, we have no way of knowing whether the favored option is only slightly preferred to the next in line or immensely preferred to it.¹⁷³ It is easier to assess the intensity and authenticity of preferences when they are backed up by reasons. As this Article will demonstrate, both the fact that reasons are offered and their content are important.

The very provision of reasons may indicate the strength of the preferences. There is effort and urgency in the offering of reasons that is lacking when preferences are stated without explanation. A person giving reasons for preference rankings strives to persuade the decisionmaker of the importance of fulfilling her preferences. More importantly for our purposes, rational and compelling reasons for favoring one option over another can establish that an intense preference actually exists. Offering persuasive reasons also mitigates the risk of lying. It is more difficult to provide credible reasons for the purported intensity of a preference when it is false.¹⁷⁴

A simple illustration for this role of reasons is the allocation of seminar topics. I give the students participating in my seminar a list of topics to choose from for their written paper assignment. Usually, more than one student requests the same topic. Asking the students to rank three or four options in order of priority does not always solve this problem. I therefore encourage my students to explain why they prefer any of the topics. This practice assists me in identifying the

and "deliberately acquired information" in the context of disclosure duties in contract law, and arguing that a duty to disclose casually acquired information will not significantly detract from people's incentives to obtain socially useful information). Even in the rarer cases of deliberate searches for lost property, the prospect of receiving its market value should certainly suffice to encourage potential finders to search for the property and report to the relevant authority.

¹⁷³ See *supra* notes 6–7 and accompanying text.

¹⁷⁴ See WEIMER & VINING, *supra* note 9, at 117 (noting, in the context of voting, that the minority's incentive to overstate the intensity of its preferences may be "checked only by the need to maintain some level of credibility"). To be sure, identification of intense preferences is not the only—or even primary—role of reasons-giving. Reasons are ordinarily offered to convince others of the merit of one's position, and are judged accordingly. Nevertheless, I will demonstrate below that a reasons-requirement sometimes serves the additional role of identifying strong preferences. See *infra* note 207 and accompanying text.

students whose preference for a topic is particularly strong because such students offer lucid and persuasive reasons for their priorities. Students who have a relatively weak preference for any topic usually do not mention reasons at all or offer bland explanations, such as: "It sounds like an interesting topic." The same rationale underlies the requirement of reasons-giving in more substantial contexts, such as conscientious objection.

Many democratic countries recognize individuals' freedom of conscience by granting an exemption from military service to conscientious objectors (COs).¹⁷⁵ A person who deeply and sincerely believes that binding obligations of conscience prevent him or her from bearing arms may be exempted from participating in violent combat.¹⁷⁶ Consequently, no punishment would be meted out for refusal to serve.¹⁷⁷ Originally, only objections based on religious foundations were accepted.¹⁷⁸ Exemption was granted to specific religious sects, such as the Quakers, who reject war as part of their preaching.¹⁷⁹ Gradually, however, the exemption was expanded to include conscientious objection grounded in secular moral convictions.¹⁸⁰

For the purposes of this Article, I need not discuss whether such an exemption is justified,¹⁸¹ and if it should be limited to "universalistic" COs who reject wars in any form,¹⁸² or extended to individuals opposed to a particular war.¹⁸³ My interest lies in the following ques-

175 For surveys of the legal treatment of COs in various countries, see EUROPEAN CONSORTIUM FOR CHURCH-STATE RESEARCH, *CONSCIENTIOUS OBJECTION IN THE EC COUNTRIES* (1992); THE NEW CONSCIENTIOUS OBJECTION: FROM SACRED TO SECULAR RESISTANCE (Charles C. Moskos & John Whiteclay Chambers II eds., 1993) [hereinafter *THE NEW CONSCIENTIOUS OBJECTION*].

176 Charles C. Moskos & John Whiteclay Chambers II, *The Secularization of Conscience*, in *THE NEW CONSCIENTIOUS OBJECTION*, *supra* note 175, at 3-5.

177 Wolfgang Loschelder, *The Non-Fulfillment of Legally Imposed Obligations Because of Conflicting Decisions of Conscience—The Legal Situation in the Federal Republic of Germany (FRG)*, in *CONSCIENTIOUS OBJECTION IN THE EC COUNTRIES*, *supra* note 175, at 3, 27-29 (stating that if a person is recognized as a CO, then "there is no penalty for non-compliance with the law").

178 Kent Greenawalt, *All or Nothing at All: The Defeat of Selective Conscientious Objection*, 1971 SUP. CT. REV. 31, 35-36; Moskos & Chambers, *supra* note 176, at 9-12.

179 David Malament, *Selective Conscientious Objection and the Gillette Decision*, 1 PHIL. & PUB. AFF. 363, 373 (1972); Moskos & Chambers, *supra* note 176, at 10-11; Michael F. Noone Jr., *Legal Aspects of Conscientious Objection: A Comparative Analysis*, in *THE NEW CONSCIENTIOUS OBJECTION*, *supra* note 175, at 177, 180.

180 Malament, *supra* note 179, at 374-75, 377; Moskos & Chambers, *supra* note 176, at 6-8, 12-14.

181 For discussion of this question, see RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 206-22 (1978); MICHAEL WALZER, *OBLIGATIONS: ESSAYS ON DISOBEDIENCE, WAR, AND CITIZENSHIP* 120-45 (1970).

182 Moskos & Chambers, *supra* note 176, at 5.

183 Often called "selective" COs. *Id.* The American Supreme Court upheld the denial of exemption to selective COs in *Gillette v. United States*, 401 U.S. 437 (1971). In contrast, selective objections qualify for exemption in other countries, such as Holland. Ben P. Vermeulen, *Conscientious Objection in Dutch Law*, in *CONSCIENTIOUS OBJECTION IN THE EC COUN-*

tion: If a state wishes to exempt COs, however defined, how does it distinguish between true COs and false ones?¹⁸⁴

This question involves the identification of intense preferences. It is reasonable to assume that a vast number of people prefer not to participate in wars. Many individuals oppose, and are even repulsed by, the notion of killing and maiming others. From among this large group of people, the state has to identify those whose opposition to war is the strongest and thus would suffer the severest injury to their conscience if forced to bear arms.¹⁸⁵

Historically, various methods were employed in this regard. Some countries conditioned military exemption on payment,¹⁸⁶ on providing a substitute willing to serve in one's place,¹⁸⁷ or on willingness to partake in a lengthier alternative civil service.¹⁸⁸ Nowadays, however, the common technique is to demand reasons from putative objectors. That is to say, the law does not suffice with a simple statement of objection.¹⁸⁹ Individuals seeking CO status must explain their principles and present their arguments for examination. A com-

TRIES, *supra* note 175, at 259, 270–71. For a thorough discussion of this subject, see generally Special Issue, *Refusals to Serve—Political Dissent in the Israel Defense Forces*, 36 ISR. L. REV. 1 (2002).

¹⁸⁴ Note that since 1973, the United States has abandoned the draft and adopted an All-Volunteer Armed Force (AVF). John W. Chambers II, *Conscientious Objectors and the American State from Colonial Times to the Present*, in *THE NEW CONSCIENTIOUS OBJECTION*, *supra* note 175, at 23, 43. Notwithstanding, even without conscription, the issue of conscientious objection has practical importance with respect to uniformed members of the AVF seeking discharge from the army. For discussion of the similar issues arising with respect to military COs, see *id.* at 43–45; Noone, *supra* note 179, at 189–92; *infra* note 193 and accompanying text.

¹⁸⁵ See *Gillette*, 401 U.S. at 453 (acknowledging “the hopelessness of converting a sincere conscientious objector into an effective fighting man”).

¹⁸⁶ WALZER, *supra* note 181, at 125 (noting that Quakers once paid money in lieu of service); see also CONSTANCE BRAITHWAITE, *CONSCIENTIOUS OBJECTION TO VARIOUS COMPULSIONS UNDER BRITISH LAW* 109, 114–15 (1995) (describing the fine system for COs that existed in Britain).

¹⁸⁷ LIBERTY AND CONSCIENCE: A DOCUMENTARY HISTORY OF THE EXPERIENCES OF CONSCIENTIOUS OBJECTORS IN AMERICA THROUGH THE CIVIL WAR 50–52 (Peter Brock ed., 2002) (describing an eighteenth-century act authorizing the seizure of property in order to pay substitutes, and listing items such as cattle and horses taken from Quakers who refused to enroll); Chambers, *supra* note 184, at 23–24, 26.

¹⁸⁸ In Denmark, the first CO law (enacted in 1917) provided that while the period of military service is six and a half months, the duration of alternative civil service for COs is twenty months. In 1933, the duration changed to, respectively, six and fifteen months. Since 1973, however, the law lays down identical periods for both services. Erik Siesby, *Conscientious Objection in Danish Law*, in *CONSCIENTIOUS OBJECTION IN THE EC COUNTRIES*, *supra* note 175, at 159, 162–63. Similarly, Italian law used to require an alternative service of double duration for COs, but this provision was struck down by the constitutional court. Sergio Lariccia, *Conscientious Objection in Italian Law*, in *CONSCIENTIOUS OBJECTION IN THE EC COUNTRIES*, *supra* note 175, at 113, 126–28.

¹⁸⁹ BRAITHWAITE, *supra* note 186, at 377 (justifying the legal position requiring more than mere statements by the temptation that would exist to falsely claim CO status); Loschelder, *supra* note 177, at 31 (“[T]he simple statement that a decision of conscience has

mittee often interviews the objector, who must convince the panel of the sincerity of her conscientious convictions.¹⁹⁰ Note that objectors do not have to prove that their views are "correct" in any objective sense.¹⁹¹ Rather, reasons are required in order to verify that the beliefs are genuinely and strongly held.¹⁹² Presumably, false COs would find it much harder to offer persuasive reasons for their position and are thus much more likely to fail the test.¹⁹³ In this way, reasons serve as identifiers of intense preferences without penalizing the *true* holders of such preferences. Reasons-provision should not be costly or burdensome for authentic COs, who are well aware, in advance, of the justifications for their position. Moreover, requiring reasons-provision helps locate strong preferences of a *conscientious* nature. In contrast, methods like payment or willingness to perform a lengthier civil service¹⁹⁴ might identify intense preferences against military service that are not based on conscientious grounds.¹⁹⁵

This role of the reasons-requirement can explain the historical preference for religious COs and the more lenient exemption process for members of certain religious sects.¹⁹⁶ When a person requesting exemption is a lifelong member of a well-known religious group that

been made does not meet the requirements of legally binding effect and equality before the law.").

¹⁹⁰ Malament, *supra* note 179, at 377 ("The Selective Service System does not accept claims to conscientious objection at face value. A personal statement, references, and an interview are required."). Under German law, a person applying for CO exemption must provide a statement of reasons and explain his decision in a convincing manner. As part of the examination process, the applicant may be required to appear before a CO committee. Loschelder, *supra* note 177, at 31-34. In a similar fashion, Dutch law requires an objector to attend a hearing before a committee "who discusses with him his objections and arguments." Vermeulen, *supra* note 183, at 276.

¹⁹¹ See CHAIM GANS, *PHILOSOPHICAL ANARCHISM AND POLITICAL DISOBEDIENCE* 156 (1992) (arguing that "freedom of conscience means the freedom to act on the dictates of conscience for the sole reason that they are given by the conscience, regardless of their justness or of the correctness of their contents"); Loschelder, *supra* note 177, at 31 (claiming that the state may not judge a CO's decision "according to the categories of right or wrong").

¹⁹² Loschelder, *supra* note 177, at 31-32; Malament, *supra* note 179, at 377-78.

¹⁹³ In a similar fashion, a military CO seeking discharge from the army is required "to establish his sincerity by offering persuasive reasons for his refusal to serve." Noone, *supra* note 179, at 177, 190; see also *Singer v. Secretary of the Air Force*, 385 F. Supp. 1369, 1373 (D. Colo., 1974) (holding that a serviceman seeking discharge on ground of conscientious objection bears the burden of proving his case under the relevant criteria, and that such "burden is met when nonfrivolous allegations of fact are presented" (quoting *Arlen v. Laird*, 345 F. Supp. 181, 186 (S.D.N.Y. 1972))).

¹⁹⁴ See *supra* notes 186-88 and accompanying text.

¹⁹⁵ Thus, for instance, a rich coward may have strong preferences against participating in wars of any kind.

¹⁹⁶ BRAITHWAITE, *supra* note 186, at 374 (explaining the relative disadvantage of an atheist or agnostic objector who—in contrast to members of Christian churches—was "not regarded as part of a recognised system of beliefs," and so "had to defend his individual beliefs and values and . . . was sometimes expected to be able to answer very difficult questions of fundamental ethics").

professes pacifism as a fundamental tenant, then the very fact of membership can serve as a proxy for intense preferences against army service. This proxy is especially reliable when such membership demands compliance with comprehensive and strict rules regarding many aspects of daily life. It is unreasonable to imagine that unreligious individuals would join a community that so tightly (albeit informally) controls its members' lives, only to evade military service.¹⁹⁷ Furthermore, one may argue that true religious belief need not be logical or consistent, and is not altered by rational persuasion.¹⁹⁸ Religious "preferences" are largely exogenous in that sense. Therefore, long-time adherence to a religion that clearly prohibits the bearing of arms may serve as sufficient proof of intense and stable preferences in this regard.

Secular conscientious objection is much more individualistic, does not require membership in recognized groups, and is potentially more receptive to argumentation. It is therefore harder to identify.¹⁹⁹ A thorough examination of the objectors' reasons may thus be necessary to judge the authenticity of their beliefs. A reasons-requirement may be more important in this case not because secular moral convictions are typically less intensely held than religious ones.²⁰⁰ Rather, reasons play a more pivotal role in the case of secular objectors because it is the best way to differentiate between sincere and insincere objectors.

A reasons-requirement does not expose every false CO. Theoretically, a person who has no strong qualms about warfare may read the relevant pacifistic literature and convincingly act out the CO role to an impressed committee. Nevertheless, this risk should not be overstated. As our experience as theatergoers shows, good acting is a rare commodity. Impersonating a CO is not a simple feat. Potential pretenders may thus balk at tackling this hurdle, or fail in the attempt.

In closing this discussion, I would like to point out that a reasons-requirement somewhat narrows the gap between two influential theo-

¹⁹⁷ The European Commission used such argumentation to support the differential treatment of Jehovah's Witnesses, and their far-reaching exemption, even from a substitute civil service. Vermeulen, *supra* note 183, at 280–81; *see also* BRAITHWAITE, *supra* note 186, at 336 ("[F]ew people would become Quakers or Christadelphians or Jehovah's Witnesses only in order to avoid military service: they would be deterred by the other obligations of membership of these bodies.").

¹⁹⁸ *Cf.* Thomas v. Review Bd., Ind. Employment Sec. Div., 450 U.S. 707, 714 (1981) (generally holding, with respect to the Free Exercise Clause, that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection").

¹⁹⁹ *See* Malament, *supra* note 179, at 380 (noting that if church affiliation were the test, then it would have been relatively easy to process CO applications).

²⁰⁰ WALZER, *supra* note 181, at 128 ("[A] moral code can be upheld as fervently as a religious code . . .").

retical approaches to legal issues: economic analysis and civic republicanism. Economic analysis of law embraces a preferences theory of welfare,²⁰¹ and usually assumes that welfare maximization involves the value-free process of satisfying people's actual preferences, regardless of their content.²⁰² Because well-being consists of giving people whatever they happen to want, the state need not inquire about the *justification* for preferences,²⁰³ but bother only with the procedural mechanisms that enable discovering, aggregating, and fulfilling people's desires.²⁰⁴ A radically different—and more modest—role is allotted to preferences in the civic-republican tradition. Preferences are merely a point of departure, not the end result for automatic implementation.²⁰⁵ In particular, republicans emphasize the importance of argument and deliberation. The strength of a person's *reasons* for a certain preference and the effectiveness of one's persuasion determine the final outcome.²⁰⁶

As explained in this section, "reasons" can serve an important role in economic analysis as well. The GNP device of requiring reasons for preferences helps determine their relative intensity and authenticity. Offering compelling reasons for favoring one option over another both establishes that strong preferences indeed exist and mitigates the risk of lies. Therefore, economic analysis of law would do well to join civic republicanism in embracing inquiries into the reasons underlying preferences. Awareness of the significance of reasons would improve economic analysis's chances of achieving its goal of welfare maximization.²⁰⁷

²⁰¹ Howard F. Chang, *A Liberal Theory of Social Welfare: Fairness, Utility, and the Pareto Principle*, 110 YALE L.J. 173, 175 (2000).

²⁰² Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165, 191, 199 (1999) (stating that standard economic theory determines a person's well-being by the extent to which she satisfies her unrestricted preferences). For critical discussion of preference theories of welfare, see Lewinsohn-Zamir, *supra* note 21, at 1677–1700.

²⁰³ See ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 194 (1993) ("Markets are responsive only to given wants, without evaluating the reasons people have for wanting the goods in question . . ."); MARK SAGOFF, *THE ECONOMY OF THE EARTH: PHILOSOPHY, LAW, AND THE ENVIRONMENT* 39 (2d ed. 2008) (stating that in economic and cost-benefit analysis "[t]he reasons people give for their views . . . are not to be counted; what counts is how much individuals will pay to satisfy their wants").

²⁰⁴ DANIEL M. HAUSMAN & MICHAEL S. MCPHERSON, *ECONOMIC ANALYSIS AND MORAL PHILOSOPHY* 72, 74 (1996).

²⁰⁵ ANDERSON, *supra* note 203, at 211 ("Politics is a domain for criticizing and changing desires through reasoned debate, not merely for aggregating given desires."); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1541 (1988) ("In the deliberative process, private interests are relevant inputs into politics; but they are not taken as pre-political and exogenous and are instead the object of critical scrutiny.")

²⁰⁶ ANDERSON, *supra* note 203, at 209–16; SAGOFF, *supra* note 203, at 27–29, 40–42, 55–57, 92–97; Sunstein, *supra* note 205, at 1548–51, 1554–55.

²⁰⁷ Admittedly, "reasons" would not be used for the same purposes in the two theories. Under the civic republican approach, reasons are offered to convince others of the merits of one's position and views. ANDERSON, *supra* note 203, at 211. In contrast, reasons will be

F. General Comments

The rules discussed in this Part come from a wide range of legal fields. They address such disparate issues as rights of first refusal, takings compensation, self-help remedies for possessors of property, selection of adopting parents, redemption rights in secured transactions, and exemptions for conscientious objectors. Yet, as we have seen, they share important common features: all of them employ some technique for identifying intense preferences. With the exception of the “reasons-requirement” device, the methods analyzed above adopt a “generalized” approach that does not require ad-hoc examination of individual cases. That is to say, they generalize about circumstances in which strong preferences are likely to exist, and insert the chosen proxies—possession, declining marginal utility, use value, etc.—into the legal rule itself. These generalizations are based on observations, experience, or studies of human nature and behavior. They represent judgments about what most people would feel or prefer in certain scenarios.²⁰⁸ More importantly, none of the devices discussed in this Part (“reasons” included) penalize individuals with intense preferences. These methods do not detect strong preferences by taxing the unique utility that some people derive from an entitlement, and they do not require individuals to hand over some (or all) of this special value as proof that intense preferences indeed exist.

This nonpenalizing feature is obvious in identifiers that do not involve any payments or monetary sanctions. For instance, the proxy of possession suffices to identify strong preferences with respect to property, which justify a self-help remedy.²⁰⁹ Similarly, the declining marginal utility rule locates preference-intensity among prospective adopting parents,²¹⁰ and a reasons-requirement reassures that conscientious objections are sincere (without placing a significant burden on true objectors).²¹¹ It is important to see, however, that nonpenalization is a characteristic of the other identifiers discussed in this Part

employed in economic analysis to prove a person’s sincerity and discourage or flush out lies. One would usually not have to persuade that her preferences are “correct” in any objective sense. Notwithstanding this difference in the “reasons for reasons,” acceptance of a reasons-examination will reduce the discord between economic analysis and civic republicanism. Consequently, even under the former theory, preferences will not be taken as given, but subjected to some scrutiny of their content.

²⁰⁸ See JAMES GRIFFIN, *WELL-BEING: ITS MEANING, MEASUREMENT, AND MORAL IMPORTANCE* 113–17 (1986) (explaining, in the context of measuring different people’s well-being, how knowledge of human nature, experience, and information about particular persons’ wants, enable us to make judgments regarding what most informed people desire). Such judgments are inescapable in a world characterized by high transaction costs. See *infra* note 271 and accompanying text.

²⁰⁹ See *supra* notes 96–110 and accompanying text.

²¹⁰ See *supra* notes 136–49 and accompanying text.

²¹¹ See *supra* notes 189–200 and accompanying text.

as well. Thus, although rights of redemption involve payments by a redeemer who wishes to retain or regain her property, these payments pertain to a former outstanding debt (in the case of redemption of a collateral by a debtor), or to the market value of the property (in the case of lost property). The owner's surplus value above market price is left intact. Likewise, even though rights of first refusal entail a purchase by the right holders, the price required is limited to the third party's offer and does not include the incremental value of the asset to the right holders.

At this point, one should note the differences between the generalized and nonpenalizing (GNP) identifiers discussed in this Part and Margaret Radin's conception of "personal property." According to Radin's personhood theory of property, assets should be classified according to their relation to personality and their contribution to people's self-development and self-actualization.²¹² The main distinction is between "personal" property, the loss of which cannot be remedied by its value equivalent or by a replacement (the family home, a wedding ring, or a family portrait), and "fungible" property, which is easily replaceable by similar objects (money, a contractor's parcel of undeveloped land, or a commercial landlord's apartment). Generally speaking, Radin argues that greater protection should be given to personal property than to fungible property.²¹³ Preventing even the compensated taking of a highly personal asset, such as the family home, may be justified.²¹⁴ In contrast, monetary compensation should always suffice for claims involving fungible property, and sometimes no compensation is necessary.²¹⁵

One may view Radin's notion of "personal property" as identifying assets in relation to which strong preferences are held. This is certainly true of a person's home. In this respect, Radin's personhood theory may arrive at similar conclusions and recommendations as those of the GNP proxy "use value vs. exchange value." GNP

²¹² See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

²¹³ See *id.* at 959–61, 986. These ideas are developed further in Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1686–92 (1988) [hereinafter Radin, *Liberal Conception*]; and Margaret Jane Radin, *Residential Rent Control*, 25 PHIL. & PUB. AFF. 350, 362–65 (1986) [hereinafter Radin, *Rent Control*].

²¹⁴ Radin, *supra* note 212, at 1005–06 (explaining that the personhood theory may protect the family home with a property rule, or condition the taking of personal property on proof of compelling state interest and absence of less intrusive alternatives).

²¹⁵ *Id.* at 988, 1014–15. Interestingly, the German takings jurisprudence similarly distinguishes between different types of property, granting broader protection to property deemed necessary for individuals' self-development and self-realization. The more a property right contributes to these goals, the greater the restrictions on state intervention, and vice versa. For discussion of this "scaling function" under German law, see GREGORY S. ALEXANDER, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE* 113, 135–39 (2006).

identifiers, however, are much broader in content and scope than the category of “personal property.”

First, the personhood theory is a theory of *property law*, whereas GNP identifiers are potentially relevant and applicable to all types of entitlements. Second, and more importantly, GNP identifiers may acknowledge the existence of intense preferences even with respect to property regarded as nonpersonal by personhood theory. The fact that money can sufficiently compensate for an injury to fungible property does not necessarily imply that intense preferences regarding it do not exist, or that strong legal protection is superfluous. Thus, for example, Radin will not categorize commercial assets—even a person’s business—as “personal.”²¹⁶ In addition, entitlements are regarded as “personal” only if enjoyed, in practice, for a significant period of time and so have come to be bound up with the person.²¹⁷ In contrast, the GNP proxy of “possession” generally applies to *all* possessors of property²¹⁸ and grants a self-help remedy also to a person using force to prevent trespass to her place of business. A freshly dispossessed businessperson may justifiably have as strong a preference for quick repossession as a person dispossessed from her residence. Similarly, the GNP identifier of “declining marginal utility” justifies an exemption in bankruptcy also for such fungible property as tools and implements of business and trade or some minimal global sum of money.²¹⁹ Although fungible, these resources are also significantly more valuable in the hands of bankrupted debtors than in the hands of their creditors. Furthermore, the declining marginal utility identifier does not unjustifiably distinguish between currently enjoyed entitlements and prospective ones. Therefore, it may allocate an entitlement to adopt a healthy baby precisely to people who have not yet experienced parenthood.²²⁰ Finally, the “reasons-requirement”

²¹⁶ See Radin, *Liberal Conception*, *supra* note 213, at 1691–92 (defending case law that denies compensation for severe value reductions caused by downzoning, by the fact that development rights are fungible property and the injured land is often held by its owner for investment or commercial purposes); Radin, *supra* note 212, at 995–96 (justifying an implied warranty of habitability in landlord-tenant law only with respect to residential leases); Radin, *Rent Control*, *supra* note 213, at 359–65 (supporting rent control for residential tenancies and arguing that “preservation of one’s home is a stronger claim than preservation of one’s business . . . noncommercial personal use of an apartment as a home is morally entitled to more weight than purely commercial landlording”).

²¹⁷ See Radin, *Rent Control*, *supra* note 213, at 361–62 (explaining, in the context of rent control, that the personhood theory applies only to residing tenants who have a strong interest in maintaining a “well-established” home, and not to “would-be tenants” who have not yet acquired a place of residence).

²¹⁸ See *supra* notes 99–100 and accompanying text.

²¹⁹ See *supra* notes 123–26, 133–34 and accompanying text.

²²⁰ As argued above, the preferences of infertile couples with no other children (either biological or adopted) are likely to be the most intense. See *supra* notes 139–41 and accompanying text.

identifier is much less rigid than the personal/fungible dichotomy and so more receptive to the subjective reasons that people offer in support of the strength of their preferences.²²¹

III

ASSESSMENT OF THE NONPENALIZING APPROACH

A. General

To assess GNP identifiers of intense preferences, this Part compares the nonpenalizing approach with four alternatives. All the methods discussed below are used in practice in certain circumstances; none are a theoretic fancy. I shall first briefly describe each of the five identification methods and then compare them in terms of their effectiveness in identifying preferences, their relative fairness and equal treatment of preferences, their administrative costs, and their ability to deal with objectionable intensities. The five methods are:

1. *Mouth*. People can reveal their preference-intensity through verbal statements. Such a method is currently used in public-opinion studies, polls, consumer-product surveys, contingent-valuation questionnaires (CVM),²²² and Quality-Adjusted Life Year Surveys (QALYs).²²³ People are asked to express the strength of their preferences in words, numbers, rankings, or hypothetical willingness to pay for the attainment of certain outcomes. The important common de-

²²¹ See *supra* notes 190–92 and accompanying text. The personhood theory draws a sharp distinction between property for personal use and property for commercial and business purposes, and thus would not accept a person's claim that the latter is personal—rather than fungible—property. See *supra* notes 212–13 and accompanying text.

²²² The questionnaire technique known as the contingent valuation method (CV or CVM) tries to elicit people's responses regarding the additional costs they would hypothetically be willing to incur (in the form of monetary donations, higher taxes or bills, and the like) in order to assure some level of a public good. People's responses may be given by mail, telephone, or personal interviews, and their stated monetary values are then employed in a cost-benefit analysis. The CVM is used in practice with respect to such public goods as environmental protection, cultural amenities, recreation, aesthetic values, and health states. Matthew D. Adler, *Welfare Polls: A Synthesis*, 81 N.Y.U. L. REV. 1875, 1882–85, 1888–90 (2006); Kevin J. Boyle, *Contingent Valuation in Practice*, in A PRIMER ON NONMARKET VALUATION 111 (Patricia A. Champ et al. eds., 2003). For comprehensive reviews of the CVM, see IAN J. BATEMAN ET AL., *ECONOMIC VALUATION WITH STATED PREFERENCE TECHNIQUES: A MANUAL* (2002); ROBERT CAMERON MITCHELL & RICHARD T. CARSON, *USING SURVEYS TO VALUE PUBLIC GOODS: THE CONTINGENT VALUATION METHOD* (1989); *CONTINGENT VALUATION: A CRITICAL ASSESSMENT* (Jerry A. Hausman, ed., 1993).

²²³ A QALY is an interview technique that typically evaluates preferences for health states in nonmonetary terms. Respondents are asked to describe how they would value various health states and their answers are combined and ranked on a scale between 0 (death) and 1 (optimum health). Adler, *supra* note 222, at 1885–87; Robert Fabian, *The Quality Approach*, in VALUING HEALTH FOR POLICY: AN ECONOMIC APPROACH 118 (George Tolley et al. eds., 1994).

nominator of these methods is that they all rely upon—and suffice with—individuals' statements.

2. *Mouth and Purse* (MP). This technique involves verbal statements of preference-intensity backed up by monetary payments or sanctions. Scholars suggest this method, for example, as a way of assessing compensation when the state expropriates land.²²⁴ Accordingly, owners' self-valuations would form the basis of takings compensation. Owners, however, would have to pay property taxes according to their assessment and refrain from selling their property for less than the self-declared value. Owners selling below these values would have to cede the difference.²²⁵

3. *Generalized and Nonpenalizing* (GNP). This category includes the identifiers that Part II discussed in detail: use value vs. exchange value, possession, declining marginal utility, redemption, and reasons. The major feature of these identifiers is that they do not tax, neither in money nor in-kind, the exceptional utility that some people derive from entitlements. Most of the nonpenalizing identifiers in this group are generalized in that they do not require ad-hoc examination of individual cases. The identifier of "reasons" necessitates case-specific inquiries, but does not sanction intense preferences.²²⁶ As I will demonstrate, although a reasons-requirement is case specific, it is in many respects much closer to the *generalized* nonpenalizing devices than to the other case-specific methods for identifying strong preferences. Therefore, I discuss "reasons" in the GNP category.

4. *Generalized and Penalizing* (GP). This method and the following one are variations on the Mouth and Purse technique because they involve significant taxation of the unique subjective utility that people with strong preferences enjoy. GP techniques differ from MP techniques in their use of generalizations. That is to say, one does not detect intense preferences in an ad-hoc manner. The legal rule lays down, *ex ante*, the circumstances in which such preferences are deemed to exist. The sanction in this category is typically nonmonetary,²²⁷ and a person's willingness to bear a cost identifies intense preferences. For example, the state may require individuals to prove the sincerity of their conscientious objection to military service by willing-

²²⁴ See *supra* notes 29–37 and accompanying text.

²²⁵ For a more detailed description, see *supra* notes 29–36 and accompanying text.

²²⁶ See *supra* notes 191–93, 208–11 and accompanying text.

²²⁷ Here and elsewhere, I use the terms "nonmonetary" or "in-kind" in a narrow sense, which denotes costs and burdens that are *nonproprietary*. That is to say, the penalty that this technique demands of people with strong preferences is neither pecuniary nor in material resources but rather in the sacrifice of time, honor, effort, etc., as the examples in the text demonstrate.

ness to partake in a longer civil service.²²⁸ Similarly, one can condition a strong preference for receiving welfare benefits on willingness to go through a grueling bureaucratic process involving lengthy form-filling, personal interviews, and close scrutiny of eligibility by officials.²²⁹

5. *Case Specific and Penalizing (CSP)*. This last method resembles MP in its two major features: it identifies strong preferences on a case-by-case basis and it imposes a cost on people with intense preferences. Nevertheless, whereas in MP *money* figures both in people's self-valuations and their subsequent payments or sanctions, the case-specific "currency" of CSP is willingness to forgo a benefit in-kind. A prime example is logrolling. When people vote, they ordinarily record only their "bare" preference for one outcome over another. The relative intensity of individuals' preferences for various outcomes is not reflected, and all votes receive equal weight.²³⁰ Because only the number of votes counts, a relatively apathetic majority can still defeat a

²²⁸ Rules that set twice—and even thrice—as long a period of alternative service have existed in some European countries. See *supra* note 188 and accompanying text. The different nature of the two services cannot plausibly justify such a vast difference between the length of the military service and of the civil one. Not all forms of military service are physically or mentally more demanding than an alternative service, such as in hospitals and clinics for drug addicts. For this reason, the Italian constitutional court struck down a law that required a twice-as-long civil service, as conflicting with the principle of equality. Lariccia, *supra* note 188, at 126. Arguably, another way to prove the sincerity of conscientious objection, is by willingness to go to jail for refusing to serve in the army. On imprisonment of COs, see Moskos & Chambers, *supra* note 176, at 12; Chambers, *supra* note 184, at 38. Obviously, a normative difference exists between these two examples of GP identifiers. By offering the alternative of a longer civil service, the state recognizes the legitimacy of conscientious objection. In contrast, imprisonment of COs implies the illegitimacy and illegality of refusing to serve in the military. Nevertheless, a common denominator exists in both examples: individuals prove the strength of their preferences against military service by readiness to bear a substantial nonmonetary cost.

²²⁹ An example of a welfare payment of this kind is the Temporary Assistance to Needy Families (TANF). 42 U.S.C. §§ 601–19 (2006). In a similar fashion, food stamps, housing vouchers, and Medicaid cards may be seen as identifying strong preferences for welfare benefits through people's readiness to bear stigmatization costs. Individuals may feel inferior or shamed when revealing themselves to others as recipients of public assistance. Martha B. Coven, *The Freedom to Spend: The Case for Cash-Based Public Assistance*, 86 MINN. L. REV. 847, 849, 891–93 (2002) (explaining the stigmatization caused by vouchers and food stamps). In a different context, Gilo and Porat have argued that suppliers' boilerplate contract provisions use the proxy of willingness to bear high transaction costs—such as readiness to fill out complex and time-consuming documents—to discriminate between consumer groups and target desirable buyers (repeat consumers, large customers, etc.). David Gilo & Ariel Porat, *The Hidden Roles of Boilerplate and Standard-Form Contracts: Strategic Imposition of Transaction Costs, Segmentation of Consumers, and Anticompetitive Effects*, 104 MICH. L. REV. 983, 989–92 (2006). Although not aimed at detecting intense preferences, these standard-form clauses employ an in-kind penalizing device to identify a group with sought-after characteristics.

²³⁰ BUCHANAN & TULLOCK, *supra* note 6, at 132 (stating that in the simple majority voting process "[a] man who is passionately opposed to a given measure and a man who is slightly favorable but does not care greatly about it are given equal weight . . ."); VAN DEN DOEL & VAN VELTHOVEN, *supra* note 7, at 108–09 (observing that each vote has equal value

passionate minority, even if the minority's utility losses are greater than the majority's utility gains.²³¹ Logrolling, a form of vote trading, can address this problem. Essentially, in logrolling, parties exchange their less intense desires for more urgent ones. Individuals who comprise a minority on a certain issue can convince persons belonging to the majority to vote in favor of their intense preferences on that issue. In return, the former will forgo a milder preference on a different issue and vote according to the latter's wishes.²³² This CSP technique uses people's readiness to bear the cost of not realizing a weaker preference to identify strong preferences.²³³ Although logrolling, unlike the other methods described above, is a private method for identifying and realizing intense preferences, it is nevertheless worth discussing along with the alternative, state-employed identifiers because of its unique features.

Having described the various methods of identifying intense preferences, we can now assess their relative strengths and weaknesses. We shall begin with their effectiveness in identifying true preferences.

B. Effectiveness

The first criterion for assessing a method for identifying strong preferences is its ability to attain its goal, and in particular to mitigate the risk of strategic misrepresentations. The concern that people might lie about the intensity of their preferences is genuine. Even if people ordinarily tell the truth (for ethical reasons or to establish a reputation of honesty), it is sufficient that there are some people who would lie about the intensity of their preferences to warrant some lie-avoidance mechanism in any method for identifying intense preferences.

The Mouth method, relying solely on verbal statements, is the only one of our five that does not include any lie-avoidance device. This fact may explain why this method is used mainly to elicit preferences regarding general policy issues and the provision of public goods (environmental protection, public health policy and the like).²³⁴ Public goods simultaneously benefit numerous people and are typically funded through government taxation. Because both the benefits and the costs of public goods are widely spread throughout society, the incentive to lie on questionnaires or public opinion polls

and that "[t]he problem of preference intensity is especially important in those cases where a *relatively apathetic majority* is faced by a *passionate minority*").

²³¹ See Hardy Lee Wieting, Jr., *Philosophical Problems in Majority Rule and the Logrolling Solution*, 76 ETHICS 85, 86–87 (1966).

²³² BUCHANAN & TULLOCK, *supra* note 6, at 132–33; Wieting, *supra* note 231, at 87.

²³³ See RIKER, *supra* note 16, at 157 (“[V]ote-trading requires that traders vote contrary to their true tastes on some issues.”).

²³⁴ See *supra* notes 222–23 and accompanying text.

is significantly diluted.²³⁵ In contrast, if all benefits and costs are concentrated on a single individual, self-valuations are much less reliable. Thus, for instance, we would not rely on verbal statements of landowners alone in awarding them takings compensation, or solely on self-assessments of tort injurers to set the damages they would subsequently have to pay.

Of the remaining four techniques, MP initially seems to clearly surpass all others as a lie-avoidance mechanism. If, for example, the government uses landowners' assessments not only for compensation purposes but also for taxing their property, and if it fully penalizes subsequent sales below self-declared values, then landowners' incentives to misrepresent their valuation are greatly reduced.²³⁶ The other methods mitigate lies in nonmonetary ways and so may offer only "rougher" guarantees of truthfulness. GNP methods, for example, employ proxies that are thought to identify instances of strong preferences, such as possession, declining marginal utility, and use value. Although these proxies are generally accurate, exceptions cannot be ruled out. GP and CSP use people's willingness to bear costs as proof of preference-intensity. But the readiness of conscientious objectors to serve a longer civil service, or the willingness of welfare recipients to undergo an exhausting eligibility-scrutiny process,²³⁷ only proves that their utility from satisfying the preference is greater than the cost inflicted upon them. Thus, the GNP, GP, and CSP methods do not expose the precise extent to which some people's preferences are more intense than those of others.

On further reflection, MP's superiority on the lie-avoidance front appears to be somewhat less impressive. First, in numerous contexts, people's exact valuations are unimportant. Leaving aside scenarios that require monetary compensation and taxation (where precise estimations are desirable), it usually suffices to detect the very existence of strongly held preferences. If adequately crafted, GNP, GP, and CSP are all capable of attaining this goal quite effectively. Thus, for example, if according to the rule of declining marginal utility, some minimal quantity of wealth is much more valuable in the hands of

²³⁵ This section focuses on the problem of lying and does not address the different question whether people—who do not wish to lie—are indeed capable of giving accurate or meaningful monetary valuations of their preferences for non-marketed and public goods. For a skeptical view see, for example, Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 82 (1995) (stating with respect to contingent valuation that "it is difficult to believe that people answering hypothetical questions can assign meaningful dollar values to various possible health or other risks"); see also ELSTER, *supra* note 136, at 221 (questioning people's ability to accurately report the relative strength of their preferences even in nonmonetary ways). A negative answer to this question strengthens the case for nonmonetary identifiers of intense preferences.

²³⁶ Though not eliminated. See *supra* note 37 and accompanying text.

²³⁷ See *supra* notes 227–29 and accompanying text.

bankrupt debtors than in the hands of their creditors, then this phenomenon justifies a property exemption in bankruptcy, regardless of the exact ratio between the debtor's utility from this minimal quantity and the creditors' utility from getting this additional quantity.²³⁸ Second, the relative advantage of MP is limited to assets that are regularly traded in markets and taxed by the state. Only then is it potentially possible to place a relatively accurate price tag on preferences.²³⁹ This precision is lost once MP is applied to preferences for nontraded or nontaxed entitlements, such as conscientious objector status or babies for adoption. Because these entitlements cannot be sold or taxed according to people's self-assessments, one cannot employ monetary sanctions to encourage truth telling. Third, and more generally, the problem of lies should not be overstated. Even if some people have no moral scruples against lying, it will not always be easy to lie successfully. Lying often requires reliable information about the preferences of others.²⁴⁰ To the extent that people do not (or cannot) exploit opportunities to lie, the practical importance of MP's lie-discouragement mechanism diminishes. To sum up, the goal of lie mitigation does not unequivocally tilt the scales in favor of the MP method. With the exception of the Mouth technique, the other methods quite successfully avoid untruthful preference-intensities.

C. Equal and Fair Treatment of Intense Preferences

This section compares the degree to which the five methods treat people and their truthful preferences equally and fairly. Three parameters will be considered:

²³⁸ See *supra* notes 133–34 and accompanying text.

²³⁹ On the possibility of employing monetary sanctions in the takings compensation context, see *supra* notes 31–38 and accompanying text. See also *supra* note 44, where I questioned whether individuals can accurately quantify their subjective valuation of an asset when they do not contemplate its *real* market sale. Arguably, people do not have a precise, abstract reservation price that is independent of the timing and circumstances of the asset's transfer and the then-prevailing market prices. If so, then MP's quest to reveal the truthful "magic" number is likely to be futile.

²⁴⁰ See VAN DEN DOEL & VAN VELTHOVEN, *supra* note 7, at 99 ("A necessary prerequisite for successful strategic voting behaviour is that the individual is completely informed of the preferences of the other group members and on their voting behaviour This condition will seldom or never be met."); Alvin E. Roth, *The Evolution of the Labor Market for Medical Interns and Residents: A Case Study in Game Theory*, 92 J. POL. ECON. 991, 1005 (1984) (claiming, in the context of procedures for assigning medical interns to hospitals according to both parties' preferences, that "if agents have little information about the preferences of other agents, they will not in general be able to determine an 'optimal' misrepresentation"). Gathering and processing the relevant information is especially difficult with respect to public goods, which potentially affect numerous people. See Adler, *supra* note 222, at 1926–27 (arguing with respect to welfare polls (such as CVM and QULY) that because people are not fully rational, they "may not realize that lying is in their interest or may not be up to the cognitive strain of keeping track of their lies").

1. *Dignity and Respect*: How does the technique fare in terms of treating individuals with dignity and respect? Is there anything humiliating, insulting or disrespectful in the way in which the method identifies intense preferences?²⁴¹

2. *Wealth Effects*: Is the technique biased in favor of people who are able to pay? If so, nonwealthy individuals would not have a fair and equal chance of proving the strength of their preferences.

3. *Equality of Treatment*: Does the technique impose heavier burdens on individuals with strong preferences than on people with weaker preferences? Does it arbitrarily single out certain people within the strong-preferences group for differential treatment?

The second and third parameters are not identical. Even assuming that people are equally affluent, or that the burden imposed in detecting preference-intensity is nonmonetary (and thus can be borne by rich and poor alike), it may still be unfair to place a heavier burden only on certain people. Ideally, we should seek identification methods that are not contingent upon individuals' willingness to bear sanctions because those methods facilitate free and full enjoyment of the exceptionally high utility these individuals derive from entitlements.²⁴² Any dilution of this value—by requiring monetary payments or by inflicting costs in-kind—is *prima facie* undesirable.

In support of this claim, recall that the sanctions used in this context are merely a *means* for detecting strong preferences. The sanctions are an unintentional and undesirable byproduct of the identification process. Penalization only dissipates value or transfers it to recipients who cannot be regarded as deserving under any plausible redistributive theory. Therefore, when sufficiently reliable identification can be attained without inflicting sanctions, one can—and should—forgo unnecessary penalizing.

Take the case of a spouse who co-owns the couple's residence, and whose partner initiates partition proceedings in which the property would be sold as a whole.²⁴³ We could force the noninitiating spouse to prove the intensity of her preferences by actually outbidding any third party wishing to purchase the property. But why should we do so? It is highly probable that the noninitiating spouse wishes to continue using the property and values it more than other persons.²⁴⁴ Were no sale imposed upon her, she would have continued enjoying her unique, subjective value in full. Requiring her to negotiate a

²⁴¹ All else being equal, we should opt for the method that is least injurious to people's dignity.

²⁴² An important qualification to this goal is the case of unfair or objectionable preference-intensities. See *infra* Part III.E.

²⁴³ See *supra* notes 64–74 and accompanying text.

²⁴⁴ Due to the difference between use value and exchange value, as explained *supra* notes 53–61 and accompanying text.

purchase only squanders this value. Neither the spouse initiating the partition (who, in any case, is willing to sell for the lower price offered in the market), nor the third party, has a legitimate expectation to receive part of the other spouse's above-market value. A statutory right of first refusal in this context—which suffices with a matching of the third party's offer—transfers the property to the person who values it most, and minimizes transaction costs. It thereby assures that the largest efficiency gains remain and averts the risk of bargaining failure. The nonpenalizing identifier is thus both more fair and more efficient. Moreover, since *ex ante* both spouses may find themselves in either the position of the initiator of the partition or of the noninitiating party, a statutory RFR benefits them both.

Note that this nonpenalizing feature also characterizes a well-functioning market. In a competitive market, prices are not set and assets are not allocated according to a “highest bidder” criterion. Rather, prices reflect the value of the *marginal* owner. All consumers pay the same amount for each unit of a good they purchase, from the first to the last, and this amount is set according to the worth of the last unit.²⁴⁵ The difference between the utility people derive from a good and its market price is their consumer surplus, which they are allowed to keep.²⁴⁶ Thus, in a well-functioning market all preferences—including intense ones—are treated equally. Individuals are not required to reveal their unique valuation of an asset beyond its market price, and this value is not—either partially or wholly—taxed away. Keeping the extent of subjective valuation private affords people equal opportunities to enjoy utility from goods and to maintain their economic advantage in future negotiations with others.²⁴⁷ Moreover, it reduces (although does not eliminate) the bias of markets against nonaffluent individuals, since not all the value that these people enjoy must be paid for. I believe that this characteristic of markets is commendable and one we should retain whenever possible.²⁴⁸ All

²⁴⁵ SAMUELSON & NORDHAUS, *supra* note 111, at 95–96.

²⁴⁶ SAMUELSON & NORDHAUS, *supra* note 111, at 96–98; see also BUCHANAN & TULLOCK, *supra* note 6, at 111 (“There is nothing in the market process which requires the participating individual to reveal the extent of his ‘consumer’s or seller’s surplus.’”).

²⁴⁷ See Omri Ben-Shahar & Lisa Bernstein, *The Secrecy Interest in Contract Law*, 109 YALE L.J. 1885, 1886–88 (2000) (arguing, in the context of expectation damages in contracts, that revealing private information about the true value of performance to the promisee would weaken her bargaining position in future negotiations and enable other parties to extract a greater share of the bargaining surplus).

²⁴⁸ True, even in markets, assets are sometimes allocated through auctions. If assets are eventually given to the highest bidder, potential buyers would have to bid closer to their actual valuation of an asset. Consequently, they would be able to retain a much smaller consumer surplus. However, the existence of auctions does not detract from my argument. First, allocation by auction is the exception, not the rule. Auctions are held with respect to *objectively* unique assets—such as a Picasso painting—and when a competitive market does not exist. Moreover, in such cases, we have no other way of knowing

else being equal, when choosing a technique for identifying intense preferences we should opt for the one that mimics the egalitarian feature of markets.

Let us now turn to examine how the five methods fare in light of these parameters of evaluation.²⁴⁹ The conclusions of the comparative analysis are summarized in Table 1 below (which also includes the effectiveness aspect discussed in the previous section).

TABLE 1

<i>Technique for Identifying Intense Preferences</i>	<i>Mitigating Risk of Lies</i>	<i>Dignity and Respect</i>	<i>Overcoming Wealth Disparities</i>	<i>Equal Treatment of Preferences</i>
<i>Mouth: Verbal Statements Only</i>	No	Yes	Yes	Yes
<i>Mouth and Purse (MP): Statements with Monetary Payments or Sanctions</i>	Yes	No	No	No
<i>Generalized and Nonpenalizing (GNP)</i>	Largely Yes	Yes	Yes	Yes
<i>Generalized and Penalizing (GP)</i>	Largely Yes	No	Yes	No
<i>Case Specific and Penalizing (CSP)</i>	Largely Yes	Partially Yes	Yes	No

Dignity and Respect. All methods for identifying intense preferences can be placed along the continuum between the two poles of “humiliation” and “respect.” The Mouth technique, ranked last according to the “lies mitigation” parameter, ranks first here. We respect individuals and preserve their dignity to the greatest extent when we accept their statements regarding preference-intensity as a given.²⁵⁰ By honoring those statements the state conveys the message: “We believe you and will act accordingly.”

GNP methods “tie” in first place with Mouth, or at least follow closely behind. This is because they too do not identify intense preferences via (monetary or nonmonetary) sanctions.²⁵¹ Furthermore,

which of the many potential buyers is the highest valuer. In contrast, in scenarios where an entitlement is only subjectively unique to a certain person, or where there are good proxies for systematically intense preferences on behalf of a specific party or side alone, we should elect to mimic the market rule, rather than the exception. Second, people participate in auctions voluntarily and are not compelled to enter a bidding competition. In contrast, many situations calling for identification of intense preferences are *forced upon* the individuals whose preferences need to be evaluated. Such is the case, for example, in takings compensation or a partition sale that was not initiated by all the co-owners.

²⁴⁹ For convenience purposes, I discuss other parameters of evaluation separately. Thus, for example, I compare the implementation costs of various identification methods *infra* Part III.D.

²⁵⁰ See *supra* notes 222–23 and accompanying text.

²⁵¹ For an explanation of why GNP identifiers are nonpenalizing, see *supra* notes 208–11 and accompanying text.

even if requirements included in some GNP techniques may potentially question people's integrity, they do so only marginally. For instance, although one may claim that requiring reasons for preferences expresses some degree of mistrust, it can hardly be argued that this requirement is considerably insulting or humiliating.

The MP, GP, and CSP techniques are found closer to the "humiliation" pole because they entail penalties in order to flush out untruthful preference-intensities. In this respect, however, CSP methods are much less derogatory than MP or GP ones. Take, for example, the CSP method of logrolling.²⁵² Although individuals must forgo the satisfaction of a certain preference in order to ensure the fulfillment of a more urgent one, they experience much control in deciding which preference to trade. Personal responsibility and lack of direct governmental intervention may lessen any hurt feelings. In contrast, both MP and GP methods involve infliction of sanctions *by the state*. Consequently, the connection between these burdens and distrust of people is conspicuous and disrespectful. For instance, although the MP method seemingly shows interest in owners' valuation statements, it concomitantly casts doubt on their integrity by informing them that they will be closely monitored henceforth and any future sale below the stated value will be taxed at a one hundred percent rate.²⁵³

In a similar fashion, GP methods verify sincerity by people's willingness to bear a significant sanction or stigmatization. Moreover, there is an inherent tension between the goal of the penalty and its effect. For instance, assuming the state wishes to exempt conscientious objectors (COs) from military service, it must distinguish between false COs and true ones. Adoption of a GP technique in this context means that the state will require alleged COs to prove their sincerity by "paying the price," such as serving a much longer alternative civil service.²⁵⁴ By submitting to the penalty, genuine COs pass

²⁵² See *supra* notes 230–33 and accompanying text.

²⁵³ In addition to being disrespectful, by implying that people are likely to lie about their preference-intensities, MP methods may actually *decrease* the incidence of voluntary truth telling. Dan Kahan has argued that most individuals behave cooperatively when they perceive that others are doing the same and uncooperatively when they believe that others are shirking. Regulatory measures that stress the penalties for noncooperation imply that people are not cooperating voluntarily, and this message inspires distrust and weakens individuals' inclination to cooperate. Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71, 72–77 (2003). Thus, for instance, dramatically publicizing the penalties for tax evasion causes people to infer that tax evasion is rampant. This inference triggers a motive to evade, which may prevail over the material incentive (caused by the penalties) to comply. *Id.* at 81–83. In the present context, when a technique for identifying intense preferences conspicuously treats individuals as probable liars, it signals that dishonesty is the norm and truthfulness is for suckers.

²⁵⁴ See Avi Sagi & Ron Shapira, *Civil Disobedience and Conscientious Objection*, 36 ISR. L. REV. 181, 212–13 (2002) (arguing that COs should be willing to bear personal sacrifices, in the form of prison terms, in order to express the genuineness, force, and validity of their

the test. But once proven to be true COs, their punishment seems unjust since only *false* COs deserve to be punished. Likewise, welfare benefits are sometimes conditioned on putative recipients undergoing an unpleasant and grueling bureaucratic process.²⁵⁵ Arguably, the willingness to suffer a humiliating administrative process identifies those persons whose preferences for the benefits are the most urgent and intense. But once these people's identities are established, their degrading treatment seems grossly unfair; worthy recipients should not be disrespectfully treated.²⁵⁶

Wealth Effects. Only a method using monetary sanctions to identify intense preferences involves the problem of wealth effects.²⁵⁷ Therefore, only the MP method is biased against nonwealthy individuals because it prevents them from having a fair and equal chance to prove their preferences' strength. The remaining four methods do not require people to pay over some (or all) of the exceptional value they receive from entitlements, and so do not suffer from this bias. This advantage is obvious with respect to the two techniques that adopt nonpenalizing identifiers and so do not require any transfers of wealth: Mouth and GNP.²⁵⁸ Note, however, that the same conclusion holds true for GP and CSP methods as well. Although penalizing, both GP and CSP methods involve nonmonetary burdens. Since individuals can prove the intensity of their preferences by bearing costs in-

values); Vermeulen, *supra* note 183, at 272–73 (claiming, in the context of exemption for COs, that the only decisive test of truthfulness is willingness to bear negative consequences, but admitting that this test may be incompatible with the freedom of conscience); *cf.* Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095, 1158–60 (2007) (explaining, with respect to civil right activists participating in “sit-ins” at segregated lunch counters, that to legitimize their trespass would undermine the expressive value of their civil disobedience and willingness to accept punishment).

²⁵⁵ For criticism of welfare payments with humiliating eligibility requirements, see Morgan B. Ward Doran & Dorothy E. Roberts, *Welfare Reform and Families in the Child Welfare System*, 61 MD. L. REV. 386, 394–402, 411–17 (2002).

²⁵⁶ The existence and degree of disrespect may vary according to different parameters. For instance, a sanction inflicted face to face (such as a humiliating interview) can be more injurious than a sanction imposed impersonally (such as through the filling of lengthy forms). Often, the offensiveness of any measure is inversely correlated to the size of the penalized group. It stands to reason that humiliation is greater when individuals perceive themselves to be singled out for derogatory treatment, as opposed to a situation in which everybody gets the same treatment. In this respect, MP and GP techniques are likely to be regarded as insulting since they do not apply to all people with strong preferences, but rather target a specific subgroup (owners of land considered for expropriation, potential recipients of welfare benefits, etc.).

²⁵⁷ See *supra* notes 39–44 and accompanying text.

²⁵⁸ See *supra* notes 208–11 and accompanying text (providing an explanation as to why even GNP identifiers that involve some payments still leave the unique surplus enjoyed by persons with intense preferences intact, in their hands).

kind, these methods are potentially available to the nonaffluent as well.²⁵⁹

Indeed, if lack of money is also a proxy for lack of education and political involvement, then nonmonetary identifiers would not ensure equal opportunities for the poor.²⁶⁰ A relatively poor person may not participate in logrolling and may not be sufficiently educated to provide persuasive reasons for conscientious objection.²⁶¹ This problem should not be overstated, however. There are well-known historical examples of successful conscientious objection or political opposition by people not belonging to the upper or middle classes, such as the Jehovah's Witnesses and the Black Muslims.²⁶² Although nonmonetary identifiers are no remedy for economic, educational, or social gaps, they remove at least one significant obstacle on the way to establishing intense preferences. Furthermore, GNP methods do not ordinarily require a special initiative or active claim of preference-intensity on behalf of the individual—an added advantage of GNP. Proxies like possession, declining marginal utility, or use value vs. exchange value are embodied in the legal rule itself and automatically activated in

²⁵⁹ For instance, a nonwealthy CO would not be able to offer money to prove her intense preferences against carrying arms but could bear the nonmonetary cost of a lengthier civil service.

²⁶⁰ Renée A. Irvin & John Stansbury, *Citizen Participation in Decision Making: Is It Worth the Effort?*, 64 PUB. ADMIN. REV. 55, 59 (2004) (noting that citizen participation committees are overpopulated with members from high socio-economic groups who have a college education); Richard D. Shingles, *Black Consciousness and Political Participation: The Missing Link*, 75 AM. POL. SCI. REV. 76, 76 (1981) ("Low-income groups are generally politically inactive. This is particularly true of more demanding forms of political participation, such as campaign work and organized community activities which require scarce human resources and high levels of individual initiative."). In a similar vein, it was claimed that political deliberation favors the more articulate, well-educated, and affluent, and is thus biased against racial minorities and poor people. Lynn M. Sanders, *Against Deliberation*, 25 POL. THEORY 347, 348–49, 352–54, 369–70 (1997).

²⁶¹ WALZER, *supra* note 181, at 142–44 (arguing that exemption of COs may introduce a class bias into the draft since such opposition is usually raised by the middle and upper classes); Noone, *supra* note 179, at 185 (claiming that the exemption process for COs is biased in favor of the well-educated and articulate). See also David A. Super, *Offering an Invisible Hand: The Rise of the Personal Choice Model for Rationing Public Benefits*, 113 YALE L.J. 815, 853–54 (2004) (arguing that a complex and time-consuming administrative process for receiving welfare benefits may have regressive effects since it "is likely to depend on the claimant's literacy, math ability, organizational and social skills, and childcare and transportation resources").

²⁶² WALZER, *supra* note 181, at 143. Furthermore, some studies have found that ethnicity and political culture have greater impact than socioeconomic status on levels of political participation. Dale C. Nelson, *Ethnicity and Socioeconomic Status As Sources of Participation: The Case for Ethnic Political Culture*, 73 AM. POL. SCI. REV. 1024, 1031–37 (1979) (finding, in the context of non-electoral political behavior—such as joining community organizations, signing petitions, and attending demonstrations—that ethnicity is the best predictor of variance in local political activity); Shingles, *supra* note 260, at 76–77, 87–90 (with the exception of voting behavior, the political participation of blacks is significantly higher than expected given their average education and income levels, and it is higher than the political activity of whites of comparable socioeconomic status).

appropriate circumstances. Thus, for example, exemptions in bankruptcy will be uniformly afforded to all debtors and the defense of self-help will protect all possessors of property.²⁶³ In this way, GNP methods reduce any bias against the less educated or politically aware.

Equality of Treatment. An identifier meets this criterion to the extent that it does not impose heavier burdens on people with intense preferences (vertical equity), and treats all individuals having strong preferences equally (horizontal equity). As explained above, an ideal method of identification would allow people to freely and fully enjoy the high utility they derive from entitlements.²⁶⁴ Only the nonpenalizing techniques—Mouth and GNP—pass both vertical and horizontal equity tests. They alone mimic the well-functioning market in permitting everyone to retain their consumer surplus.²⁶⁵ Furthermore, in doing so, they afford *all* people with intense preferences equal chances of enjoyment. All the proxies that GNP methods employ (use value, possession, declining marginal utility, redemption, and reasons), apply generally to, and to the benefit of, every person with strong preferences. In contrast, MP, GP, and CSP methods are penalizing, that is, they impose costs on people with intense preferences only.²⁶⁶ In addition, MP and CSP methods apply haphazardly to persons belonging to the strong-preferences group and are thus discriminatory.²⁶⁷ For example, the MP method of self-assessments backed up by monetary payments would not affect all property owners with high subjective valuation but only those who own land that is considered for expropriation.²⁶⁸ Similarly, the CSP technique of logrolling would not be available in practice to all wishing to use it,²⁶⁹ but only to voters who have preferences they can exchange and that other parties are interested in. That is to say, if a person wishes to recruit additional votes for an intensely held preference, she must have a weaker preference she is willing to trade and a trading partner who strongly values it. These will not always be available.²⁷⁰

²⁶³ See, respectively, notes 121–28, 96–100 and accompanying text.

²⁶⁴ See *supra* notes 242–49 and accompanying text.

²⁶⁵ For further explanation, see *supra* notes 244–48 and accompanying text.

²⁶⁶ See *supra* Part III.A.

²⁶⁷ This horizontal equity problem does not plague the GP technique. Because it is a generalized—rather than case specific—identification method, its nonmonetary burden would apply to everyone belonging to the intensely-held-preferences group. For instance, all people with strong preferences for welfare benefits will be subject to a close-scrutiny eligibility process. See *supra* notes 227–29 and accompanying text.

²⁶⁸ See *supra* notes 45–47 and accompanying text.

²⁶⁹ It stands to reason that some people would find the very idea of vote trading distasteful and would not engage in logrolling. See Wieting, *supra* note 231, at 92.

²⁷⁰ See *id.* at 94 (explaining that people with strong preferences on a great many issues and weak preferences on only a few will have little to trade with, making logrolling unsuccessful); see also RIKER, *supra* note 16, at 157 (“[I]f the same absolute majority passes two motions, no trade is available.”); Goodin, *supra* note 41, at 319 (acknowledging possibility

In summary, the above analysis and Table 1 clearly demonstrate that the GNP method is the superior method. In fact, generalized and nonpenalizing identifiers are the only identifiers that effectively mitigate the risk of lies and at the same time treat people with dignity and respect, afford equal treatment to their preferences, and do not favor the affluent. All alternative methods for identifying intense preferences were found to be lacking in one or more of these aspects. The Mouth and MP methods are mirror images of one another. The advantages of Mouth are the shortcomings of MP and vice versa. The former suffices with verbal statements and therefore contains no lie-avoidance mechanism (although it fares well on the other parameters). The advantage of MP is its strong incentives for truthful revelation of intense preferences. This advantage comes at a heavy price since MP fails the remaining tests. The GP and CSP techniques achieve mixed results. On the one hand, they deal satisfactorily with the problem of wealth effects and contain lie-mitigation devices. On the other hand, these methods do not afford equal treatment to preferences and are (to varying degrees) disrespectful toward people.

D. Implementation Costs

The attractiveness of any method for identifying intense preferences depends, among other things, on its implementation costs. When considering the costs of GNP methods, one should differentiate between “reasons-giving” and other GNP identifiers. The former requires case-specific inquiries about the reasons underlying people’s preferences. The latter employs generalized proxies for intense preferences that do not necessitate such examinations. Proxies like use value, possession, declining marginal utility, and redemption are embodied in the legal rule itself. Dispensing with the need for case-by-case assessments significantly reduces implementation costs.²⁷¹ Although requiring reasons for preferences entails more costs, these should not be especially high. Judges and decisionmakers do not have to determine whether the reasons are “correct” in any objective sense. Rather, the role of reasons is to convince that the alleged

of “persistent minorities who are always in the losing coalition”). In addition, present votes cannot be exchanged for future ones if the parties do not know when the next voting opportunity will take place, or if the voting is by secret ballot, making it impossible to check whether voting promises are kept. BUCHANAN & TULLOCK, *supra* note 6, at 132.

²⁷¹ Indeed, generalized proxies may often be the only feasible solution for regulators and decisionmakers who lack knowledge of individuals’ utility functions and resources to verify them. See GRIFFIN, *supra* note 208, at 122 (arguing, in the context of welfare promotion by the state, that “governments would in general compare different citizens’ well-being by appeal to things that it is assumed they all value”); Arneson, *supra* note 8, at 188 (“In many contexts of practical importance the best an agent of society can do in order to determine what a particular person prefers is to impute to that person the preferences that most people share.”).

strong preferences are genuine. It therefore suffices that the reasons offered are sincere and reasonable.²⁷²

Like GNP methods, GP techniques involve *generalized* identifiers. Hence, they too dispense with the need for expensive case-specific inquiries, thereby reducing administrative costs. However, since GP identifiers impose sanctions on holders of intense preferences, and such imposition may involve substantial costs, they typically involve greater costs than GNP techniques.

CSP methods—such as logrolling—seem inexpensive because they rely on voluntary bargaining by individuals.²⁷³ People trade their weaker preferences for stronger ones by themselves, and there is no need for state involvement through courts or public officials. Yet, shifting costs from public institutions to the individual bargainer does not mean the costs disappear. The costs of the trading process, including information gathering and negotiation, are not insignificant. Individuals need to seek out potential trading partners, and there is no predetermined “market price” for this type of preference.

Generally speaking, Mouth and MP methods are likely to require relatively higher administrative costs than the other three methods because they call for case-by-case handling by administrative agencies. Although the Mouth method suffices with verbal statements of individuals, it involves the gathering and processing of information from numerous people, in the form of public opinion surveys, polls, contingent valuation questionnaires and the like.²⁷⁴ MP methods entail even greater costs, because they also incur the cost of monitoring people’s future behavior to impose the monetary sanctions that ensure truth telling. For example, in the compensation-for-takings context, the lie-mitigating requirement that land not be sold for less than owners’ self-declared values necessitates stringent monitoring of real estate transactions and collection of any discrepancies between declared values and (lower) sale prices.²⁷⁵

In summary, the GNP technique is not only superior to other methods in terms of equal and fair treatment of intense preferences, but also attains this goal at relatively low administrative costs. At the very least, no other technique seems preferable in this regard.

²⁷² See *supra* notes 191–92 and accompanying text.

²⁷³ On decentralization as a partial solution to the problem of high administrative costs, see CALABRESI & BOBBITT, *supra* note 41, at 36, 53–54.

²⁷⁴ See *supra* notes 222–23 and accompanying text.

²⁷⁵ See *supra* notes 47–48 and accompanying text; see also Holland & Vaughn, *supra* note 29, at 99 (“A major objection to all assessment schemes, . . . particularly to self-assessment, lies in the great difficulty of determining the ‘true’ value of real estate. So difficult is this valuation that it is entirely possible that, for a good many properties, professionals would have to be employed at a cost greater than or equal to the cost of government assessment. Thus, the administrative advantage of self-assessment would be spurious, for it would merely involve shifting costs from government to individuals.”).

E. Dealing with Unfair and Objectionable Intensities

The different identifiers of intense preferences should also be assessed according to their ability to contend with unfair and objectionable preference-intensities. This concern comes in various forms. It has been argued that due to their character and temperament, some people have a general tendency to “feel strongly” about their preferences. It seems unfair to favor these people—for instance, in allocating scarce resources—over people who lack such a disposition.²⁷⁶ By the same token, one should be careful not to create an allocation bias in favor of people who are exceptionally efficient consumers of goods and therefore derive *systematically* greater value from resources than others.²⁷⁷ This problem may exist even when no strategic behavior is involved, but has the potential to intensify if people possess some control over the formation of their preferences.²⁷⁸ If we take strength of preferences into account, we encourage people to deliberately develop intense preferences, in order to increase their chances of winning entitlements.²⁷⁹ This activity not only lacks social value but also needlessly increases the injury to those who would not receive entitlements. Finally, even ignoring the former problems, certain intensities can be viewed as downright objectionable. Even if the content of the

²⁷⁶ RICHARD B. BRANDT, *A THEORY OF THE GOOD AND THE RIGHT* 252 (1979) (arguing that favoring the person with the more intense preferences is problematic “if Mr. X happens to want a great many things more than Mr. Y, and perhaps more intensely”); see also ELSTER, *supra* note 136, at 219 (claiming that “natural tempers” should not be a factor in compensation and allocation decisions).

²⁷⁷ See Goodin, *supra* note 41, at 318 (describing the super-efficient individual “who is very good indeed at converting material commodities into subjective utility,” and the problem that the goal of total utility maximization requires that virtually all material goods be allocated to such “pleasure machines”); see also T.M. Scanlon, *Preference and Urgency*, 72 J. PHIL. 655, 663 (1975) (arguing that indiscriminate consideration of people’s subjective preference-intensities “would leave us open to being ‘held up’ by people . . . who attached inordinate importance to some relatively minor concern”).

²⁷⁸ For the view that individuals are at least partially capable of mastering and adjusting their preferences, see Arneson, *supra* note 8, at 175. See also John Rawls, *A Kantian Conception of Equality*, in JOHN RAWLS: COLLECTED PAPERS 254, 261 (Samuel Freeman ed., 1999) (“We are assuming that people are able to control and to revise their wants and desires in the light of circumstances and that they are to have responsibility for doing so Persons do not take their wants and desires as determined by happenings beyond their control. We are not, so to speak, assailed by them, as we are perhaps by disease and illness so that wants and desires fail to support claims to the means of satisfaction in the way that disease and illness support claims to medicine and treatment.”). The physically and mentally handicapped may have involuntary costly preferences because they sometimes require more resources than the healthy in order to attain a similar level of welfare. RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 59–62 (2000).

²⁷⁹ The literature has discussed the somewhat analogous problem of people who freely choose to cultivate expensive preferences and therefore unfairly require more resources to maintain the same preference-satisfaction level as persons with more modest desires. DWORKIN, *supra* note 278, at 48–59; Arneson, *supra* note 8, at 176, 185–94; Scanlon, *supra* note 277, at 659–66.

preference is inoffensive—not being racist, malicious, prejudiced, or the like²⁸⁰—the enormous intensity of the preference may be regarded as preposterous.²⁸¹ Although people are certainly allowed to differ in the intensity of their desires, this continuum of rising utility has reasonable limits. The socially acceptable level of preference-intensity is not infinite. To take an extreme example, students participating in my property seminar may significantly diverge in the strength of their preferences for one writing topic over another.²⁸² But it would seem unacceptable for a student to hold such a strong desire for a particular paper topic as to contemplate suicide if not granted her wish.²⁸³

The problem of unfair and objectionable preference intensities is important, but should not be overstated. Obviously, we cannot forgo consideration of preference-intensity for both efficiency and fairness reasons.²⁸⁴ Because not all people's preferences can be satisfied and some must be frustrated, a relevant—albeit not sole—consideration is their relative strength. Although some individuals may possess an unusual propensity for intense preferences or an exceptional capacity to enjoy any resource, it is reasonable to assume that most others hold both strong and weak preferences and have a relatively similar ability to experience utility.²⁸⁵ Therefore, we should not throw the baby out

²⁸⁰ Preferences whose very content—regardless of their intensity—is offensive are often referred to as “objectionable preferences.” See Lewinsohn-Zamir, *supra* note 21, at 1681–83. Legislatures often attempt to “weed out” antisocial preferences in a generalized fashion, such as outlawing racial discrimination in housing or employment. See Joseph W. Singer, *Things That We Would Like to Take for Granted: Minimum Standards for the Legal Framework of a Free and Democratic Society*, 2 HARV. L. & POL'Y REV. 139, 149–50, 153–59 (2008) (arguing that rejection of objectionable preferences should rest on the notion that a free and democratic society entails minimum standards of decency and fairness and the treatment of every person with equal respect).

²⁸¹ Peter Vallentyne, *The Problem of Unauthorized Welfare*, 25 NOÛS 295, 308 (1991) (“*Supersensitive utility monsters* are individuals who care excessively intensely about the differences between alternatives (e.g., where eating an apple rather than an orange gives a person a million extra units of utility, but ‘normal’ individuals would only get at most a few extra units of utility).”).

²⁸² For a discussion of this example in the context of the GNP identifier of “reasons,” see *supra* note 174 and accompanying text.

²⁸³ I encountered a less extreme example during my compulsory military service in the Israeli Army. I interviewed would-be soldiers about their preferences regarding their upcoming service. Most individuals ranked a few preferences and indicated their relative intensity. Some, however, were adamant: “Either boss-driver or jail.” In other words, if they did not receive the one position they wanted—personal driver to a high-ranking officer—they would refuse doing anything else and instead choose to spend their military service in the army prison. Even if these persons meant what they said, their preference-intensity seems unreasonably excessive.

²⁸⁴ For an explanation why both efficiency and fairness require the consideration of preference-intensities, see *supra* notes 8–15 and accompanying text.

²⁸⁵ See Goodin, *supra* note 41, at 316 (postulating that individuals have equal capacities to experience happiness); Hovenkamp, *supra* note 7, at 71–72 (explaining the assumption that people possess equivalent capacities for satisfaction); see also JONATHAN BARON, THINK-

with the bathwater, but rather seek identifiers that minimize the problems of objectionable intensities. In addition, even assuming that individuals have partial control over the shaping of their preferences, the deliberate cultivation of high-intensity preferences has drawbacks. For instance, by intentionally increasing the strength of one's desires, one also self-enhances the frustration from subsequent nonfulfillment of preferences. In a similar vein, a person who holds only (or mainly) strong preferences would not be able to engage in logrolling, since vote trading requires the existence of relatively weak preferences that can be exchanged for more urgent ones.²⁸⁶

It is worthwhile to note that the problem of excessive preference-intensities differs from the more commonly discussed problem of *expensive* preferences. An example of the latter is people who deliberately cultivate a desire to drink champagne while others suffice with beer. If the state aims at equality of welfare, it would consequently have to spend a larger part of its limited resources in order to grant the champagne drinkers an equal level of well-being. This will reduce the quantity—and fair share—of resources available for others.²⁸⁷ The preference-intensity issue, in contrast, often arises with respect to the allocation of the same or same type of asset. We must decide who should receive a given entitlement, and its eventual allocation to the person whose preferences are the most intense does not entail additional expenditures. Recall, for example, our discussion of rights of redemption, self-help remedies, rights of first refusal, and adoption entitlements.²⁸⁸ Allocation of such rights to people with strong preferences—rather than to people with weaker ones—does not involve greater costs. An exception in this regard is compensation situations.²⁸⁹ For example, if takings compensation recognizes owners' subjectively high valuation of their land, then the state must spend more on such persons from its limited budget. However (assuming we can accurately estimate owners' true valuation), one gains nothing from cultivating intense preferences with respect to the land: a landowner whose subjective loss from the taking is 500 will receive 500, and an owner whose losses are twice as large—1000—will receive 1000. In other words, compensation (at most) offsets the genuine subjective losses from the taking. A person who happens to have a

ING AND DECIDING 421–22 (4th ed. 2008) (stating that an assumption that people's marginal utility functions are similar will maximize expected utility, if we do not know which person has the greater ability to experience utility or who is a "utility monster").

²⁸⁶ See Wieting, *supra* note 231, at 95, 99.

²⁸⁷ See DWORKIN, *supra* note 278, at 48–59. Dworkin uses the problem of expensive preferences to support his argument that the state should aim at equality of resources, rather than equality of welfare. *Id.* at 58, 65–119.

²⁸⁸ See respectively, *supra* notes 153–68, 93–110, 62–81, 136–49 and accompanying text.

²⁸⁹ See *supra* notes 27–37 and accompanying text.

higher valuation has not thereby improved her relative position in any way.²⁹⁰

Following these general remarks, let us examine whether the five identification methods can address the concern of unacceptable intensities.

The three case-specific methods—Mouth, MP, and CSP—do not contain any measure for curbing unfair and objectionable preference-intensities. The Mouth technique accepts people's declared intensities as given.²⁹¹ Although MP and CSP methods require that individuals back up their preferences-statements with either monetary²⁹² or nonmonetary²⁹³ payments, both methods do not place any caps on socially acceptable intensities. Admittedly, people's actual ability to pay (in cash or in-kind) indirectly restrains their possibilities of realizing outrageous preference-intensities. However, this limitation would apply haphazardly, or unjustifiably favor the rich.²⁹⁴

In contrast, generalized methods for identifying strong preferences—GNP and GP²⁹⁵—can directly deal with inappropriate intensities simply by not applying to, or excluding, situations in which unfair or objectionable intensities are likely to exist. Lawmakers can draft the legal rule to include only unproblematic cases: ones that do not encourage the cultivation of unjustifiable intensities, do not allocate too many resources to people with strongly held preferences, and so forth. Recall, for instance, our discussion of "possession" as a proxy for intense preferences. Observation and experience support the con-

²⁹⁰ *But see* Wyman, *supra* note 42, at 270–71 (arguing, with respect to governmental takings, that compensation of expensive tastes may create a moral hazard problem but conceding that such a problem does not arise with respect to land bought for self-use and that moral hazard may generally exist whenever compensation is set according to market value).

²⁹¹ *See supra* notes 222–23 and accompanying text.

²⁹² For instance, through willingness to pay higher taxes. *See supra* notes 33–37 and accompanying text.

²⁹³ For example, through readiness to trade their votes on weaker preferences for additional votes on their strong preferences.

²⁹⁴ Note that although rich people with objectionable intensities may be able to afford the extra payments required by MP, they will usually have no reason to reveal the full extent of their outrageous intensity. They can report a lower self-assessment that they still expect to be significantly higher than that of any other individual. *See supra* note 37 (discussing incentives to lie). Nonetheless, it is true that under MP, the richer a person is, the greater her chances of realizing objectionably strong preferences. Although CSP is not similarly biased in favor of the wealthy there is no correlation between the magnitude of the preference's intensity and the value of the in-kind benefit that is sacrificed to realize it. One can forego an identical benefit for the satisfaction of both objectionable and unobjectionable intensities. Thus, the MP and CSP methods place no meaningful barriers in the way of objectionable preference-intensities.

²⁹⁵ As explained above, although both methods employ generalizations that do not require ad-hoc examination of specific cases, GNP identifiers do not penalize intense preferences, whereas GP detects strong preferences through willingness to bear sanctions. *See supra* notes 226, 227–29 and accompanying text.

clusion that owners who were recently dispossessed of their property have very strong preferences for immediate repossession of the property, which justifies a self-help remedy.²⁹⁶ Nonpossessing owners usually hold significantly weaker preferences for immediate reclamation of property, and therefore the advantages of preventing violence and preserving the public peace override their preferences for self-help privileges.²⁹⁷ Nonetheless, some nonpossessing owners may be outraged by learning about a trespass to their land even if occurring thousands of miles away, and might strongly desire to fly over immediately to violently oust the trespasser. By crafting a rule that limits self-help to possessors, the law bars the use of force by individuals with objectionable preference-intensities. Another example is the employment of a “use value” identifier in the context of compensation for takings. According to this identifier, owners using certain kinds of land often have high subjective valuation of it and should receive some fixed percentage above market value.²⁹⁸ Such a rule determines in advance the maximum percentage—for example, fifty percent—by which compensation can exceed market prices.²⁹⁹ One can see this as setting the limits to the socially acceptable valuation of land. Although some owners may indeed value their home at five hundred percent of fair market value or even more, the GNP rule excludes the satisfaction of inappropriately high or fetishistic preferences.³⁰⁰

It is interesting to note that although the GNP identifier of “reasons” is applied on a case-by-case basis, it shares this advantage of generalized identifiers, rather than the shortcoming of the case-specific methods. By requiring reasons for preferences, we can not only detect the *existence* of strong preferences,³⁰¹ but also flush out inappropriate intensities. A reasons-requirement is flexible and discretionary enough to include a stipulation that only explanations that are indicative of both the genuineness and minimal reasonableness of intensity would pass the test.³⁰²

²⁹⁶ See *supra* notes 95–102 and accompanying text.

²⁹⁷ See *supra* notes 102–10 and accompanying text.

²⁹⁸ See *supra* notes 82–90 and accompanying text.

²⁹⁹ See *supra* notes 85–89 and accompanying text.

³⁰⁰ In a similar fashion, GP identifiers select, *ex ante*, scenarios in which strong preferences may legitimately exist, and offer people the opportunity to prove their truthfulness by readiness to bear a cost.

³⁰¹ See *supra* notes 173–75, 188–200 and accompanying text (explaining how requiring reasons detects strong preferences with respect to allocation of seminar topics and exemption of conscientious objectors).

³⁰² Cf. Scanlon, *supra* note 277, at 659–661, 666 (advocating an inquiry into the reasons for preferences in order to differentiate between objectively important preferences and ones that are only subjectively so for the person holding them, and supporting granting priority to the former).

F. Summary

The theoretical discussion above has demonstrated that GNP identifiers of intense preferences enjoy many advantages that other methods lack, either wholly or in part. GNP identifiers treat people with dignity and respect, afford equal treatment to their preferences, do not favor the rich, and at the same time mitigate the risk of lies. Furthermore, GNP methods are capable of dealing with objectionable preference-intensities and their implementation entails relatively low costs. Table 2 below pulls all the threads together and summarizes the conclusions of our comparative evaluation.

CONCLUSION AND EXTENSIONS

This Article explored the important issue of how to identify intense preferences. It discussed several methods for detecting strong preferences and analyzed their relative advantages and weaknesses. The Article demonstrated that generalized and nonpenalizing devices—which constitute the hidden common denominator of a great variety of legal rules—are the superior identification method.

An important caveat is in order. I do not claim that generalized and nonpenalizing identifiers can entirely replace Mouth and Purse or other penalizing mechanisms for detecting intense preferences. Generalized and nonpenalizing identifiers are feasible, for example, whenever we can generalize that a certain proxy—such as use value, possession, declining marginal utility, or redemption—succeeds in capturing cases in which systematically high preference-intensities are likely to be present.³⁰³ In addition, GNP devices are especially suita-

³⁰³ In scenarios in which the existence of intense preferences is nonsystematic, but rather random, one cannot generalize in advance which of the parties competing for an entitlement would have the most intense preferences for it. For instance, we can use possession as a proxy for intense preferences in various situations because possessing owners usually have stronger preferences with respect to an asset than nonpossessing owners. See *supra* Part II.B. In contrast, we could not have used this proxy in crafting legal rules if both possessors and nonpossessors were equally likely to have intense preferences with respect to the asset. In cases where strong intensity is haphazardly distributed, allocation of an entitlement may involve the formidable task of interpersonally comparing the utility experienced by individuals. See ELSTER, *supra* note 136, at 218 (noting that information and measurement problems may prevent us from carrying out interpersonal comparisons of utility on a case-by-case basis); Daniel M. Hausman, *The Impossibility of Interpersonal Utility Comparisons*, 104 MIND 473 (1995) (arguing that it is largely impossible to make interpersonal comparisons of utilities). But see R.M. HARE, MORAL THINKING: ITS LEVELS, METHOD, AND POINT 117–30 (1981) (discussing interpersonal comparisons of degrees or strengths of preference); John C. Harsanyi, *Morality and the Theory of Rational Behaviour*, in UTILITARIANISM AND BEYOND 49–52 (Amartya Sen & Bernard Williams eds., 1982) (advocating a method of “imaginative empathy” to enable interpersonal comparisons of utility). Economic analysis and the Kaldor-Hicks efficiency criterion bypass this problem by substituting utility with money. Coddington, *supra* note 6, at 222–23. Accordingly, economic efficiency regards the person who is willing to pay the most for an entitlement as the one whose preferences for it are the strongest. POSNER, *supra* note 9, at 11, 13. As the literature widely acknowl-

TABLE 2

<i>Technique for Identifying Intense Preferences</i>	<i>Mitigating Risk of Lies</i>	<i>Dignity and Respect</i>	<i>Overcoming Wealth Disparities</i>	<i>Equal Treatment of Preferences</i>	<i>Costs of Implementation</i>	<i>Coping with Objectionable Intensities</i>
<i>Mouth</i>	No	Yes	Yes	Yes	Medium	No
<i>Mouth and Purse</i>	Yes	No	No	No	Medium-High	No
<i>Generalized and Nonpenalizing</i>	Largely Yes	Yes	Yes	Yes	Low*	Yes
<i>Generalized and Penalizing</i>	Largely Yes	No	Yes	No	Low-Medium	Yes
<i>Case Specific and Penalizing</i>	Largely Yes	Partially Yes	Yes	No	Low-Medium	No

* Exception: Reasons = Medium

ble when all one needs is an affirmation that an intense preference exists, or a relatively “rough” comparison between stronger and weaker preferences,³⁰⁴ rather than an exact quantification of the preferences’ strength. This may explain why the literature suggests MP techniques with respect to compensation for takings of land.³⁰⁵ In compensation scenarios, ideally we seek the “magic number” that represents the individual’s true valuation of an asset or the precise extent of her losses. Notwithstanding, GNP identifiers—which compensate landowners with high subjective valuation by granting them some fixed percentage above market price³⁰⁶—may be regarded as superior even in this context. The relative crudeness of such a compensation formula is offset by the many advantages of GNP devices, as explained above.³⁰⁷ Moreover, and beyond the takings sphere, the significant shortcomings of penalizing identifiers have been ignored or downplayed, while the impressive advantages of GNP identifiers have been overlooked in the theoretical literature. We should therefore expand the use of GNP mechanisms and create additional rules that utilize this technique.

Our analysis of GNP identifiers focused on their promise for detecting intense preferences. GNP techniques, however, have further beneficial implications. In closing, I would like to point out one such example. The GNP method’s value is not limited to detection of *high* intensity preferences, but can be extended to *low* intensity preferences as well. Specifically, proxies for exceptionally low valuation of entitlements can also be incorporated into legal rules. A good example is the proxy of “non-use.” Both trademark law and rent-controlled housing rules hold that non-use of these rights leads to their loss.³⁰⁸ This

edges, while “willingness to pay” eases measurement and comparisons between individuals, it might be a poor proxy for utility. Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191, 199–201 (1980); Cass R. Sunstein, *Willingness to Pay vs. Welfare*, 1 HARV. L. & POL’Y REV. 303, 304, 308–14 (2007) (explaining why WTP is likely to be a crude proxy for welfare).

³⁰⁴ See also Harsanyi, *supra* note 303, at 49 (“In everyday life we make, or at least attempt to make, interpersonal utility comparisons all the time. When we have only one nut left at the end of a trip, we may have to decide which particular member of our family is in greatest need of a little extra food. Again, we may give a book or a concert ticket or a free invitation to a wine-tasting fair to one friend rather than to another in the belief that the former would enjoy it more than the latter would.”).

³⁰⁵ See *supra* Part I.

³⁰⁶ See *supra* notes 82–90 and accompanying text.

³⁰⁷ See *supra* Part III. Alternatively, one could improve the accuracy of a GNP compensation device by observing the results of an MP mechanism applied elsewhere. For instance, a state interested in awarding landowners some *fixed* percentage above market value could determine the appropriate bonus by examining the common or average percentage above market price reported by self-assessing landowners in jurisdictions that adopt an MP identifier.

³⁰⁸ 2–3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §§ 16:9, 17:5, 17:11 (4th ed. 2008) (explaining that ownership of a trademark requires continuous use and that nonuse extinguishes the right); P.F. SMITH, EVANS & SMITH: THE

outcome seems surprising at first glance since the liberty to use one's property implies the freedom *not* to use it.³⁰⁹ Furthermore, intensive use of a right imposes burdens on the people who must respect the right and suffer the consequences of its use, whereas non-use of a right entails the positive result of more freedom to others.³¹⁰ Nevertheless, "non-use" is sometimes a reliable identifier of low-intensity preferences. The value of entitlements may be intimately connected with, and dependent on, their actual use. This is particularly true of rights created for a specific, narrow purpose that cannot be unilaterally changed. The whole point of a trademark is its actual business-related use: the identification of the source of goods and services.³¹¹ Likewise, the sole objective of rent control is to supply affordable housing to those who would otherwise be homeless.³¹² Therefore, a significant period of non-use may serve as an indicator of the low value which owners place on their entitlements.³¹³ The absence of self-relinquishment by right holders can be attributed to the costs of affirmatively giving up rights,³¹⁴ or strategic behavior.³¹⁵ By extinguishing unused rights of these types the law reduces the incidence of low-valuing owners, while saving on the transaction costs associated

LAW OF LANDLORD AND TENANT 271–77 (4th ed. 1993) (stating that tenants must reside in the rent-controlled apartment or else forfeit their rights, and that succession by family members also depends on the fulfillment of occupancy requirements).

³⁰⁹ Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 Nw. U. L. REV. 1122, 1130 (1985) (claiming that an owner's right to use his property as he wishes as long as he does not injure others should also include the right to "ignore the property, if by ignoring it he does not injure others").

³¹⁰ Daphna Lewinsohn-Zamir, *More Is Not Always Better Than Less: An Exploration in Property Law*, 92 MINN. L. REV. 634, 641 (2008). In this Article, I generally discuss the phenomenon that the law often affords less tolerance and more interference to moderate measures relating to property (such as conditioned transfer, non-use, and modification) than to extreme measures (such as total inalienability, intensive use, and destruction).

³¹¹ SIEGRUN D. KANE, TRADEMARK LAW: A PRACTITIONER'S GUIDE § 1:1.1 (4th ed. 2003).

³¹² See W. DENNIS KEATING ET AL., RENT CONTROL: REGULATION AND THE RENTAL HOUSING MARKET 3 (1998) (discussing the origins of rent control as an emergency measure to deal with temporary housing shortages).

³¹³ Non-use of land by its owner, in contrast, is not a good proxy for low valuation. This is because ownership of land enables *many* potential and diverse enjoyments, some of which may be realized only in the future. It may very well be the case that land is presently unutilized because it is not yet ripe for development or because its owner is waiting for the time when a better use can be made. STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 73–74 (2004). A use-it-or-lose-it rule might therefore create inefficient incentives for premature development.

³¹⁴ For instance, the time and money required to communicate the act of relinquishment to all the relevant burdened parties and to the land registry (if it needs to erase a formerly recorded right).

³¹⁵ Even if a right has no value to its holder, who does not intend ever to use it in the future, the holder can utilize its very existence to extract gain from the party most heavily burdened by the right. For instance, the continuing existence of a rent-controlled tenancy prevents the landlord from putting the vacant apartment to any other use and realizing its full market value. Consequently, the tenant can hold on to her right for "blackmailing" purposes only. Lewinsohn-Zamir, *supra* note 310, at 687–88.

with freeing scarce resources for more efficient uses. Involuntary abolition avoids dissipation of value through unnecessary negotiations as well as the risk that such negotiations will fail.³¹⁶ Once the role of a “non-use” proxy is acknowledged, we can extend its employment to additional scenarios. Accordingly—and contrary to current servitudes law³¹⁷—non-use of a servitude for a lengthy period of time should lead to its loss.

Young Arthur was revealed as England’s rightful king by a miracle. Regrettably, the law cannot rely on miracles to discover preference-intensities. Yet, the GNP method advocated in this Article shares a common feature with the sword-in-the-stone: both are nonpenalizing devices. Mere verbal statements (“I am the one!”), willingness to pay, force (“might makes right”), or readiness to bear nonmonetary sanctions did not determine the identity of the true king. Arthur was only required to perform—what was for him—a very simple task. It was effortless for Arthur, but impossible for all others.³¹⁸ We would do well to follow this example and adopt nonpenalizing identifiers whenever possible.

³¹⁶ *Id.* at 685–86, 688–91. Bilateral monopoly may hinder efficient transactions. When there is only one seller and one buyer for a particular entitlement (as is the case when negotiating a release from a rent-controlled tenancy) and the parties have imperfect information about the other’s true valuation, mutual attempts to capture the potential gains from the trade may result in bargaining failure. SHAVELL, *supra* note 313, at 89–91 (discussing the role of information asymmetry in failures to reach mutually beneficial agreements through negotiation).

³¹⁷ Non-use alone ordinarily does not terminate servitudes. Termination requires some additional factor, such as affirmative behavior that expresses the servitude owner’s intent to abandon her right. JON W. BRUCE & JAMES W. ELY, JR., *THE LAW OF EASEMENTS AND LICENSES IN LAND* §§ 10:18–10:20 (2001 & Supp. 2007). Such is the case, for example, if the servitude holder not only ceased to use her right of way, but also blocked the sole access route permitting exercise of the servitude. *Hatcher v. Chesner*, 221 A.2d 305, 307–08 (Pa. 1966).

³¹⁸ HOPKINS, *supra* note 5, at 15–16, 18.