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"THE ETERNAL TRIANGLES OF THE LAW": TOWARD A THEORY OF PRIORITIES IN CONFLICTS INVOLVING REMOTE PARTIES

*Menachem Mautner**

Here we meet the Eternal Triangle of the Law: an honest man (A), a rascal (B), and another honest man (C). Typically, the rascal imposes upon both of them . . . and leaves to the law the problem of deciding which of them shall bear the loss.¹

The purchaser of entrusted or stolen goods faces a claim of title by the owner of the goods. A secured party discovers that a competing claim is made by another secured party with respect to his collateral. The holder of a document of title discovers that the goods covered by the document have been sold to another person. "Eternal triangles" are abundant in the law.

The contexts vary;² yet one thing is common: parties not in contractual privity themselves assert simultaneous claims of rights over the same asset whose concurrent discharge is legally impossible, and the law is called upon to resolve the conflict.³ How should the law resolve such conflicts? No comprehensive theory has evolved to guide us in allocating rights in assets between competing claimants in such "triangle" situations.⁴ The object of this article is to take the first

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1. A. JAMES CASNER & W. BARTON LEACH, *CASES AND TEXT ON PROPERTY* 179 (1950).

2. "Query whether you have taken any course in this school which did not bring up some problems in priorities?" Edgar N. Durfee, *Priorities*, 57 MICH. L. REV. 459, 460 (1959).

3. See also Edgar N. Durfee, *Priorities: II*, 57 MICH. L. REV. 685, 718 (1959) (discussing the pattern of priority conflicts).

A complexity is sometimes added to a triangle situation when the original asset to which the claim of one party had related has subsequently been converted into another asset with respect to which the claim of the other party is being made. In such cases, an initial determination is necessary as to whether the first competing party would be allowed to trace its claim into the converted asset. On tracing, see 1 GEORGE E. PALMER, *THE LAW OF RESTITUTION* §§ 2.14-2.18 (1978); Dale A. Oesterle, *Deficiencies of the Restitutionary Right to Trace Misappropriated Property in Equity and in UCC § 9-306*, 68 CORNELL L. REV. 172 (1983); see also *infra* text accompanying notes 98-108.

4. See also Durfee, *supra* note 2, at 460 ("Even within particular fields, such as land law, one does not find a well-organized and systematic treatment of priorities."); cf. Thomas H. Jackson & Anthony T. Kronman, *Secured Financing and Priorities Among Creditors*, 88 YALE L.J. 1143,

steps in an attempt to formulate such a theory.

Theoretically, from the perspective of the two competing parties, the question of how the law resolves priority conflicts should be of little importance: the parties would be content with any arbitrary priority criterion offered by the law for allocating the disputed asset between them, because the losing party under this rule would always enjoy the option of pursuing a contract or tort claim against the intermediate wrongdoer. In a perfect world, by the end of these proceedings, the situation of the two competing parties would be the same. In an imperfect world, however, in many cases a suit for contract or tort damages against the intermediate wrongdoer proves impractical, because that party has either absconded or is insolvent. Yet even where the intermediate wrongdoer is not judgment-proof, a damage claim against him is an unattractive option: the object of the controversy may be a unique asset; the proceedings may involve irrecoverable expenses; the claimant may lose due to a judicial error; or if the claimant wins, he may still be undercompensated. Given these limitations, inherent in any damage claim and typical of damage claims against wrongdoers such as the intermediate parties dealt with above, the priority rule developed by the law should be of considerable importance to the competing parties. In many cases, the right of one of the two competing parties in the asset, as determined by the priority rule, is the only meaningful legal remedy available to the parties.⁵ Moreover, even if the priority rule offered by the law would not matter to the parties, the choice among possible priority rules could still matter from society's perspective: different priority rules might differently affect and approximate varying policies that bear on the conduct of the parties and on the resolution of their conflict.⁶

Anglo-American priority law is premised on a doctrinal-derivational approach under which "triangle conflicts" are supposed to be resolved on the basis of the legal rights that the intermediate, wrongdoing party could have transferred from the first-in-time competing party to the second-in-time competing party. In Part I, I outline the major propositions of this approach. I argue that in focusing on the

1144 (1979) (stating that "the analytic justification for many of Article 9's most important priority rules remains obscure").

5. See ALAN SCHWARTZ & ROBERT SCOTT, *COMMERCIAL TRANSACTIONS* 488 (2d ed. 1991); Douglas G. Baird & Thomas H. Jackson, *Possession and Ownership: An Examination of the Scope of Article 9*, 35 STAN. L. REV. 175, 190 (1983); Richard A. Epstein, *Inducement of Breach of Contract as a Problem of Ostensible Ownership*, 16 J. LEGAL STUD. 1, 8 (1987); Thomas Jackson, *Transfer Rules and the Resolution of Competing Ownership Claims*, Discussion Paper No. 22, at 2-3 (Sept. 1986) (Program in Law and Economics, Harvard Law School).

6. See *infra* text accompanying notes 9-36.

intermediate party, the doctrinal-derivational approach fails to address the primary consideration relevant to resolving triangle conflicts, namely the conduct of the two remote claimants involved in the conflict. In Part II, I focus on the two remote parties involved in triangle conflicts. I offer two sets of prescriptions for resolving such conflicts, one founded on the goal of efficiency, the other on the goal of justice. I show, in turn, that the prescriptions these two normative concepts dictate are basically similar. In Part III, I analyze the good faith purchaser for value doctrine that stands at the core of Anglo-American priority law. I explore the extent to which this doctrine can be rationalized in light of the prescriptions suggested in Part II. I argue that, indeed, the doctrine can be rationalized in terms of both efficiency and justice. This, in turn, leads to the further general argument that the considerable success of legal economists in rationalizing vast portions of common law doctrine stems from the convergence that exists between the concept of efficiency and the concept of justice. In Parts IV-VII, I analyze the rules governing four basic triangle conflicts: entrustments, conflicting transactions, seller-transferee conflicts, and theft. I explore the extent to which the rules governing these conflicts implement the prescriptions suggested in Part II.

I. THE DOCTRINAL-DERIVATIONAL APPROACH

At least three parties are involved any time a triangle conflict arises: a first-in-time claimant of rights in the asset (*A*), a second-in-time claimant (*C*), and an intermediate wrongdoer (*B*) who transacts with each of these two parties. Thus, in any triangle conflict *C*'s rights in the asset derive from *B*, and, in turn, *B*'s rights in the asset derive from *A*. One possible way to resolve the *A-C* conflict, therefore, is to hold that *C*'s rights as against *A* would depend on the amount of legal rights that could have been transferred by *B* to *C*, given *B*'s rights as against *A*. We may call this approach "the doctrinal-derivational approach." It has exerted a considerable influence on the evolution of our priority rules.

The doctrinal-derivational approach is premised on two basic rules. The first is "*nemo dat quod non habet*" ("he who hath not cannot give").⁷ Under this rule, *C*'s rights in the disputed asset may never exceed those of *B*, as determined by *B*'s transaction with *A*. The second rule is the "shelter rule," which may be viewed as the positive counterpart of the *nemo dat* rule. Under the shelter rule, *B* may trans-

7. For a discussion of the *nemo dat* rule, see 1 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 7.10 n.1 (1965).

fer to *C* as many legal rights in the asset as *B* had acquired from *A*.⁸

The pivotal question, therefore, for resolving the *A-C* conflict under the doctrinal-derivational approach, is what degree of legal right in the disputed asset *B* owned by the time she transacted with *C*. In addressing this question, Anglo-American law recognizes three kinds of title that may vest in *B* as a result of her transaction with *A*.

First, *B*'s title in the asset may be classified as *void* title, her transaction with *A* giving *B* neither any legal rights in the disputed asset nor any legal powers with respect to the asset. In cases of this type, under the *nemo dat* rule, *C*'s title in the asset would be classified as void title as well, so that in the *A-C* conflict, *A* would prevail over *C*.

Second, *B*'s title in the asset may be classified as *valid* title, *B*'s transaction with *A* resulting in *B*'s acquiring all legal rights and powers of *A* in the disputed asset. In cases of this type, *A* could make no claim for specific restitution of the disputed asset while, under the shelter rule, *C*'s title in the asset, like *B*'s title, would be classified as valid title. *C* would prevail, therefore, over *A*.

Third, *B*'s title in the asset may be classified as *voidable* title. *B*'s title is voidable if *B*'s transaction with *A* has initially vested *B* with valid title in the asset subject, however, to *A*'s right subsequently to cancel his contract with *B* and to demand from *B* specific restitution of the disputed asset. In cases of this type, where *A* has canceled, the doctrinal-derivational approach deems *B* to have no rights in the asset as against *A*, but still to have the legal power to transfer valid title in the asset to *C*, provided *C* meets certain conditions. These conditions usually require that *C* qualify as "good faith purchaser for value" (GFPV). Thus, in cases in which *B*'s title is classified as voidable title, *A* would prevail over *C*, unless *C* attains the status of GFPV, in which case *C* would prevail over *A*. In cases of voidable title, therefore, even though *B* has no rights in the asset as against *A*, *B* may still have the legal power to transfer valid title in the asset to *C* (a GFPV).

The doctrinal-derivational approach seems intuitively appealing. At first sight, it seems hard to deny the plausibility of the *nemo dat* rule and the shelter rule. The major flaw of this approach, however, is that it resolves the *A-C* conflict without explicitly and directly taking

8. *In re Gary Aircraft Corp.*, 681 F.2d 365 (5th Cir. 1982), cert. denied, 462 U.S. 1131 (1983); *American Std. Credit, Inc. v. National Cement Co.*, 643 F.2d 248 (5th Cir. 1981); *Dan Pilson Auto Ctr., Inc. v. DeMarco*, 509 N.E.2d 159 (Ill. App. Ct. 1987); *Inmi-Etti v. Aluisi*, 492 A.2d 917 (Md. Ct. Spec. App. 1985); *In re Hennessy*, 494 A.2d 853 (Pa. Super. Ct. 1985); U.C.C. § 2-403(1) (1990) ("A purchaser of goods acquires all title which his transferor had . . ."); JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* 171 (3d ed. 1988); John F. Dolan, *The Uniform Commercial Code and the Concept of Possession in the Marketing and Financing of Goods*, 56 TEXAS L. REV. 1147, 1154 (1978).

into account the conduct of the parties involved and the policies relevant to that conduct. Rather, the major determinant under the doctrinal-derivational approach is the amount of legal rights and powers held by the intermediate wrongdoer, *B*, as a result of her transaction with *A* (i.e., whether *B*'s title was void, valid, or voidable). Moreover, this determinative factor supposedly arises within the context of the *A-B* transaction independently of the prospect that the disputed asset will eventually be transferred from *B* to *C*, so that the real conflict will involve *A* and *C*, rather than *A* and *B*. Obviously, a rational approach to the *A-C* conflict would view the conduct of these two competing parties and the policies pertaining to it as central to any resolution.⁹ It is the purpose of this article to elaborate such an approach.

It should be noted, however, that in most cases in which *A* could demand reclamation of his asset from *B*, with whom *A* had transacted, the common law would classify *B*'s title in the asset as voidable title, rather than as valid or void title.¹⁰ As I have noted earlier, in cases in which *B*'s title is classified as voidable title, Anglo-American priority law resolves the *A-C* conflict by inquiring whether *C* has managed to qualify as a GFPV. In introducing the GFPV concept, therefore, our law seems to shift its focus of inquiry, at least in part, to the competing parties themselves. We need to explore, therefore, the extent to which the GFPV concept may, indeed, serve as an appropriate doctrine for resolving conflicts involving remote parties.¹¹

II. NORMATIVE PRESCRIPTIONS: EFFICIENCY AND JUSTICE

In what follows, I shall offer normative guidelines for resolving triangle conflicts that derive from the concepts of efficiency and justice. In contrast to the doctrinal-derivational approach, which focuses on *B*, the intermediate wrongdoer who links both *A* and *C*, the efficiency and the justice approaches entirely ignore *B*. Rather, they both focus on the two remote parties involved in the conflict, *A* and *C*, viewing them as two parties pressing conflicting claims for legal protection of two conflicting interests.

9. Baird & Jackson, *supra* note 5, at 188-90, 199; LAW REFORM COMM., TWELFTH REPORT, TRANSFER OF TITLE TO CHATTELS, §§ 6-7 (1966), reprinted in JOHN HONNOLD, CASES AND MATERIALS ON THE LAW OF SALES AND SALES FINANCING 412, 413-14 (5th ed. 1984).

10. See *infra* Parts IV-VII. In discussing the GFPV concept, the authors of the *Corpus Juris Secundum* list 42 different legal contexts in which it serves to determine priority between competing, remote parties. See 11 C.J.S. *Bona Fide* at 388-89 (1938).

11. See *infra* text accompanying notes 77-108.

A. Efficiency

Legal scholarship of the past two decades in the areas of contract law, tort law, and commercial law has been dominated by the writings of legal economists. These scholars have argued, normatively,¹² that legal rules should promote the goal of allocative efficiency. As a normative concept, efficiency implies the maintenance of a certain *ratio* between means and ends, inputs and outputs, resources and outcomes. It mandates that the least amount of resources be invested for the attainment of a given end. In so doing, it is a subset of what Weber called "formal rationality":¹³ the expedience of means to any given ends.

Priority rules aspiring to promote the goal of efficiency in the context of triangle conflicts would attempt to minimize three costs: first, the cost of preventing triangle conflicts; second, the losses resulting from such conflicts; third, the costs involved in resolving these conflicts. Efficiency-oriented priority rules would, therefore, be designed in the following manner:

In cases in which one of the two competing parties could have clearly prevented the occurrence of the conflict *ex ante* by incurring expenses relatively smaller than the value of the interests at stake (*e.g.*, by informing potential second-in-time competing parties of his claim to the asset or, having acquired knowledge of the existence of an earlier conflicting claim, by avoiding a conflicting transaction), taking into account the probability of the occurrence of a conflict, priority should be accorded to the other party.

In all other cases in which no party enjoys a clear advantage over the other in terms of the ability to prevent the conflict, priority should be granted to the party likely to suffer the greater loss *ex post* if he is denied priority and the other party prevails.¹⁴ Additionally, priority rules should be shaped in such a manner as to minimize the parties' resort to the court system and the administrative costs involved in

12. Economic analysis of law has been divided into three parts: descriptive law and economics, concerned with the principle of economic efficiency as an explanatory tool of existing legal rules; positive law and economics, concerned with the capacity of economic models to provide a concept within which legal problems may be conceived; normative law and economics, concerned with the evaluation of legal rules in terms of their economic efficiency and with the fashioning of new legal rules in light of the efficiency criterion. See Jules L. Coleman, *Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law*, 68 CAL. L. REV. 221, 221-22 (1980); Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 548-49 (1980). Most of the literature generated as part of the economic analysis of law scholarship has been descriptive and positive, rather than normative.

13. See ROGERS BRUBAKER, *THE LIMITS OF RATIONALITY* 35-43 (Controversies in Sociology No. 16, 1984).

14. See also SCHWARTZ & SCOTT, *supra* note 5, at 22-23, 230-32.

litigation.¹⁵

The above prescriptions closely resemble those suggested by legal economists who have advocated that our tort rules governing accidents¹⁶ ought to promote the goal of efficiency.¹⁷ Those legal economists have suggested that tort rules governing accidents ought to promote three major policies.¹⁸

First, they should promote the policy of guiding behavior so that individuals take efficient ex ante measures for risk reduction and for accident prevention. Under this policy, whenever one of the parties to an accident possesses a greater ability to prevent the occurrence of an accident, liability for the accident should be imposed on that party if his avoidance costs would have been lower than the accident's expected losses.

Second, the rules should promote the ex post policy of minimizing the losses suffered by accident victims. Under this policy, tort liability

15. The literature that has attempted to offer solutions to priority conflicts in triangle situations has confined itself, almost without exception, to the above ex ante consideration. See, e.g., SCHWARTZ & SCOTT, *supra* note 5, at 488-91; Harold R. Weinberg, *Sales Law, Economics, and the Negotiability of Goods*, 9 J. LEGAL STUD. 569 (1980); Jackson, *supra* note 5. These attempts have usually endeavored to identify one of the two competing parties as the party better situated to avoid the conflict. In doing so, these attempts have usually disregarded the relevance of the first above-mentioned ex post consideration to some cases of conflict, and the relevance of the second above-mentioned ex post consideration to all cases of conflict. In this article, I shall employ all three considerations for evaluating both the content and the structure of the priority rules that have evolved in our system for resolving triangle conflicts.

16. A basic distinction exists in tort law between accidents and intentional harms: whereas in accident cases injuries are the result of the conducts of two or more parties that are mutually irreconcilable, in intentional harm cases one party deliberately inflicts a harm upon another. Richard A. Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391, 391-94 (1975).

17. Normative tort law scholarship of the past two decades has been dominated by two major approaches. First, the economic approach whose foundations have been laid down by Guido Calabresi in his seminal *The Costs of Accidents*. GUIDO CALABRESI, *THE COST OF ACCIDENTS* (1970). Second, the corrective justice approach, advocated by such scholars as Richard Epstein, George Fletcher, and Jules Coleman. See Richard A. Epstein, *Causation and Corrective Justice: A Reply to Two Critics*, 8 J. LEGAL STUD. 477 (1979) [hereinafter Epstein, *Causation*]; Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974); Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979) [hereinafter Epstein, *Nuisance Law*]; Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Epstein, *supra* note 16; George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972); Jules Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421, 423, 426 (1982) [hereinafter Coleman, *Corrective Justice*]; Jules L. Coleman, *The Morality of Strict Tort Liability*, 18 WM. & MARY L. REV. 259 (1976) [hereinafter Coleman, *Strict Liability*]. For other expressions of the corrective justice approach, see Jules L. Coleman, *Moral Theories of Torts: Their Scope and Limits: Part I*, 1 LAW & PHIL. 371, 372-76 (1982); Joseph M. Steiner, *Putting Fault Back into Products Liability: A Modest Reconstruction of Tort Theory*, 1 LAW & PHIL. 419, 422-23 (1982).

18. C.G. VELJANOVSKI, *THE NEW LAW AND ECONOMICS* 71 (1982); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1093-105 (1972); Itzak England, *The System Builders: A Critical Appraisal of Modern American Tort Theory*, 9 J. LEGAL STUD. 27, 33-56 (1980); Joseph M. Steiner, *Economics, Morality, and the Law of Torts*, 26 U. TORONTO L.J. 227, 229-39 (1976).

rules should be designed so that the losses caused by accidents are distributed between the parties in such a manner as to minimize their adverse consequences.

Third, the rules should promote the ex post policy of minimizing the costs of administering the system of accident law. Under this policy, tort liability rules should be designed to minimize the costs involved in determining the rights and liabilities that result from accidents.

The resemblance between the efficiency imperatives relating to triangle conflicts and those relating to tort accidents is not incidental. Triangle conflicts may well be viewed as accidents,¹⁹ while accidents may be viewed as events involving priority conflicts.²⁰

19. See STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 1 (1987) (defining accidents as "harmful outcomes that neither injurers nor victims wished to occur — although either might have affected the likelihood or severity of the outcomes"); VELJANOVSKI, *supra* note 18, at 71 (describing an accident as a cost-imposing event); Steiner, *supra* note 18, at 227 (Accidents occur "whenever the practitioners of two activities simultaneously attempt to use the same resource . . . under conditions where only one can do so successfully, and thus to the detriment of the other.").

20. Tort law governs the relationships of *foreigners*, i.e., parties who have not established contractual privity to regulate their relationship. It determines the *interests* that are supposed to be protected by the law against injurious interference by foreigners and the *contexts* in which this protection would be accorded. 1 FOWLER V. HARPER ET AL., *THE LAW OF TORTS* lv-lxi (2d ed. 1986); W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* 6, 16 (5th ed. 1984); see also Calabresi & Melamed, *supra* note 18, at 1090, 1100-01 (asserting that the function of the legal system in general is to allocate entitlements between conflicting claimants). By so doing, tort law mediates between claims for the protection of conflicting interests: whenever it determines that a certain interest deserves legal protection in a certain context, it also determines that another, competing interest does not deserve such protection. Thus, tort law is a priority law par excellence.

I argued that normative tort law scholarship of the last two decades has been dominated by the economic approach and by the corrective justice approach. See *supra* note 17. Out of these two approaches, the only one relevant to the issues raised by the conflicts discussed in this article is the economic approach. The corrective justice approach is premised on the assumption that the legal system establishes a well-defined set of interests and contexts in which interests are protected (so that the role of tort law is to remedy the condition of those who suffer harm to a protected interest of theirs). Coleman, *Corrective Justice*, *supra* note 17, at 423, 426, 429-36; Coleman, *Strict Liability*, *supra* note 17, at 263, 267; Epstein, *Causation*, *supra* note 17, at 479-80, 489, 501; Epstein, *Nuisance Law*, *supra* note 17, at 49-53; Fletcher, *supra* note 17, at 543, 546, 550; Donald H. Gjerdingen, *The Coase Theorem and the Psychology of Common-Law Thought*, 56 S. CAL. L. REV. 711, 715-22 (1983); Steiner, *supra* note 18, at 227-28, 248, 250-51. In contrast, the economic approach is premised on the assumption that even though the interests that are supposed to be protected by the system are generally known, the interests that will be protected by the law in particular cases of accident cannot be known in advance. Rather, these interests are supposed to be determined by the system by applying the guidelines offered by this approach. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 328 (1990); Susan R. Rose-Ackerman, *The Simple Economics of Tort Law: An Organizing Framework*, 2 EUR. J. POL. ECON. 91, 96-97 (1986); see also Englund, *supra* note 18, at 54 (arguing that Posner's tort theory is not concerned with the plaintiff's quest for redress but with the efficient allocation of society's resources). It is this feature of the economic approach that makes it so relevant and attractive for serving as a normative guideline for resolving the conflicts discussed in this article: the question raised in each of these conflicts is which of two mutually irreconcilable interests deserves protection by the law, i.e., in what contexts should the interests of one competing party be protected and in what contexts should those of the other party. It is with respect to these questions that

B. Justice

The concept of justice is relevant for the conflicts discussed in this article because, at least in part, it presupposes a world of scarce resources in which people are pressing conflicting claims for the protection of competing interests. One of the functions of a theory of justice is to offer normative criteria for arbitrating between such conflicting claims.²¹

The concept of justice is widely held to be comprised of three major types: retributive justice, concerned with criteria for the punishment of wrongdoers; corrective justice, concerned with the protection of entitlements from injury or appropriation;²² and distributive justice, concerned with the distribution of scarce resources to competing claimants on the basis of criteria such as equality, desert, or need.²³

The essence of the concept of retributive justice is that wrongdoers deserve to be punished for (and in proportion to) their wrongdoings.²⁴ Though retributive justice has been most commonly invoked to justify punishments inflicted by the state mechanism on criminal offenders, it can be (and, indeed, has been) used in other contexts as well. Thus, retribution has sometimes been invoked to justify the imposition of

the corrective justice approach cannot offer normative guidelines whereas the economic approach can.

21. ARISTOTLE, *THE NICOMACHEAN ETHICS* 177-79, 186-87 (J.A.K. Thomson trans., 1955); BRIAN BARRY, *THEORIES OF JUSTICE* (1989); DAVID HUME, *AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS*, sec. 3, pt. 1 (1751), reprinted in 4 DAVID HUME, *THE PHILOSOPHICAL WORKS* 179-87 (1752, 1957); JOHN RAWLS, *A THEORY OF JUSTICE* 4, 10, 281 (1971); Stanley I. Benn, *Justice*, in 4 *ENCYCLOPEDIA OF PHIL.* 298 (1967).

22. Corrective justice does not seem to be relevant to the conflicts discussed in this article. This concept presupposes the existence of a well-defined system of entitlements, yet we should assume such a system is missing when we resign ourselves to the task of constructing systems of priority rules for resolving triangle conflicts. Thus, the concept of corrective justice is irrelevant for the resolution of triangle conflicts for the same reasons that make the corrective justice approach of contemporary normative tort scholarship irrelevant to such conflicts. See *supra* note 20.

23. Benn, *supra* note 21. Different writers have put forward different criteria for distributing scarce resources. For a review of the literature, see JOHN R. LUCAS, *ON JUSTICE* 164-65 (1980).

24. GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* §§ 6.3, 6.6 (1978); H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 1-27, 210-37 (1968); K.G. Armstrong, *The Retributivist Hits Back*, in *THE PHILOSOPHY OF PUNISHMENT* 138 (Harry B. Acton ed., 1969); K.E. Baier, *Is Punishment Retributive?*, in *THE PHILOSOPHY OF PUNISHMENT*, *supra*, at 130; John Hospers, *Punishment, Protection and Retaliation*, in *JUSTICE AND PUNISHMENT* 21 (Jerry I. Cederblom II & William Blizsek III eds., 1977); Richard A. Posner, *Retribution and Related Concepts of Punishment*, 9 J. LEGAL STUD. 71 (1980); Richard Wasserstrom, *Some Problems with Theories of Punishment*, in *JUSTICE AND PUNISHMENT*, *supra*, at 173. Retribution is often presented as a subcategory of desert, rather than as an independent category of justice considerations. See, e.g., GEORGE SHER, *DESERT* 69-90 (1987); Joel Feinberg, *Justice and Personal Desert*, in *NOMOS VI* 69, 80-85 (Carl J. Friedrich & John W. Chapman eds., 1963).

Usually for the concept of retribution to apply the conduct of an actor should be intrinsically immoral, but the concept is sometimes applied to cases involving morally neutral, yet wrongful, conduct as well. See FLETCHER, *supra*; Wasserstrom, *supra*.

liability on tortfeasors to compensate their victims,²⁵ to rationalize the allocation of entitlements under the Uniform Commercial Code,²⁶ and to justify differential treatment within the family circle.²⁷ Retribution, therefore, can be a criterion in the resolution of priority conflicts such as those discussed in this article. A party who fails to take precautionary measures for the prevention of a possible conflict fails to show respect for the autonomy of a potential competing party.²⁸ A party forced to lose an interest as a result of a triangle conflict is forced to bear adverse consequences not chosen by him. From a retributivist perspective, therefore, whenever one of the parties to a conflict can easily prevent the occurrence of the conflict but fails to do so, priority should be accorded to the other competing party, so that the party who fails to take measures appropriate for prevention will bear the losses resulting from the conflict. Obviously, this imperative resembles, to a great extent, the *ex ante* policy derived from the concept of efficiency.²⁹

25. For discussion see 3 HARPER ET AL., *supra* note 20, § 12.1, at 108 n.10, 4 *Id.* § 25.1, at 490-97; SHAVELL, *supra* note 19, at 76.

26. David M. Phillips, *The Commercial Culpability Scale*, 92 YALE L.J. 228 (1982).

27. HART, *supra* note 24, at 3 ("it would be dogmatic to deny the names of punishment or property to the similar though more rudimentary rule-regulated practices within groups such as a family, or a school, or in customary societies whose customs may lack some of the standard or salient features of law"); Wasserstrom, *supra* note 24, at 173, 175 ("I see no reason to believe that the case of legal punishment is any more the paradigm of punishment than is, for example, the case of parental punishment. . . . I see no reason to focus upon the law rather than the school, the family, or a voluntary association as the standard or central setting for punishment.").

28. The retributivist theory of Herbert Morris seems particularly suitable to cases of retribution within the context of contract and commercial law. In Herbert Morris, *Persons and Punishment*, 52 THE MONIST 475 (1968), reprinted in PUNISHMENT AND REHABILITATION 40 (Jeffrie G. Murphy ed., 1973), Morris presents the criminal law as a body of rules designed to define for each person a sphere that is immune from interference, thus requiring individuals to assume the burden of the exercise of self-restraint. A person who fails to exercise the required self-restraint renounces a burden that others have assumed and thus gains an advantage over them. Punishment of those who violate the rules is therefore justified for three reasons.

First, it is only reasonable that those who voluntarily comply with the rules be provided some assurance that they will not be assuming burdens which others are unprepared to assume. . . . Second, fairness dictates that a system in which benefits and burdens are equally distributed have a mechanism designed to prevent a maldistribution in the benefits and burdens. . . .

Third . . . [P]unishing . . . restores the equilibrium of benefits and burdens by taking from the individual what he owes, that is, exacting the debt.

Id. at 42-43. For discussion of Morris' suggestions see FLETCHER, *supra* note 24, § 6.3; SHER, *supra* note 24, at 53-58; Wasserstrom, *supra* note 24, at 173, 191-94. It seems that the force of Wasserstrom's criticism of Morris' theory is of lesser relevance when the theory is applied to cases of retribution in contract law (as opposed to the hard core norms of criminal law). See also Phillips, *supra* note 26, at 251 (discussing "the moral tenet that it is selfish for one to engage in conduct that does not allow for the exercise of equivalent conduct by others"); *id.* at 254 ("[T]he negligent actor has subjected others to risk, thereby showing disrespect for them. His conduct further shows a lack of cooperativeness. The degree of freedom that the negligent actor allows himself is such that, if enjoyed by others, would prevent society from functioning efficiently.").

29. See *supra* text accompanying notes 12-20. Landes and Posner come close to this argument when they say: "An avoidable injury — implying social waste — might be perceived as

As I noted earlier, distributive justice concerns the distribution of scarce resources between competing claimants. Out of the various possible distributive criteria that might be used under this concept, the one most relevant for resolving triangle conflicts is the need criterion.³⁰

The concept of needs has been neglected by philosophers, while liberal economists have denied its separate existence outside of the concept of preferences.³¹ It is usually invoked to justify social and humanitarian programs to assure individuals a certain level of minimal welfare that they would not have been able to reach otherwise.³² Yet the core idea of the concept of needs may be generalized to imply that scarce resources should be allocated to avoid excessive hardship and suffering,³³ i.e., to parties who would undergo a great amount of suffering if they were deprived of such resources.³⁴ Within the context

wrongful and therefore arouse indignation and desire for retribution for which tort remedies are a surrogate. This would illustrate a merging of fairness and efficiency, retributive and deterrent, tort theories." WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 14 (1987); see also Phillips, *supra* note 26, at 251-53, 255-61 (culpability considerations and loss avoidance considerations as leading to the same allocation of entitlements); Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697, 699-703 (1978) (the convergence between the economic concept of negligence and the concept of moral fault).

30. The criterion of desert mandates that individuals enjoy benefits and suffer detriments according to their autonomous decisions. See BRIAN BARRY, *POLITICAL ARGUMENT* 108-09 (1965); LUCAS, *supra* note 23, at 202; SHER, *supra* note 24; Feinberg, *supra* note 24; James Rachels, *What People Deserve*, in *JUSTICE AND ECONOMIC DISTRIBUTION* 150 (John Arthur & William H. Shaw eds., 1978); Lloyd L. Weinreb, *The Complete Idea of Justice*, 51 U. CHI. L. REV. 752 (1984). Usually, in triangle conflict cases, both competing parties find themselves involved in the conflict following their own voluntary actions. The criterion of desert, in itself, therefore, is too indeterminate for resolving such conflicts. As to the criterion of equality, a condition for treating the two competing parties equally for the purpose of resolving their conflict is that no distinction between them, based on some relevant consideration, be discerned. As I argued earlier, however, sometimes considerations of retribution suggest bases for treating the parties to a conflict differently, and, as I shall argue below, considerations of need also might serve as ground for according them different treatment. Moreover, action according to the equality criterion will raise further questions such as whether to let the two competing parties enjoy equal opportunity to appropriate the disputed asset (flipping a coin? inviting bids?) or, alternatively, to effect the sale of the asset to a third party and then apportion the proceeds between the competing parties (equally? pro-rata to the parties' losses?).

31. DAVID BRAYBROOKE, *MEETING NEEDS* 1-24 (1987).

32. *Id.*; CHAIM PERELMAN, *JUSTICE, LAW, AND ARGUMENT* 4, 16-17 (1980); RAWLS, *supra* note 21, at 276-77; NICHOLAS RESCHER, *DISTRIBUTIVE JUSTICE* 75-76 (1966); Charles Fried, *Distributive Justice*, 1 SOC. PHIL. & POLY. 45 (1983); Thomas C. Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 STAN. L. REV. 877 (1976); M.H. Lessnoff, *Capitalism, Socialism and Justice*, in *JUSTICE AND ECONOMIC DISTRIBUTION*, *supra* note 30, at 139; H.J. McCloskey, *Human Needs, Rights and Political Values*, 13 AM. PHIL. Q. 1 (1976); Shalom Schwartz, *The Justice of Need and the Activation of Humanitarian Norms*, 31 J. SOC. ISSUES, Summer 1975, at 111.

33. "Needs are . . . linked to hardship and suffering, which it is surely part of the first business of ethical theory to understand, as it is the first business of ethics to prevent." BRAYBROOKE, *supra* note 31, at 8.

34. On the relation between need and utilitarianism, see *id.* at 161-86.

of priority conflicts such as the ones discussed in this article, the need criterion would mandate giving priority to that competing party likely to suffer the greater loss if the other party prevails.³⁵ Obviously, this imperative resembles, to a great extent, the first ex post policy derived from the concept of efficiency.³⁶

Two criteria of justice suggest themselves as particularly relevant for the resolution of triangle conflicts: retribution and need. Considerations of retributive justice mandate that priority over a disputed asset be denied to a competing party who could have taken measures to prevent the conflict, but failed to do so. Need considerations mandate granting priority to that competing party likely to suffer the greater loss as a result of the conflict, if the other party prevails. Obviously, these two considerations resemble, respectively, the ex ante and ex post imperatives derived from the concept of efficiency.

C. Structuring Priority Rules

Having derived our normative prescriptions, the next question we

35. Theoretically, in applying the need criterion, the overall utility situation of the two parties involved in the conflict should be taken into account. But the law never operates in such a way. Rather, it always confines the information relevant for the allocation of the entitlement under a rule to that which bears on the policies embodied in the rule. Thus, for example, it might be argued that, in contract law, the doctrine of supervening contingencies, the rule that specific performance is denied if it entails unreasonable hardship to the party in breach, and the substantial performance rule all involve redistribution of at least some of the expectation interest of injured promisees to breaching promisors for the sake of protecting the promisors from excessive losses. In none of these cases, however, is the overall utility situation of the two parties taken into account in determining whether to apply the rule to their contractual relation or not. (This, in turn, may result in redistribution of resources from a poor promisee to a rich promisor, merely because in the narrow context in which the rule is applied the rich person is likely to suffer a considerable harm.)

36. See *supra* text accompanying note 14. The debate over the relationship between justice and utilitarianism, and over the relationship between rights theories and utilitarianism, is a classical one in the history of moral philosophy involving, among others, such figures as Hume, Mill, and Sidgwick. See HUME, *supra* note 21; JOHN S. MILL, *Utilitarianism*, in *UTILITARIANISM AND OTHER ESSAYS* 272 (Alan Ryan ed., 1987); HENRY SIDGWICK, *THE METHODS OF ETHICS* 264-94, 423-59 (7th ed. 1907). For contemporary discussion of this topic, see BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 71-87 (1977); RONALD DWORKIN, *LAW'S EMPIRE* 276-312 (1986); RUSSELL HARDIN, *MORALITY WITHIN THE LIMITS OF REASON* 75-165 (1988); R.M. HARE, *MORAL THINKING* (1981); SAMUEL SCHEFFLER, *THE REJECTION OF CONSEQUENTIALISM* (1982); *UTILITY AND RIGHTS* (R.G. Frey ed., 1984); BERNARD WILLIAMS, *MORAL LUCK* 71-82 (1981); Alan Gewirth, *Can Utilitarianism Justify Any Moral Rights?*, in *NOMOS XXIV* 158 (J. Roland Pennock & John Chapman eds., 1982); Kent Greenawalt, *Utilitarian Justifications for the Observance of Legal Rights*, in *NOMOS XXIV*, *supra*, at 139; R.M. Hare, *Ethical Theory and Utilitarianism*, in *UTILITARIANISM AND BEYOND* 23 (Amartya Sen & Bernard Williams eds., 1982) [hereinafter Hare, *Ethical Theory*]; Hare, *Utility and Rights: Comment on David Lyons's Essay*, in *NOMOS XXIV*, *supra*, at 148; Lyons, *Mill's Theory of Justice*, in *VALUES AND MORALS* 1 (Alvin I. Goldman & Jaegwon Kim eds., 1978); David Lyons, *Utility and Rights*, in *NOMOS XXIV*, *supra*, at 107; Philip Soper, *On the Relevance of Philosophy to Law: Reflections on Ackerman's Private Property and the Constitution*, 79 COLUM. L. REV. 44 (1979); Symposium on Law and Philosophy, 12 HARV. J.L. & PUB. POLY. 611 (1989); Charles Taylor, *The Diversity of Goods*, in *UTILITARIANISM AND BEYOND*, *supra*, at 129.

face is how fact-specific we want the application of our priority rules to be. Two possible methods of application (which resemble the current tort law distinction between the standard of negligence and "strict liability" rules) suggest themselves: a case-by-case method and a "typical situations" method.

Under a case-by-case method, our priority rules would be defined only by the above goals of efficiency or justice. This would mean that *in every particular case of conflict* we would have to consider whether one of the two competing parties had enjoyed a clear advantage over the other in terms of the ability to prevent the occurrence of the conflict, and, if not, which of the two competing parties would be likely to suffer the greater loss if the other party prevails.

In contrast, under a typical situations method, we would endeavor to identify typical situations about which we could tell, with a high degree of certainty, that members of one of the two *categories* of competing parties involved in the conflict are better located to avoid the occurrence of the conflict than members of the other category.³⁷ Our priority rule would then provide that in all cases in which a certain conflict arises in circumstances such as those envisioned by the rule, members of the other category of competing parties would prevail. Additionally, we would endeavor to identify typical situations about which we could tell, with a high degree of certainty, that members of one of the two categories of competing parties to a conflict are likely to suffer the greater loss if members of the other category prevail. Our priority rule would then provide that, in all cases in which a conflict arises in circumstances such as those envisioned by the rule, members of the former category of competing parties would prevail. (We shall apply this rule whenever we are unable to apply the first rule.)

Obviously, the ex post efficiency policy of minimizing the costs involved in resolving priority rules dictates that we opt for typical situations rules rather than for case-by-case rules.³⁸ Indeed, I shall argue that the priority rules that have evolved in our law are typical situations rules: they are not comprised of standards for determining priority conflicts according to unique facts of each particular conflict. Instead, these rules are designed to resolve priority conflicts by identi-

37. On the similar facet of strict liability rules, see Guido Calabresi & Jon Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055; Phillips, *supra* note 26, at 232, 233, 261-63; Posner, *supra* note 24, at 90-91.

38. See *supra* note 37; see also Epstein, *supra* note 5, at 13-15. For a similar argument on the relation between typical situations rules and case-by-case rules, see SCHWARTZ & SCOTT, *supra* note 5, at 490-91, 516-17; Richard Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 300 (1975); Anthony Kronman, *Mistake, Disclosure, Information and the Law of Contracts*, 7 J. LEGAL STUD. 1, 16-18 (1978).

fyng situations in which members of certain categories of competing parties will most often deserve priority.

In the foregoing discussion I have approached the issue of the structure of priority rules from the perspective of the ex post efficiency policy of minimizing the costs involved in the administration of claims resulting from conflicts and accidents. This perspective is undoubtedly relevant for the priority rules discussed in this article, for it is inherent in these rules that (much like the rules governing tort accidents) they allocate a *loss* to one of the parties involved in these conflicts. Priority rules are loss allocation rules. But there is an important difference between tort accidents and triangle conflicts: accidents result in a loss; triangle conflicts result in both a loss to one party and a *gain* to the other. Priority rules for triangle conflicts are, therefore, not only loss allocation rules, but also rules for determining entitlements in disputed assets. The question is in what way this additional facet of priority rules bears on the issue of their structure.

In tort accident cases, allocative efficiency requires the minimization of the three costs identified earlier in this article (the costs of preventing accidents; the losses due to accidents; the costs of administering accident law).³⁹ While these costs are relevant to triangle conflicts as well, such conflicts raise an additional concern of allocative efficiency: that resources (*e.g.*, disputed assets) be put to their *best productive use*.⁴⁰ There is no way for the legal system to design its priority rules to accommodate this additional efficiency concern in each individual case of conflict. But the system can, at least indirectly, *facilitate* the allocation of disputed assets in a manner accommodating this additional efficiency concern.

It has been argued that when the transaction costs involved in an exchange transaction are low, a legal system pursuing the goal of allocative efficiency will tend to adopt rules that afford little discretion in determining entitlements. The combination of low transaction costs and low entitlement-determination costs will maximize the extent to which conflicts between competing parties will be resolved by market

39. See *supra* text accompanying notes 12-20.

40. ANTHONY KRONMAN & RICHARD POSNER, *THE ECONOMICS OF CONTRACT LAW* 1-2 (1979); RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 9-11, 30-33, 67, 79 (3d ed. 1986); SCHWARTZ & SCOTT, *supra* note 5, at 25; VELJANOVSKI, *supra* note 18, at 54; Calabresi & Melamed, *supra* note 18, at 1093-94; Jules L. Coleman, *Economics and the Law: A Critical Review of the Foundations of the Economic Approach to Law*, 94 *ETHICS* 649, 658-59 (1984); Epstein, *Nuisance Law*, *supra* note 17, at 77; Gjerdingen, *supra* note 20, at 722-28; Frank Michelman, *Constitutions, Statutes, and the Theory of Efficient Adjudication*, 9 *J. LEGAL STUD.* 431, 434, 435 (1980).

transactions, rather than by resort to the court system.⁴¹

If parties involved in a triangle conflict wish to enter a transaction for the transfer of the entitlements determined by the system's priority rules, such an exchange will involve low transaction costs: once the conflict erupts, the parties know each other; the number of the parties is small (usually two); and the relationship between the parties is discrete ("one shot").⁴² In short, the conditions for minimal transaction costs are present. Therefore, a system interested in minimizing the parties' resort to the court system and in encouraging, instead, further transactions between them will provide the parties with the other requisite for easy market transactions: simple, mechanical rules of priority that will unequivocally determine their entitlements and that will serve as a *baseline* for further negotiation between them.⁴³ By doing so, the system will promote efficiency both by putting resources (entitlements in disputed assets) to their best productive use and by minimizing the parties' resort to the system. Thus, from these perspectives as well, typical situations priority rules seem preferable to case-by-case rules.

III. THE GOOD FAITH PURCHASER FOR VALUE AND ITS OFFSPRING

I have argued⁴⁴ that in most cases in which a person *A*, who has transferred an asset under a contract, is entitled to demand specific restitution of the asset, the common law classifies the title of the person holding the asset *B* as voidable title. I have also argued that if *B* further transfers the asset to a third party *C*, our priority law provides that *C* would prevail over the first-in-time claimant *A* if *C* is a "good faith purchaser for value" (GFPV). Appearing in one version or another in the various conflicts involving remote parties over rights in the same asset, the GFPV is that pivotal figure of Anglo-American priority law who is capable of defeating a prior, *prima facie* preferred claim to rights in an asset.

For the purposes of the various conflicts discussed in this article

41. Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. LEGAL STUD. 13, 14, 25-26 (1985).

42. *Id.* at 21-22; KRONMAN & POSNER, *supra* note 40, at 6 n.6; POSNER, *supra* note 40, at 106; Calabresi & Melamed, *supra* note 18, at 1096-97; A. Mitchell Polinsky, *Controlling Externalities and Protecting Entitlements: Property Right, Liability Rule, and Tax-Subsidy Approaches*, 8 J. LEGAL STUD. 1, 3-4, 9-10, 42 (1979).

43. Isaac Ehrlich & Richard Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974); Thomas Jackson, *Embodiment of Rights in Goods and the Concept of Chattel Paper*, 50 U. CHI. L. REV. 1051, 1073 (1983).

44. See *supra* text accompanying note 10.

we must be familiar with three versions of the GFPV concept: the traditional GFPV concept, the GFPV concept of the Uniform Commercial Code (UCC), and the buyer in the ordinary course of business (BOCB) concept of the UCC. The latter two concepts may be viewed as somewhat diluted versions of the traditional GFPV concept.⁴⁵

A. *The Traditional Concept of Good Faith Purchase for Value*

Under the traditional rules of equity, for a party to qualify as a GFPV, that party should both provide value for the right purchased and acquire title in the right, without having notice of the existence of an adverse claim with respect to the right.

1. *Value*

a. Actual, new value. Value, for the purpose of acquiring the status of GFPV, means present value, *i.e.*, the *actual transfer of resources* (payment of money, transfer of property, rendering a service).⁴⁶ Value should be distinguished from both consideration and past consideration. Consideration, the mere promise of future performance (the typical consideration sufficient to uphold a contractual promise under Anglo-American contract law in the past 200 years), and past consideration, *i.e.*, a debt antecedently owed to the purchaser (excluded from the contractual concept of consideration with the advent of the concept of bargained-for consideration in the second half of the nineteenth century), would not be regarded as the rendering of value on the part of the purchaser for the purpose of attaining the status of GFPV.⁴⁷

45. The other major concept that is closely related to the GFPV concept is the concept of the holder in due course applicable in priority conflicts involving negotiable instruments. See U.C.C. §§ 3-302, 3-306 (1990).

46. RESTATEMENT OF RESTITUTION § 173 (1937); RESTATEMENT (SECOND) OF TRUSTS § 298 (1959); ROGER CUNNINGHAM ET AL., THE LAW OF PROPERTY § 11.10, at 783 (1984); PALMER, *supra* note 3, §§ 16.5, 16.8; 3 AUSTIN W. SCOTT, THE LAW OF TRUSTS § 298 (3d ed. 1967); HERBERT T. TIFFANY, REAL PROPERTY § 1300 (3d ed. 1939); Durfee, *supra* note 2, at 489-90.

47. The problem of balancing the rights of the two competing parties arises because usually the disputed asset is indivisible. In contrast, money is the most divisible asset. Therefore, in cases of dispute over a negotiable instrument, the law solves this problem by recognizing the possibility of a partial holder in due course: in cases in which C, the holder of a negotiable instrument, qualifies as a holder in due course only to the extent of part of the value rendered by her for the instrument, C would be entitled to cut off A's defense to that extent while, with regard to the balance of the instrument's amount, A would be able to defeat C's claim. On consideration within the context of the GFPV doctrine, see RESTATEMENT OF RESTITUTION § 173 (1937); RESTATEMENT (SECOND) OF TRUSTS § 302 (1959); CUNNINGHAM ET AL., *supra* note 46, § 11.10, at 783; SCOTT, *supra* note 46, §§ 297A, 302, 475.1. On past consideration within the context of the GFPV doctrine, see RESTATEMENT OF RESTITUTION § 173 (1937); RESTATEMENT (SECOND) OF TRUSTS § 304, 305 (1959); CUNNINGHAM ET AL., *supra* note 46, § 11.10, at 785-86; PALMER, *supra* note 3, § 16.5; SCOTT, *supra* note 46, §§ 304, 475; Durfee, *supra* note 2, at 489-90.

Thus, value in this context is not only "*actual value*," but also "*new value*."

b. Adequate value. As is well known, under the contractual doctrine of consideration, courts are not supposed to inquire whether the consideration given by a promisee in exchange for a promise has been adequate. This is not the case, however, with respect to the value needed for qualifying as GFPV. Although the purchaser will be treated as having parted with value even when the worth of that value is lower than that of the right purchased in exchange, a major difference in worth between the two may be treated as evidence of bad faith on the part of the purchaser and, thus, disqualify her from the status of GFPV.⁴⁸

c. Full value. Where the value of the right purchased approximates the value the purchaser rendered for it, the issue may still arise whether, in order to attain the status of GFPV, the purchaser has to part with *all* of the value promised by him. This issue has not been settled: "While there are statements that only full payment constitutes value, the issue must be regarded as in doubt when substantial payments have been made."⁴⁹ Thus, for the purchaser to qualify as GFPV, he needs to part with *at least a substantial amount* of the value promised by him.

2. Good Faith

The good faith requirement for GFPV status relates to the state of mind of the purchaser at the time she enters into her contract and until she both renders value for the right and acquires title in it. Under the good faith requirement, the purchaser should not possess either of two states of mind. First, the purchaser should not act with *actual knowledge* that her transaction conflicts with the rights in, or claim to, the asset of some prior party. Second, in cases in which the purchaser lacks actual knowledge of the existence of a prior right or claim, she should not hold any *suspicion* as to this possibility.⁵⁰ How-

48. See RESTATEMENT OF RESTITUTION § 173 (1937); RESTATEMENT (SECOND) OF TRUSTS § 298 (1959); 4 AMERICAN LAW OF PROPERTY § 17.10 (A. James Casner ed., 1952); CUNNINGHAM ET AL., *supra* note 46, § 11.10, at 783; SCOTT, *supra* note 46, §§ 289, 298.4; Durfee, *supra* note 2, at 491.

49. PALMER, *supra* note 3, § 16.5, at 486; see also RESTATEMENT (SECOND) OF TRUSTS § 303 (1959); RESTATEMENT OF RESTITUTION § 173 (1937); CUNNINGHAM ET AL., *supra* note 46, § 11.10, at 783; SCOTT, *supra* note 46, § 302.

50. See RESTATEMENT OF RESTITUTION § 174 (1937); RESTATEMENT (SECOND) OF TRUSTS § 297 (1959); 4 AMERICAN LAW OF PROPERTY, *supra* note 48 § 17.11; CUNNINGHAM ET AL., *supra* note 46, § 11.10, at 787, § 11.15, at 833; SCOTT, *supra* note 46, §§ 288, 297, 476; E. Allan Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666, 670-71 (1963).

ever, whereas the standard for measuring actual knowledge is a subjective standard (the actual state of the purchaser's mind), the standard for measuring lack of suspicion is objective. Whenever the circumstances that surround the transaction are such that a reasonable person in the position of the purchaser would have suspected that a prior conflicting right or claim exists, the purchaser would be deemed to have acted in bad faith, even if it is clear that she has actually acted without suspicion. It should be noted, however, that the required lack of suspicion does not amount to, and is distinct from, a due care and reasonable diligence requirement: the purchaser may qualify as GFPV even if she has acted negligently in failing to discover the existence of a prior conflicting claimant.⁵¹

3. *Combination of Value, Good Faith, and Acquisition of Title*

For a purchaser to attain the status of GFPV under the traditional GFPV doctrine he should acquire title in the right for the purchase of which he has transacted; this requirement is in addition to the former two requirements of value and good faith. Moreover, the purchaser needs both to render value for the right, and to acquire title in the right, while being in good faith. If, at any time before the purchaser both renders value for the right and acquires title in it, he actually becomes aware that a conflicting claimant exists, or the circumstances become such as should reasonably excite suspicion in his mind that such a claimant exists, the purchaser will not qualify as a GFPV.⁵² This means that the purchaser will not be entitled to the benefit of his bargain (*i.e.*, the purchaser may suffer expectation and reliance losses).⁵³ But will the purchaser lose the value rendered by him for the purchase of the asset before he received notice of the existence of the prior claimant (*i.e.*, will the purchaser suffer restitution losses)? The traditional GFPV doctrine balances the interests of the purchaser and the prior claimant in several ways. Usually, the purchaser *C* will be entitled to *reimbursement* by the prior (prevailing) claimant *A* for the part of the purchase price that the purchaser has paid,⁵⁴ or to a *lien* upon the disputed asset to the extent of that payment.⁵⁵ But the courts have, at times, employed other methods for balancing the inter-

51. Epstein, *supra* note 5, at 16; Farnsworth, *supra* note 50, at 670-71; 77 C.J.S. *Sales* § 288 (1952).

52. RESTATEMENT OF RESTITUTION §§ 173, 175 (1937); RESTATEMENT (SECOND) OF TRUSTS §§ 299-302, 310, 311 (1959); SCOTT, *supra* note 46, §§ 299-303, 310, 311, 477; TIFFANY, *supra* note 46, § 1300.

53. RESTATEMENT OF RESTITUTION § 173 cmt. i (1937).

54. RESTATEMENT (SECOND) OF TRUSTS § 303; SCOTT, *supra* note 46, § 303.

55. RESTATEMENT OF RESTITUTION § 173 cmt. i (1937); SCOTT, *supra* note 46, § 303.

ests of the parties.⁵⁶

B. *The Concept of Good Faith Purchase for Value Under the UCC*

Under the UCC, in the case of some of the conflicts discussed in this article, a purchaser of goods *C* may prevail over a prior claimant of a right in the same goods *A* if the purchaser is a GFPV.⁵⁷

Although there is some doubt about it, it seems that there is no difference in the content of the good faith requirement under the GFPV concept of the Code and under the traditional GFPV concept.⁵⁸ The Code clearly deviates, however, from the traditional concept in the way it defines the "value" that has to be rendered by the GFPV. Under the Code, "value" is "generally . . . any consideration sufficient to support a simple contract,"⁵⁹ as well as "a pre-existing claim" of the purchaser.⁶⁰ Thus, under the Code, "value" encompasses not only the actual transfer of resources, but also *consideration* and *past consideration* in the contractual sense. This means that, under the Code, a purchaser who has entered a binding contract and who has not yet parted with any actual value, or who has parted with actual value in the past, would qualify as a GFPV.

56. CUNNINGHAM ET AL., *supra* note 46, at 795-96; SCOTT, *supra* note 46, § 303.

57. See *infra* Parts IV-VII.

58. U.C.C. § 1-201(19) (1990) provides: "'Good faith' means honesty in fact in the conduct or transaction concerned." For the purposes of article 2 of the Code, however, "[g]ood faith" in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." U.C.C. § 2-103(1)(b) (1990). It is not clear, however, to what extent the objective requirement of "the observance of reasonable commercial standards of fair dealing in the trade" is meant to apply within the context of the GFPV concept; it seems that the drafters have intended to apply it as a standard to measure the conduct of merchants in performing their contractual obligations. Many courts, in line with the traditional GFPV concept, have applied the "subjective" test of U.C.C. § 1-201(19). See *Johnson & Johnson Prods., Inc. v. Dal Intl. Trading Co.*, 798 F.2d 100 (3d Cir. 1986); *Martin Marietta Corp. v. New Jersey Natl. Bank*, 612 F.2d 745 (3d Cir. 1979), *modified*, 653 F.2d 779 (1981); *Graves Motors, Inc. v. Docar Sales, Inc.*, 414 F. Supp. 717 (E.D. La. 1976); *Frank Davies Buick AMC-Jeep, Inc. v. First Ala. Bank*, 432 So. 2d 855 (Ala. Civ. App. 1982); *Dick Hatfield Chevrolet, Inc. v. Bob Watson Motors, Inc.*, 708 P.2d 494 (Kan. 1985); *United Road Mach. Co. v. Jasper*, 568 S.W.2d 242 (Ky. Ct. App. 1978); *Karibian v. Paletta*, 332 N.W.2d 484 (Mich. Ct. App. 1983); *Simon v. Travelers Ins. Cos.*, 378 N.Y.S.2d 870 (Civ. Ct. 1975); *Treit v. Oregon Auto Ins. Co.*, 499 P.2d 335 (Or. 1972); *Liles Bros. & Son v. Wright*, 638 S.W.2d 383 (Tenn. 1982). Others, however, have resorted to the "objective" test of U.C.C. § 2-103(1)(b) in resolving triangle conflicts. See *Collingwood Grain, Inc. v. Coast Trading Co.* (*In re Coast Trading Co.*), 744 F.2d 686 (9th Cir. 1984); *Brumley Estate v. Iowa Beef Processors, Inc.*, 704 F.2d 1351 (5th Cir. 1983); *Stowers v. Mahon* (*In re Samuels & Co.*), 526 F.2d 1238 (5th Cir. 1976) (en banc); *Harris Trust & Sav. Bank v. Wathen's Elevators, Inc.* (*In re Wathen's Elevators, Inc.*) 32 B.R. 912 (Bankr. W.D. Ky. 1983); *Hollywood Natl. Bank v. IBM Corp.*, 113 Cal. Rptr. 494 (Ct. App. 1974); *Reliance Ins. Co. v. Market Motors, Inc.*, 498 A.2d 571 (D.C. App. 1985). See also SCHWARTZ & SCOTT, *supra* note 5, at 498-99, 649-50; Farnsworth, *supra* note 50, at 670-71.

59. U.C.C. § 1-201(44)(d) (1990).

60. U.C.C. § 1-201(44)(b) (1990). See *Werhan v. Pinellas Seafood Co.*, 404 So. 2d 570 (Ala. 1981). A narrower concept of value is used by the Code for the purpose of the holder in due course doctrine of article 3. See U.C.C. § 3-303 (1990).

Under the traditional GFPV concept, the purchaser needs to acquire title in the right she purchased. It is not clear whether under the GFPV concept of the Code the purchaser needs to acquire title in the goods: the Code does not provide any clue as to its approach to this issue and the case law is scarce. Theoretically, four major approaches suggest themselves: the purchaser may qualify as a GFPV upon the *formation* of her contract; the purchaser should acquire *title* in the goods;⁶¹ the purchaser should take *possession* in the goods;⁶² or the goods should be *identified* to the contract of the purchaser and her seller.⁶³ (Under each of these four approaches the purchaser should still be in good faith by the time she acquires the prescribed interest in the goods.)

C. *The Concept of Buyer in the Ordinary Course of Business Under the UCC*

Under the UCC, in the case of some of the conflicts discussed in this article, a purchaser of goods *C* needs to qualify as BOCB for him to prevail over a competing prior claimant *A*.⁶⁴ The BOCB concept⁶⁵ is a variant of the traditional GFPV concept: it is comprised of the elements of good faith, value, the purchase transaction's being a sales transaction, and the identity of the seller as a merchant.

As in the case of the Code's concept of GFPV, although there is some doubt about it, it seems that there is no difference between the content of the good faith requirement under the BOCB concept of the Code and under the traditional GFPV concept.⁶⁶ Just as with the Code's concept of value sufficient to protect a GFPV, however, the Code deviates from the traditional GFPV concept in defining value for the purposes of the BOCB concept. Under the Code, "buying" includes the taking of goods "for cash or by exchange of another prop-

61. Under the Code, parties to sales transactions enjoy freedom of contract in determining the point in their transaction in which title is supposed to pass. In the absence of such determination, "title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods." U.C.C. § 2-401(2) (1990).

62. *Shacket v. Philko Aviation, Inc.*, 681 F.2d 506 (7th Cir. 1982), *revd.*, 462 U.S. 406 (1983).

63. U.C.C. § 2-501 (1990).

64. *See infra* Parts IV-VII.

65. U.C.C. § 1-201(9) (1990); *see also* U.C.C. § 2A-103(1)(a) (1990).

66. U.C.C. §§ 1-201(9), 1-201(19), 1-201(25) (1990). *But see* SCHWARTZ & SCOTT, *supra* note 5, at 649-50; *Swift v. J.I. Case Co.*, 266 So. 2d 379, 381 (Fla. Dist. Ct. App.), *cert. denied*, 271 So. 2d 147 (Fla. 1972) (an "objective" approach to the good faith requirement for the purposes of the BOCB concept); *Porter v. Wertz*, 416 N.Y.S.2d 254, 258-59 (App. Div. 1979), *aff'd*, 421 N.E.2d 500 (1981) (same); *Atlas Auto Rental Corp. v. Weisberg*, 281 N.Y.S.2d 400, 404-05 (Civ. Ct. 1967).

erty," as well as the taking of goods "on . . . credit."⁶⁷ Thus, value in this context includes not only the actual transfer of resources, but also *consideration* in the contractual sense. It does not include, however, the taking of goods in satisfaction of a preexisting debt.⁶⁸

The Code's requirements for BOCB status differ from its requirements for GFPV status in a number of other respects as well. Unlike both the traditional and the Code's concepts of GFPV, buying in the ordinary course of business under the Code is limited to the *purchasing* of goods under a *sales* contract. It does not include cases in which goods are taken as collateral under a security agreement,⁶⁹ nor does it include cases in which the purchaser is a lessee.⁷⁰ In addition, the traditional as well as the Code concept of GFPV applies to transactions between a purchaser *C* and *any* seller *B* of a right in an asset. The Code's concept of BOCB, however, applies only to sales transactions entered into between a purchaser and a *merchant*, i.e., "a person in the business of selling goods of that kind."⁷¹

As noted earlier,⁷² under the traditional GFPV concept, the purchaser can qualify as GFPV only if he acquires title in the disputed asset (for value while still being in good faith). The definition of the term BOCB in the Code provides no explicit guidance as to the Code's approach to the title issue. Nor does the Code provide any clue as to whether a BOCB needs to take possession in the goods. Theoretically, a buyer might be viewed as having achieved the status of BOCB at four possible stages, and each of these approaches has found some support in the courts: the date of the *formation* of his contract;⁷³ the date the goods are *identified* to the contract of the buyer and his seller;⁷⁴

67. U.C.C. § 1-201(9) (1990); see also U.C.C. § 2A-103(1)(a) (1990).

68. U.C.C. § 1-201(9) (1990) ("Buying" . . . does not include a transfer . . . in total or partial satisfaction of a money debt."); see also U.C.C. § 2A-103(1)(a) (1990).

69. U.C.C. § 1-201(9) (1990) ("Buying" . . . does not include a transfer . . . as security for . . . a money debt."); see also U.C.C. § 2A-103(1)(a) (1990).

70. U.C.C. §§ 1-201(9), 2-106(1) (1990). But see the definition of the term "lessee in ordinary course of business" in § 2A-103(1)(o) of the Code.

71. U.C.C. § 1-201(9) (1990); see also U.C.C. § 2A-103(1)(a) (1990).

72. See *supra* text accompanying notes 52-56.

73. General Elec. Credit Corp. v. Gayl (*In re Darling's Homes, Inc.*), 46 B.R. 370, 377-78 (Bankr. D. Del. 1985); Carey Aviation, Inc. v. Giles World Mktg., Inc., 46 B.R. 458, 463-64 (Bankr. D. Mass. 1985); Rex Fin. Corp. v. Mobile Am. Corp., 580 P.2d 8 (Ariz. 1978); International Harvester Credit Corp. v. Associates Fin. Servs. Co., 211 S.E.2d 430 (Ga. Ct. App. 1974); Wilson v. M & W Gear, 442 N.E.2d 670 (Ill. App. Ct. 1982); Herman v. First Farmers State Bank, 392 N.E.2d 344 (Ill. App. Ct. 1979); Chrysler Credit Corp. v. Sharp, 288 N.Y.S.2d 525, 533-34 (Sup. Ct. 1968).

74. Maremont Corp. v. Hoesch Am., Inc., 663 F. Supp. 876 (E.D. Mich. 1987), *aff'd*, 852 F.2d 568 (6th Cir. 1988); Troy Lumber Co. v. Williams, 185 S.E.2d 580 (Ga. Ct. App. 1971); Big Knob Volunteer Fire Co. v. Lowe & Moyer Garage, Inc., 487 A.2d 953, 958-59 (Pa. Super.

the date the buyer takes *possession* of the goods;⁷⁵ and the date the buyer acquires *title* in the goods.⁷⁶ (Under each of these four approaches the buyer should still be in good faith by the time he acquires the prescribed interest in the goods.)

D. *Rationalizing the Good Faith Purchase for Value Concept*

1. *Good Faith*

As noted earlier, under both the traditional concept of GFPV and the Code's concepts of GFPV and BOCB, the purchaser *C* cannot prevail over the prior claimant *A* where the purchaser acts with actual knowledge of the conflicting claim of the prior claimant, or where the circumstances are such that a reasonable person in the purchaser's position would have suspected that a prior claimant exists.⁷⁷

The good faith requirement embodies the *ex ante* efficiency policy and the retributive justice considerations under which, whenever one of the two competing parties enjoys a clear advantage over the other in terms of the ability to prevent the occurrence of the conflict, that party should be denied priority. Clearly, whenever the purchaser acts with actual knowledge or presumed suspicion of the existence of a prior conflicting claim, the purchaser is the party best located to prevent the conflict by avoiding the transaction.⁷⁸

1985); *Serra v. Ford Motor Credit Co.*, 463 A.2d 142 (R.I. 1983); *Holstein v. Greenwich Yacht Sales, Inc.*, 404 A.2d 842 (R.I. 1979); *Daniel v. Bank of Hayward*, 425 N.W.2d 416 (Wis. 1988).

75. This was the approach of the Uniform Trust Receipts Act (UTRA), which preceded the UCC. It defined a "[b]uyer in the ordinary course of trade" as "a person to whom goods are sold and delivered for new value and who acts in good faith and without knowledge . . ." UNIF. TRUST RECEIPTS ACT § 1 (1933, superseded by the UCC in 1951). Gilmore writes that "[s]ince the 'buyer in ordinary course' definition in the Code so closely follows the comparable definition in UTRA, it would be reasonable to assume that the omission of the delivery requirement was deliberate." 2 GILMORE, *supra* note 7 § 26.6 (1965). *United States v. Wyoming Natl. Bank*, 505 F.2d 1064, 1067-68 (10th Cir. 1974); *General Elec. Credit Corp. v. Tidwell Indus., Inc.*, 565 P.2d 868, 870-71 (Ariz. 1977); *First Natl. Bank v. Smoker*, 286 N.E.2d 203, 209 (Ind. Ct. App. 1972); see also *Dolan*, *supra* note 8, at 1159; Hal M. Smith, *Title and the Right to Possession Under the Uniform Commercial Code*, 10 B.C. INDUS. & COM. L. REV. 39, 59-61 (1969); William D. Warren, *Cutting Off Claims of Ownership Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 469, 473 (1963).

76. *United Carolina Bank v. Sistrunk*, 279 S.E.2d 272 (Ga. Ct. App. 1981); *Chrysler Corp. v. Adamatic, Inc.*, 208 N.W.2d 97 (Wis. 1973); see also John F. Dolan, *The U.C.C. Framework: Conveyancing Principles and Property Interests*, 59 B.U. L. REV. 811, 853 (1979); *Dolan*, *supra* note 8, at 1156, 1159.

A caveat is in order, however. Although cases interpreting "buyer in ordinary course" may arise under U.C.C. §§ 2-403 and 9-307, most cases have arisen under § 9-307. White and Summers note, however, that "those provisions essentially deal with similar policy issues — the cutting off of third party property interests by purchasers — so that judicial glosses on the definition generally apply irrespective of whether the case arose under Article Nine or Two." WHITE & SUMMERS, *supra* note 8, at 178.

77. See *supra* text accompanying notes 58, 66.

78. The denial of protection by the law to a party who knowingly enters a situation that might endanger an interest of his is a pattern recurring in numerous contexts in the law. Four

We should ask, however, why, under the good faith requirement, the purchaser has been absolved from the standard of care of *negligence* and, instead, has been subordinated to the much narrower standard of lack of actual knowledge and presumed suspicion. If, by exercising reasonable precaution, the purchaser could have discovered the existence of the prior competing claimant, why have a priority rule in favor of a purchaser who has failed to take such measures?

A possible answer to this question is that generally purchasers of assets or rights in assets are unable to take any meaningful precautionary measures to verify whether a prior conflicting claimant exists. The only meaningful way potential purchasers can prevent triangle conflicts is by interviewing past owners of the assets they intend to purchase to verify that no conflicting claims exist. But obviously, this procedure is unreasonable under any cost-benefit test and, besides, the question arises: How far in the past should the purchaser inquire? It is, therefore, the assumption of our law that, as a general rule, purchasers, as a class, cannot do much to prevent triangle conflicts.⁷⁹ The option is always there, however, for a first-in-time competing party to prove actual knowledge or presumed suspicion on the part of a particular purchaser and, in doing so, to deny that purchaser's priority.⁸⁰

striking examples include first, the "assumption of risk" doctrine of tort law, under which the claim of a plaintiff against a negligent defendant is supposed to be rejected if the plaintiff has knowingly and willfully exposed herself to the dangerous conduct of the defendant, *see KEETON ET AL.*, *supra* note 20, § 68; Calabresi & Hirschhoff, *supra* note 37, at 1062, 1065, 1073; second, the "last clear chance" rule of tort law, under which in a contributory negligence regime the claim of a negligent plaintiff would be upheld if the defendant has had the last clear chance to avoid the accident, *see KEETON ET AL.*, *supra* note 20, § 66; third, under the RESTATEMENT (SECOND) OF TORTS § 402A (1964), the regular strict liability rule against manufacturers of defective products would not apply whenever the ultimate user uses a defective product with knowledge of the defect; and finally, under U.C.C. § 9-401(2) (1990), an improperly located financing statement would be effective against a party knowledgeable of the contents of the financing statement. The good faith requirement that is part of the traditional GFPV concept and of the Code's concepts of GFPV and BOCB reflects policies similar to those embodied in the foregoing examples. *See also Epstein*, *supra* note 5, at 16-17; Kronman, *supra* note 38, at 6-9.

79. *See also Epstein*, *supra* note 5, at 15 ("[I]mposing any affirmative duties on the purchaser is subject to the same, probably fatal, flaw as the basic negligence rule. There is simply no clear standard of how much care is reasonable under the circumstances . . .").

80. Sometimes, however, a potential purchaser can take relatively little effort and identify the flaw in his transferor's title. A good example of this is *Porter v. Wertz*, 416 N.Y.S.2d 254 (App. Div. 1979), *aff'd*, 421 N.E.2d 500 (1981). Porter, the owner of an Utrillo, lent it to one von Maker, to help him decide whether to buy it. Von Maker made known to Feigen, an art dealer, that the Utrillo was available for sale. One Wertz, von Maker's confederate, appeared at the Feigen gallery with the painting and sold it to Feigen for \$20,000. At trial, Feigen testified that he was told that Wertz was an art dealer. In fact, Wertz was a delicatessen employee and the Feigen gallery could have learned this had it called either of the telephone numbers Wertz had given to it. Moreover, the gallery had a book on Utrillo that listed the owner of the painting at issue in 1969, just four years before it transacted to purchase the painting, but the gallery failed to use it. The court held that Feigen lacked good faith because it purchased without making inquiries. In cases of this type, *ex ante* efficiency considerations and considerations of retribution may mandate that the standard of negligence be applied to measure the conduct of the purchaser.

2. Value and Acquisition of Title

a. Market value losses and personal value losses. The requirements of value and acquisition of title under the traditional GFPV concept can be rationalized as addressing both the ex post efficiency policy and the need consideration of minimizing the losses suffered by parties who compete over rights in the same asset.

Let us assume that in our attempt to resolve a certain kind of conflict we are unable to apply ex ante efficiency and retributive justice considerations to the conduct of the competing parties. This means that the disputed asset must be allocated on the basis of ex post efficiency considerations and "need" considerations, *i.e.*, allocated to that competing party who is likely to suffer the greater loss if the other party prevails.⁸¹ But how can we determine whether in a given conflict it is the first-in-time party *A* or the subsequent purchaser *C* who is likely to be the greater loss sufferer? Again, if we were to resolve triangle conflicts by a case-by-case method, we would be able to assess the losses likely to be suffered by the parties in each particular case, and be able to allocate disputed assets accordingly. But what if (because of the need to minimize the costs of resolving such conflicts) we opt against a case-by-case method? In that case, in each of the typical categories of conflict (entrustment, conflicting transactions, and so on), we must identify typical situations about which we can say, with a high degree of certainty, that one of the two competing parties involved in that conflict is likely to suffer the greater loss.⁸² Thus, we must identify the typical losses likely to be suffered by competing parties and then allocate disputed assets to those parties whose losses would presumably be the greatest.

Two distinctions might prove helpful to that process. The first, offered in an important article by Professor Margaret Jane Radin,⁸³ is between "*personal* property" and "*fungible* property." Objects are personal property if their owners feel that the objects

are almost part of themselves. These objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world. . . . [A]n object is closely related to one's personhood if its loss causes pain that cannot be relieved by the object's replacement.⁸⁴

In contrast, an object is fungible property if it is held "for purely instrumental reasons," so that it "is perfectly replaceable with other

81. See *supra* notes 31-36 and accompanying text.

82. See *supra* text accompanying notes 37-43.

83. Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

84. *Id.* at 959.

goods of equal market value.”⁸⁵ Thus, “if a wedding ring is stolen from a jeweler, insurance proceeds can reimburse the jeweler, but if a wedding ring is stolen from a loving wearer, the price of a replacement will not restore the status quo — perhaps no amount of money can do so.”⁸⁶ Money, an automobile in the hands of a dealer, land in the hands of a developer, or an apartment in the hands of a commercial landlord are all additional examples of fungible property.⁸⁷ A person’s own car, house, or land are more likely to be personal property.

The second distinction is between cases in which an owner of an asset *willfully* parts with it and cases in which an owner is deprived of an asset *against her will*.

Using these two distinctions, we may say that whenever an owner *A* of an asset that is *fungible* property willfully parts with it in a sales transaction, the owner’s loss if the buyer *B* fails to pay the price would equal the contract price of the asset, which, presumably, will approximate the market value of the asset. The fact that the asset has been a fungible property asset at the disposal of its owner implies that the owner’s loss would amount to the market value of the asset, and that the owner would suffer no loss of personal value. A similar loss would be suffered by the owner *A* of a *fungible* property asset who is deprived of her asset against her will. In this case, again, the fungible nature of the asset would exclude any element of personal value loss, in excess of the market value of the asset. Likewise, an individual *A* who willfully parts with a *personal* property asset in a sales transaction would lose the contract price of the asset which, presumably, will resemble the market value of the asset, if the buyer *B* defaults. This owner as well will avoid personal value losses, because all of the asset’s value to the owner presumably would be reflected in the contract price.

In contrast, in cases in which the owner *A* of a *personal* property

85. *Id.* at 960.

86. *Id.* at 959.

87. *Id.* at 960; Ralph Waldo Emerson wrote that

[t]he only gift is a portion of thyself. . . . Therefore, the poet brings his poem; . . . the girl, a handkerchief of her own sewing. This is right and pleasing, for it restores society in so far to its primary basis, when a man’s biography is conveyed in his gift But it is a cold, lifeless business when you go to the shops to buy me something, which does not represent your life and talent, but a goldsmith’s.

RALPH W. EMERSON, *Gifts*, in *ESSAYS* 305, 306 (Vintage Books 1990) (1847); see also STANLEY FISHER ET AL., *INTRODUCTION TO MICROECONOMICS* 112 (2d ed. 1988) (“[C]onsumer’s surplus . . . is the difference between the maximum amount a consumer would pay for the quantity of that good he or she demands and the actual amount paid.”); Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554, 570-74 (1977) (the expected cost of establishing true losses resulting from breach of contract will induce promisees who attach idiosyncratic value to the performance promised them to negotiate liquidated damages clauses).

asset is deprived of it against his will, the owner's loss might exceed the market value of the asset. This loss would be comprised of (a) a loss equal to the market value of the asset and (b) an additional loss, not reflected in the market value of the asset, *i.e.*, a personal value loss representing the "personhood" element in the owner's title.

The foregoing analysis is captured in the following fourfold table:

TYPE OF PROPERTY	TYPE OF TRANSACTION	
	Willful	Unwillful
Fungible	Market Value Loss	Market Value Loss
Personal	Market Value Loss	Market Value Loss+ Personal Value Loss

b. Value and title as "equalizers."

1. The traditional GFPV concept.

The ex post efficiency policy and the need consideration of minimizing the losses of parties involved in triangle conflicts mandate that disputed assets be allocated to a second-in-time competing party *C* only if his losses at least equal the losses likely to be suffered by the first-in-time competing party *A* involved in the conflict. This means that, for any type of loss that might be suffered by a first-in-time competing party, we would need to identify an *equalizer*, *i.e.*, an equivalent, offsetting type of loss that the second-in-time competing party might suffer.

Thus, in cases in which the first-in-time party is likely to suffer the loss of only the market value of the disputed asset, it would be reasonable to condition the priority of the second-in-time party on his parting with value in the traditional sense (*i.e.*, actual value). By parting with actual value, the second-in-time party would equalize the losses likely to be suffered by him if the first-in-time party prevails to the losses the first-in-time party will likely suffer if the second-in-time party prevails. In such circumstances, no reduction of the losses suffered by the parties would be attained by insisting upon the return of the disputed asset by the second-in-time party to the first-in-time party.

In cases in which the first-in-time competing party is likely to suffer the loss of both the market value and personal value of the disputed asset, however, it would be reasonable to condition the priority of the

second-in-time party on her parting with actual value and, in addition, on either her taking possession of, or acquiring legal title in, the asset. Again, the rendering of value would equalize the market value loss the first-in-time party will likely suffer if the second-in-time party prevails. Additionally, either by taking possession of the asset or acquiring title in it, the second-in-time party would equalize the personal value loss the first-in-time party will likely suffer if the second-in-time party prevails. By taking actual possession of an asset a person may begin to establish a unique personal connection with it, making it an important, even indispensable, part of his personality. Likewise, one's knowing that he has secured title to a certain asset may lead him to view the asset as *his* in the profound, personal sense of its being part of his identity in the world. Thus, both possession and title may serve as landmarks in the relation of a person to an asset. In securing either of them, a person may subjectively treat the asset as part of his life and begin to develop a personal relationship with it.⁸⁸

Looked at from this perspective, the *traditional* GFPV concept⁸⁹ seems to envision triangle conflicts involving personal property assets that have been taken from their owners both against their will and without their fault. Put differently, the traditional GFPV concept seems to reflect ex post efficiency considerations and considerations of justice in the sense of need and to apply to conflicts over personal property assets taken from first-in-time parties against their will. The requirement of value that is part of the traditional GFPV concept is supposed to serve as an equalizer for the market value loss a first-in-time competing party will likely suffer. (And one should bear in mind that "value" means "adequate value": it should reasonably approximate the worth of the disputed asset.⁹⁰) The requirement of acquisition of title that is part of that concept⁹¹ is supposed to serve as an equalizer for the personal element of loss that may result any time an owner of a personal property asset is deprived of it against his will.

Why does the traditional GFPV concept condition the priority of the second-in-time party on her conforming with the most stringent

88. The foregoing analysis assumes that the buyer develops a personal interest weighty enough to offset the personal value loss of the previous owner upon taking possession or acquiring title in an asset. One may argue, however, that in many cases personal value develops over time, and therefore, only after the buyer has possessed or owned the asset for a certain period of time would the buyer's personal value loss equalize that of the previous owner. A priority rule which took this argument into account, however, would face numerous complications, such as how to determine the length of the period required to make the buyer's personal interest in the asset weighty enough.

89. See *supra* text accompanying notes 46-56.

90. See *supra* text accompanying notes 46-49.

91. See *supra* text accompanying notes 52-56.

requirements (rendering of actual value and acquisition of title)? Two answers suggest themselves. The first is that the roots of the traditional concept of GFPV lie in the preindustrial era⁹² in which triangle conflicts brought for the law's resolution typically involved personal property rather than fungible assets. Therefore, the traditional concept was shaped to address conflicts in which first-in-time parties might suffer personal in addition to market value losses. The second answer focuses on the nature of the GFPV rule as a typical situations rule. The traditional GFPV rule is supposed to govern a variety of triangle conflicts, each having its own unique equities. The law has chosen to address all these conflicts through a single priority rule, the traditional GFPV rule. The rule may have been shaped, therefore, around the assumption that, for the second-in-time competing party to prevail, his potential losses should equalize the most extreme losses possibly suffered by a first-in-time party involved in the conflict.

2. The Code's approach.

(a) Value. As I showed earlier,⁹³ under the Code's GFPV and BOCB concepts, a second-in-time competing party *C* may prevail in a conflict over a disputed asset without rendering any actual value, for under these two concepts of the Code, value can be rendered by a mere promise, *i.e.*, consideration in the contractual sense. How can we account for this content of the value requirement?

A possible way to rationalize the Code's value requirement is to say that the Code's GFPV and BOCB concepts apply considerations of *ex ante* efficiency and retributive justice to conflicts in which the first-in-time competing parties to the conflict possess a greater ability to prevent the conflict than do the second-in-time parties. Thus, because of the failure of the first-in-time parties to take the necessary precautionary measures to prevent the conflict, the second-in-time competing parties should prevail, even without rendering actual value. Determining that, as a general rule, first-in-time parties to a certain conflict can usually prevent the conflict, we would want to allocate the resulting loss to them. Conditioning the priority of members of the second-in-time category upon their parting with value in the traditional sense would cause any second-in-time party who paid only *part*

92. For a review of cases from the late seventeenth century and the first half of the eighteenth century dealing with the GFPV doctrine see Harold R. Weinberg, *Markets Overt, Voidable Titles, and Feckless Agents: Judges and Efficiency in the Antebellum Doctrine of Good Faith Purchase*, 56 TUL. L. REV. 1, 15-32 (1981). The traditional GFPV doctrine can be traced to at least as early as the eighteenth century. "It seems to have been a common opinion in early times that a court of equity would give no assistance against a purchaser for value without notice." J. B. Ames, *Purchase for Value Without Notice*, 1 HARV. L. REV. 1, 1 (1887).

93. See *supra* text accompanying notes 57-76.

of the disputed asset's price to lose the asset (to the first-in-time party) and the payment made by him to the intermediate wrongdoer. That, however, would run counter to the efficiency and justice considerations that, given our assumptions, should have led to the allocation of these losses to the first-in-time parties to the conflict. Therefore, in cases of this type, we would want to allocate the disputed asset to second-in-time parties even when they have not fully paid the asset's price. Thus, the particular content the UCC gives to the value requirement reflects an underlying assumption by the Code about the ability of first-in-time parties to avoid triangle conflicts.⁹⁴ I will discuss the extent to which this assumption is justifiable in the subsequent parts of this article.

(b) Title. I have noted that the Code does not provide any meaningful clue as to whether a GFPV or a BOCB should acquire title in the disputed goods, or take possession of them, or whether a buyer may qualify as a GFPV or BOCB under the Code upon the formation of his contract, or upon identification of the goods to his contract.⁹⁵ One way to solve this problem is to accept that the Code's priority rules endorse the assumption that first-in-time parties are better able to prevent the conflicts it governs. In that case, just as it would not make sense to condition the priority of second-in-time parties on their parting with full value, it would not make sense to condition the priority of these parties on their acquiring title to, or in their taking possession of, these goods. Rather, given these assumptions, second-in-time parties should enjoy priority upon the identification of the goods to their contract with the intermediate wrongdoer.

A second possibility is that the Code contemplates triangle conflicts that involve goods used by their owners as fungible rather than as personal property. This explanation seems plausible on several grounds. First, the Code's design applies mainly to transactions involving professionals and specialists who do not treat the goods they own as personal property. Second, the typical actor under the Code is probably a business corporation, an entity incapable of developing any personal attachment to goods.⁹⁶ Third, the Code is a product of the industrial era, in which most goods are fungible rather than per-

94. See also Dolan, *supra* note 8, at 1172 (stating that the voidable title doctrine recognizes that "possession induces reliance" in the buyer); Phillips, *supra* note 26, at 232-33 (stating that the UCC focuses on which party could have protected himself with the least cost).

95. See *supra* text accompanying notes 61-63, 73-76.

96. In some extraordinary and rare cases, however, a corporation may suffer a personal value loss if deprived of an asset. This will be the case, for example, when a symbolic item which uniquely represents the corporation (e.g., the original of a painting reproduced as the corporation's logo) is stolen from it.

sonal.⁹⁷ The Code's GFPV and BOCB concepts, therefore, may not explicitly spell out a title requirement because, based on a typical situations approach, the Code's priority rules envision conflicts over fungible goods, with respect to which second-in-time parties need not equalize the losses of first-in-time parties by acquiring title to disputed goods or by taking possession of them.

(c) The tracing doctrine. Under the Code's definition of the term *value*, it might be possible for a second-in-time competing party to gain priority over disputed goods without parting with any actual value for them, or by offering only partial payment of their price. This outcome would result in a windfall to the prevailing second-in-time party to the extent of the unpaid balance of the price she owes. Moreover, ex post efficiency considerations and need considerations of justice dictate that, upon winning priority over the disputed goods, the second-in-time party pay the unpaid balance of the price she owes to the intermediate wrongdoer directly to the first-in-time party. Indeed, there is good reason to presume that the Code's drafters intended to furnish first-in-time parties with an entitlement to such unpaid balances when they adopted the Code's definition of the term *value*. This argument necessitates the introduction of the doctrine of tracing into our discussion.

Tracing is the "right to follow property into its product"; it is ap-

97. In a fascinating study, the French anthropologist Marcel Mauss describes the development of the relationship between persons and the assets they own. In archaic societies, assets are perceived as having personalities of their own, independent of their owners. In a more advanced stage, every asset is viewed as embodying the personality of its owner (and sales transactions, therefore, necessitate the purging of the asset from the spirit of its seller to enable the buyer to vest her spirit in the asset). Finally, in advanced societies, assets are treated instrumentally, independent of the persons who own them. MARCEL MAUSS, *THE GIFT* (W.D. Halls trans., Rontledge 1990) (1950). Georg Simmel writes that "[f]or primitive people in all parts of the world, the solidarity between the person and his possession is expressed in the custom that the possession, to the extent that it is personal, conquered or acquired by work, goes into the grave with the owner." GEORG SIMMEL, *THE PHILOSOPHY OF MONEY* 333 (David Frisby ed. & T. Bottomore & D. Frisby trans., 2d ed., Rontledge 1990) (1907). Simmel also writes about

the extreme difficulty in buying commodities from native people. This has been explained by the fact that each object has a decidedly individual stamp of originality with regard to its origin and use. The tremendous labour applied to producing and decorating it and its exclusive personal usage makes it part of the person himself. To part with it thus meets with the same resistance as parting with a limb of the body . . .

Id. at 403. Similarly, Henry Maine writes that "the separation of the Law of Persons from that of Things has no meaning in the infancy of law, [and] the rules belonging to the two departments are inextricably mingled together." HENRY S. MAINE, *ANCIENT LAW* 251 (3d ed. 1888).

The implications of the claim that in the modern era persons are surrounded by fungible objects were most thoroughly analyzed by Georg Simmel. In *The Philosophy of Money*, Simmel argued that in the modern economy "the individual object becomes irrelevant," and "the specificity and individuality of objects becomes more and more indifferent, insubstantial and interchangeable to us." SIMMEL, *supra* at 301. He also argued that in the modern economy, the treatment of objects by their owners is characterized by "coldness and frivolity," *id.* at 393, and by "insecurity and disloyalty," *id.* at 404.

plicable "wherever a person wrongfully transfers property in which another has the beneficial interest, whether legal or equitable, and receives other property in exchange therefor."⁹⁸ "Through tracing, a person who in the first instance would be entitled to the restitution of money or other property is often permitted to assert his claim against a substituted asset — an asset which is traceable to or the product of such money or other property."⁹⁹ The tracing doctrine is premised on the principle of unjust enrichment; it is designed to avoid an inappropriate gain of one person at the expense of another.¹⁰⁰ It is often implemented through a number of more specific remedies such as constructive trust, equitable lien and subrogation.¹⁰¹

The goal of minimizing the losses suffered by the parties involved in triangle conflicts¹⁰² dictates that, in cases in which the second-in-time competing party *C* is entitled to the disputed goods without rendering actual value for them, the first-in-time competing party *A* be entitled to trace her right to the disputed goods against the intermediate wrongdoer *B* into that party's right to collect the price from the second-in-time competing party *C*. Thus, in cases of this type, *A* should be subrogated¹⁰³ to the right of *B* to collect the price from *C*. The Code's concept of value for the purpose of the Code's GFPV and BOCB concepts¹⁰⁴ may be viewed, therefore, as founded on the assumption that for the purpose of minimizing total losses, *A* would be allowed to trace her claim to *C*.

This assumption is supported by the text of the comment to a draft of an early forerunner of the Code, the Uniform Revised Sales Act of 1944.¹⁰⁵

"Value" . . . is defined very broadly It does not in itself require fresh payment, nor does it require that a payment freshly promised shall

98. SCOTT, *supra* note 46, § 507.

99. PALMER, *supra* note 3, § 2.14.

100. *Id.*; Oesterle, *supra* note 3, at 175-76.

101. PALMER, *supra* note 3, § 1.5, § 2.14; Oesterle, *supra* note 3, at 184.

102. See *supra* text accompanying notes 17-20, 34-36.

103. "Subrogation may be defined as the substitution of another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt." 83 C.J.S. *Subrogation* § 1 (1953) (footnote omitted). "Subrogation is closely akin to, if not part of, the equitable principle of 'restitution' and 'unjust enrichment.' . . . The object of subrogation is the prevention of injustice." *Id.*, § 2 (footnotes omitted). "Subrogation simply means substitution of one person for another; that is, one person is allowed to stand in the shoes of another and assert his rights." DAN B. DOBBS, *REMEDIES* § 4.3 at 251 (1973); see also PALMER, *supra* note 3, § 1.5(b); U.C.C. § 4-407 (1990).

104. See *supra* text accompanying notes 57-76.

105. UNIF. REV. SALES ACT (Sales Chapter of Proposed Commercial Code) (Proposed Final Draft No.1 Apr. 27, 1944).

have been actually made before notice,¹⁰⁶ and cases to the contrary¹⁰⁷ are rejected. . . . But where the purchaser has not yet paid, any original claimant whose claim is wiped out by the good faith purchase is properly subrogated to the fraudulent transferor's right to the promised but still unpaid price¹⁰⁸

In sum, the traditional GFPV concept seems suitable to govern triangle conflicts involving assets that have been used by their owners, the first-in-time competing parties, as personal property and of which these parties have been deprived against their will. In cases of this type, the value requirement in the traditional sense would equalize the market value loss suffered by the first-in-time party while the title requirement would equalize the personal element of loss suffered by the first-in-time party. In contrast, the Code's GFPV and BOCB concepts seem suitable to apply to conflicts involving goods that have been used by their owners, the first-in-time competing parties, as fungible property goods. In cases of this type, the second-in-time competing party would prevail even without rendering any actual value for the goods to the intermediate wrongdoing party. However, the first-in-time competing party would be entitled to trace his claim as against the intermediate party for the restitution of the goods, into the product of the goods, *i.e.*, the right of the intermediate party to collect the goods' price from the second-in-time competing party.

3. *The Good Faith Purchase Doctrine: Between Efficiency and Justice*

As I have shown in the foregoing discussion, it is possible to rationalize the traditional GFPV concept in terms of the *ex ante* and *ex post* imperatives of allocative efficiency. This means that if we apply to the GFPV concept the pivotal question of the descriptive¹⁰⁹ portion

106. UNIF. REV. SALES ACT (Sales Chapter of Proposed Commercial Code) (Proposed Final Draft No. 1 Apr. 27, 1944) § 57(2) (" 'Value' with respect to good faith purchase for value means (a) any consideration sufficient to support a simple contract; or . . . (c) taking goods or documents of title in satisfaction of or as security for a pre-existing claim.").

107. Apparently, the Comment refers to the definition of the term "value" within the context of the traditional GFPV concept. See *supra* text accompanying notes 46-49.

108. UNIF. REV. SALES ACT (Sales Chapter of Proposed Commercial Code) (Proposed Final Draft No. 1 Apr. 27, 1944) Comment on § 58: Transfer of Goods by Person With Defective Title; Good Faith Purchase of Goods. Application of the tracing doctrine in this context may be viewed as the equivalent of the means used by the traditional GFPV doctrine to mitigate the losses of second-in-time parties who lose assets to first-in-time parties. See *supra* text accompanying notes 54-56; see also PALMER, *supra* note 3, §§ 2.14, 4.10 (tracing in cases of breach of contract); John P. Dawson, *Restitution or Damages?*, 20 OHIO ST. L.J. 175, 182-83 (1959) (same); Recent Decisions, 33 MICH. L. REV. 1290 (1935) (same); Oesterle, *supra* note 3, at 178-80 (same).

109. See *supra* note 12.

of the economic analysis of law scholarship — is the common law efficient? — the answer should be yes.

Even scholars not associated with the law and economics movement have admitted that the efficiency criterion suggested by the scholarship of that movement is of considerable explanatory power when applied to a substantial number of common law doctrines.¹¹⁰ Scholars associated with the law and economics movement have offered two major explanations for its success. One is that common law judges have intuitively applied economic considerations in their rulemaking so that unknowingly and subconsciously they have addressed economic concerns.¹¹¹ Another is the causal, litigant-oriented evolutionary explanation under which self-maximizing individuals have relitigated inefficient precedents more than efficient ones, resulting in a long-term trend toward efficiency.¹¹²

As is well known, both explanations have been sharply criticized.¹¹³ One recurrent criticism has been that the major motivating force of common law judges has been the desire to attain just results in the particular cases brought before them.¹¹⁴ Endorsing the hypothesis that, indeed, it has been a major concern for common law judges to come out with decisions that seem to do justice in particular litigated cases, however, I shall suggest that the efficiency criterion may have explanatory power because some of its imperatives converge with

110. "Economic analysis and criticism of judge-made law are in flower now in the academic groves — partly, I readily admit, because they are so often illuminating, clarifying, and stimulating, as well as elegant and captivating." Frank I. Michelman, *Norms and Normativity in the Economic Theory of Law*, 62 MINN. L. REV. 1015, 1027-28 (1978). "[S]triking successes [have been] achieved by the positive economic theory of law in showing a pervasive tendency for law — judicial, common law — to regress on a norm of pure efficiency." *Id.* at 1038; see also CHARLES FRIED, *RIGHT AND WRONG* 85-86 (1978) (Economic analysis of rights "is a recent, sophisticated elaboration of utilitarian thinking Because it is so subtle, powerful, and comprehensive, no consideration of rights can ignore it.").

111. LANDES & POSNER, *supra* note 29, at 1, 19; POSNER, *supra* note 40, at 20-26; POSNER, *supra* note 20, at 372-73; Richard A. Posner, *The Economic Approach to Law*, 53 TEXAS L. REV. 757, 764, 777-78 (1975); see also KRONMAN & POSNER, *supra* note 40, at 5-6; Richard A. Posner, *Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 281, 288-95 (1979).

112. POSNER, *supra* note 20, at 360, 372-73; John C. Goodman, *An Economic Theory of the Evolution of Common Law*, 7 J. LEGAL STUD. 393 (1978); George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977); Paul H. Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977); R. Peter Terrebonne, *A Strictly Evolutionary Model of Common Law*, 10 J. LEGAL STUD. 397 (1981).

113. DWORKIN, *supra* note 36, at 276-95; RONALD DWORKIN, *A MATTER OF PRINCIPLE* 263-66 (1985); MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 114-50 (1987); J.M. Balkin, *Too Good to be True: The Positive Economic Theory of Law*, 87 COLUM. L. REV. 1447 (1987) (book review); Charles Fried, *The Laws of Change: The Cunning of Reason in Moral and Legal Theory*, 9 J. LEGAL STUD. 335 (1980); Michelman, *supra* note 40; Michelman, *supra* note 110; Wes Parsons, Note, *The Inefficient Common Law*, 92 YALE L.J. 862 (1983).

114. Balkin, *supra* note 113, at 1476-89; Fried, *supra* note 113, at 336-41, 352-53; Coleman, *supra* note 40, at 677-78; Michelman, *supra* note 110, at 1027-32, 1037-41, 1047.

some of the basic intuitions deriving from the sentiment of justice.¹¹⁵

Scholars of the law and economics movement have recurrently demonstrated that in various contexts the law allocates entitlements against the "cheapest cost avoider," *i.e.*, the party better located to avoid the conflict that calls for the law's intervention.¹¹⁶ Indeed, as we have seen, within the context of the GFPV concept, the good faith requirement arguably displays this very same logic.¹¹⁷ It is my hypothesis, however, that the reason for the abundance of this pattern of allocation of entitlements in the law is that the cheapest cost avoider is also the most blameworthy party, *i.e.*, the party that under basic sentiments of retributive justice deserves to assume liability.¹¹⁸ Thus, in allocating legal entitlements, common law judges have been motivated by a sentiment against the parties whose conduct could have been perceived as faulty in the sense of its failure to prevent the occurrence of the conflict.

Likewise, law and economics scholars have repeatedly demonstrated that entitlements are allocated by the law in a manner designed to minimize the losses suffered by competing claimants.¹¹⁹ Indeed, as we have seen, the requirements of value and acquisition of title, consistent within the traditional GFPV concept, may be viewed as serving this same goal.¹²⁰ It is my hypothesis, however, that this pattern of allocating entitlements persists because it coincides with the need criterion of the distributive justice sentiment.¹²¹ Thus, in cases in which common law judges allocate legal entitlements, they are motivated by a sentiment favoring the party bound to suffer the greater loss if the other party prevails. The cases that the law and economics literature have interpreted as representing *ex post* efficiency concern for the minimization of the adverse effects of conflicts over entitlements can be interpreted as representing a justice concern for the allocation of enti-

115. See also *supra* text accompanying notes 21-36. Each of the criteria comprising the normative concept of justice has its equivalent in the actual sentiment of justice shared by human beings. See *id.*

116. See, e.g., READINGS IN THE ECONOMICS OF CONTRACT LAW 53-76 (Victor P. Goldberg ed., 1989); POSNER, *supra* note 40, at 83-85, 88-90, 94, 99, 114; SCHWARTZ & SCOTT, *supra* note 5, at 22.

117. See *supra* text accompanying notes 77-78.

118. On the retributivist sentiment, see Posner, *supra* note 24; Yoram Shachar, *The Fortuitous Gap in Law and Morality*, CRIM. JUST. ETHICS, Summer-Fall 1987, at 12.

119. See, e.g., POSNER, *supra* note 40, at 84, 87-88, 106-07, 118, 121-22; see also Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake"*, 52 U. CHI. L. REV. 903, 906 n.12 (1985) (discussing "the emphasis in law and economics scholarship on the design of legal rules to affect behavior *ex ante*").

120. See *supra* text accompanying notes 81-108.

121. See *supra* text accompanying notes 33-36. On the "need" sentiment of justice, see JENNIFER L. HOCHSCHILD, *WHAT'S FAIR?* 46-110 (1981).

lements to the parties who need them most.¹²²

IV. ENTRUSTMENT

A. *The Common Law, the Factors Acts, and the UCC*

For the purpose of our discussion of conflicts that result from the entrusting of goods, we must distinguish among three typical situations in which the entrustment conflict may arise: the commercial context, the semi-commercial context, and the noncommercial context.

The commercial context: *A*, the manufacturer of a product, appoints *B* to be his selling agent in the market in which *B* is located. *A* delivers goods to *B* on consignment. *B* sells the goods to *C* and absconds with the proceeds. Alternatively, *B* pledges the goods to *C* to secure a loan made by *C* to *B*.¹²³

The semi-commercial context: *A*, the owner of a painting, delivers it to *B*, a dealer, for restoration and repair. *B* repairs the painting and sells it to *C*.

The noncommercial context: *A*, a university professor, plans to go abroad on sabbatical for a year. *A* entrusts his beloved painting to *B*, his friend, to keep it for him for the year. *B* sells the painting to *C*. Alternatively, *B* pledges the painting to *C* to secure a loan made by *C* to *B*.

Initially, in addressing all these contexts, the common law gave precedence to *A*, the original owner, regardless of the conditions under which *C* had purchased the goods: under no circumstances could *C* defeat *A*'s title in the goods. This rule accorded extreme protection to

122. An argument similar to the one made here about the convergence between utility and justice was made over a hundred years ago by Sidgwick:

[T]he claim to services that arises out of special need . . . may obviously be rested on an utilitarian basis [I]f I am made aware that . . . another's resources are manifestly inadequate to protect him from pain or serious discomfort . . . my theoretical obligation to consider his happiness as much as my own becomes at once practical; and I am bound to make as much effort to relieve him as well as will not entail a greater loss of happiness to myself or others. If, however, the calamity is one which might have been foreseen and averted by proper care, my duty becomes more doubtful: for then by relieving him I seem to be in danger of encouraging improvidence in others.

SIDGWICK, *supra* note 36, at 436. On the relation between the sentiment of justice and prescriptions of utility, see ACKERMAN, *supra* note 36, at 1-22, 41-87; HARE, *supra* note 36, at 44-64, 147-168; HUME, *supra* note 21, at 179-96; MILL, *supra* note 36, at 314-38; SIDGWICK, *supra* note 36, at 264-94, 423-59.

123. There is evidence that goods entrusted to agents make up a significant percentage of the goods that enter criminal redistribution. The same evidence suggests that persons who deal with entrusted goods, such as stockroom employees or truck drivers, are preferred sources of illegitimate merchandise because they are considered by receivers to be more reliable to deal with than shoplifters, addicts, and other common thieves.

Weinberg, *supra* note 15, at 590. For the rule governing the conflict between the consignor and the general creditors of the consignee, see U.C.C. § 2-326 (1990).

the property interest of owners: owners who had not consented to part with their goods under the terms imposed on them by their entrustees were not compelled to do so. In the early part of the nineteenth century, however, an exception to this rule was carved out. The Factors Acts, widely enacted at that time in the United States and England, provided that anyone buying from a factor in good faith, *i.e.*, without notice of limitations on the factor's authority, in reliance on the factor's possession of the goods, took good title against the true owner, even where the factor had acted beyond his authority.¹²⁴

Thus, the exception carved out by the Factors Acts was premised on a distinction between transactions made in the commercial context, on one hand, and transactions made in the semi-commercial and non-commercial contexts, on the other. Only in cases where goods were entrusted to a merchant seller and only if the entrustment was made for the purpose of selling the goods (as opposed to entrustment for the purpose of repair, bailment, and so on), could a GFPV cut off the title of the owner-entruster.¹²⁵

The UCC also declines to adopt an all-encompassing entrustment priority rule that allows all GFPVs who purchase entrusted goods to prevail over owner-entrusters.¹²⁶ Under the Code, a BOCB who purchases entrusted goods purchases all rights of the entruster in the goods.¹²⁷ The Code follows the Factors Acts, however, in limiting its protection of buyers of entrusted goods to those who purchase from "a merchant who deals in goods of that kind."¹²⁸ The Code nevertheless expands the protection accorded to such buyers by abolishing the former distinctions pertaining to the purpose of the entrustment: the entrustment rule of the Code applies to all cases in which possession is entrusted to a merchant, regardless of the particular purpose of the entrustment. Put differently, the entrustment rule of the Code applies to both commercial and semi-commercial cases. This also means that, under the Code, in all cases of entrustment in the noncommercial con-

124. Grant Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057, 1058 (1954); Warren, *supra* note 75, at 470-71; Katharine F. Jillison, Note, *U.C.C. Section 2-403: A Reform in Need of Reform*, 20 WM. & MARY L. REV. 513, 537-39 (1979).

125. Grant Gilmore, *The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman*, 15 GA. L. REV. 605, 608-10 (1981); Warren, *supra* note 75, at 471-72.

126. On entrustment under the UCC, see Gilmore, *supra* note 125, at 618-19; Fairfax Leary, Jr. & Warren F. Sperling, *The Outer Limits of Entrusting*, 35 ARK. L. REV. 50 (1981); Warren, *supra* note 75, at 472-75; Weinberg, *supra* note 92, at 32-36; John F. Cargill, Note, *Entrustment Under U.C.C. Section 2-403 and Its Implications for Article 9*, 9 CAMPBELL L. REV. 407 (1987); Jillison, *supra* note 124, at 551-53.

127. U.C.C. §§ 2-403(2), 2-403(3) (1990); *see also* U.C.C. § 2A-305(2) (1990).

128. U.C.C. § 2-403(2) (1990); *see also* U.C.C. § 2A-305(2) (1990).

text, the *nemo dat* rule would apply and the owner-entruster would be able to defeat the interest of the purchaser.¹²⁹

B. *Consideration as Value*

As noted earlier,¹³⁰ under the value requirement of the traditional GFPV concept, the purchaser needs to part with actual resources, yet this is not the case under the BOCB concept of the UCC. Under the Code, for the buyer of entrusted goods *C* to prevail over the owner-entruster *A*, the buyer needs to be a BOCB, and "buying" in this context includes not only parting with actual resources but also buying "on credit," *i.e.*, merely promising future payment or other transfer of resources in exchange for the goods. A buyer who enters in good faith into a contract for the purchase of entrusted goods would enjoy priority over the adverse claim of the owner-entruster, even though the buyer may not have parted with any actual value and may have become or should have become aware of the owner's claim, before value passed.

Why is it that the Code enables a buyer who has parted with no actual value to prevail over an owner-entruster?

A possible answer to this question is that the Code presumes that the entruster has a greater ability to prevent the occurrence of the conflict. Therefore, on the basis of *ex ante* efficiency considerations and retributive justice considerations, the Code allocates an entitlement to the disputed goods to the buyer and the loss resulting from the conflict to the owner-entruster.¹³¹

Two arguments support the Code's presumption that, in the commercial context, the entruster can prevent the occurrence of the conflict more easily than the buyer. First, in the commercial setting, the relationship of the entruster and the trustee is usually intended to be stable and continuous. Therefore, it is easier for the entruster to bear the first-starter cost of gathering information for verifying the honesty of the trustee than it is for the buyer, whose relationship with the trustee is not necessarily meant to be continuous and institutionalized.¹³² Moreover, once the entruster-trustee relationship becomes

129. In those cases, however, the purchaser would still prevail if the doctrine of estoppel could be applied against the entruster. See UNIF. SALES ACT § 23 (1950); Smith, *supra* note 75, at 61; Warren, *supra* note 75, at 470, 475; see also Ken Kanjian, Note, *The Nemo Dat Rule and Estoppel by Representation and Estoppel by Negligence*, 8 SYDNEY L. REV. 698 (1979); Christina L. Kunz, *Motor Vehicle Ownership Disputes Involving Certificate of Title Acts and Article Two of the U.C.C.*, 39 BUS. LAW. 1599, 1646-48 (1984).

130. See *supra* text accompanying notes 46-49, 59-60.

131. See *supra* text accompanying notes 95-97.

132. Dolan, *supra* note 8, at 1171.

institutionalized, the entruster gains an additional opportunity both to acquaint himself further with the conduct of the trustee and to foresee potential dishonesty on his part.

Second, the entruster can protect himself against misconduct on the part of the trustee by insisting upon a guarantee of the trustee's liabilities toward the entruster by such means as cash deposit, guarantee, or security interest. Again, such precautionary measures can be expected of the entruster, but not of the buyer, because, in the commercial entrustment case, the relationship of the entruster with the trustee, unlike that of the buyer and the trustee, is more likely to be continuous and institutionalized.¹³³

Another possible explanation for the Code's position against entrusters and in favor of buyers rests on the rationale of estoppel.¹³⁴ Buyers who purchase goods from merchant sellers usually assume their sellers have valid title to the goods possessed by them. Therefore, any person who delivers goods to a merchant while limiting his authority to sell these goods effectively deceives buyers who justifiably rely on the seller's possession. In other words, even though, as a general rule, our law has not adopted an ostensible ownership rule (*i.e.*, generally buyers are not entitled to deduce from their sellers' possession that those sellers own the goods they dispose),¹³⁵ within the particular context of the marketplace our law recognizes an ostensible ownership rule against those who create a division between ownership and possession.¹³⁶

133. See also Epstein, *supra* note 5, at 13-14; Weinberg, *supra* note 15, at 591; Baird & Jackson, *supra* note 5, at 187, 189-90; Jackson, *supra* note 5, at 20-26.

At least the first above-mentioned argument applies to noncommercial entrustments as well: in the noncommercial setting, the entrustment will usually take place between persons having a stable, long-term relationship, so that, as between the entruster and the buyer, the former would usually enjoy a clear informational advantage over the latter in terms of his ability to foresee potential misconduct on the part of the trustee. Nonetheless, both the Factors Acts and the UCC have excluded from their protection purchasers of entrusted goods in the noncommercial context.

In both the semi-commercial and noncommercial cases of entrustment, one can make an additional argument for supposing that the entruster is the party better located to prevent the conflict: as a general rule, it is easier to provide information "downstream" than it is to ferret out information "upstream." In our context, it is reasonable to assume that the owner-entruster, who already had possession of the disputed goods prior to their entrustment, would be better located to inform potential purchasers of his interest (by engraving or branding) than would the potential purchaser to discover the existence of the owner-entruster. See Jackson, *supra* note 5, at 20-26.

134. SCHWARTZ & SCOTT, *supra* note 5, at 503; Dolan, *supra* note 8, at 1170; William H. Lawrence, *The "Created by His Seller" Limitation of Section 9-307(1) of the U.C.C.: A Provision in Need of an Articulated Policy*, 60 IND. L.J. 73 (1984).

135. See generally Baird & Jackson, *supra* note 5.

136. Note that our law does not protect the institution of the market per se. Thus, buyers of stolen goods are not protected by our law even when they buy their goods from merchant sellers. See *infra*. Likewise, the Code's entrustment rule does not protect all buyers of entrusted goods

Thus, we may say that, on the basis of ex ante efficiency considerations and retributive justice considerations, it is the Code's position that losses resulting from entrustment conflicts should be borne by owners-entrusters rather than by buyers who purchase entrusted goods. For this reason, the Code grants priority to buyers of entrusted goods even before they have parted with actual value.¹³⁷

C. *The Buyer's Interest in the Goods*

As precondition to his priority over the conflicting claim of the owner-entruster, what kind of legal interest in the goods must the buyer of entrusted goods acquire while remaining in good faith? The importance of this question stems from the structure of our priority rules: whenever these rules set forth several conditions for the priority of a purchaser, in order for the purchaser to prevail he should meet ("combine") these conditions at one point in time during his transaction. Thus, for example, a rule that conditions priority of a purchaser upon his parting with value, acting in good faith and acquiring title in the disputed asset means that the purchaser should both acquire title and part with value while acting in good faith.¹³⁸ Therefore, when we ask what kind of legal interest the buyer should have in the goods as a condition to his priority, we actually mean to ask until what stage in his transaction the buyer should lack actual or presumed knowledge of the adverse claim of the owner-entruster.

As I have noted earlier, four possible approaches suggest themselves with respect to this issue:¹³⁹ the buyer should acquire title in the goods; the goods should be identified to the contract (of the entrustee and the buyer); the buyer should take possession of the goods; or the buyer may qualify as a BOCB upon entering into her sales con-

who purchase their goods from merchant sellers, but only buyers who purchase entrusted goods from merchant-entrustees (that is, if the entrustment took place in a transaction prior to the one involving the merchant and his seller, the buyer from the merchant seller would not be protected under § 2-403(2) of the Code). Thus, apparently, it is the estoppel rationale — not the policy of sanctioning and reinforcing the operation of the institution of the market — that underlies the Code's entrustment rule. In a similar fashion, § 9-307(1) of the Code enables a BOCB to cut off a prior security interest only if the buyer's seller had created the security interest. Therefore, a buyer who purchases a computer from a dealer would take it subject to any security interest that had attached to it prior to the dealer's acquiring it. On the estoppel rationale within this context, see Lawrence, *supra* note 134.

137. One should bear in mind, however, that ex post efficiency considerations and need considerations (see *supra* text accompanying notes 12-36) mandate that an owner-entruster who has lost her goods to a buyer would still be entitled to the tracing remedy, *i.e.*, the owner-entruster would be entitled to collect from the buyer the unpaid balance the buyer owes to the intermediate wrongdoing entrustee. See *supra* text accompanying notes 95-108.

138. See *supra* text accompanying notes 52-56.

139. See *supra* text accompanying notes 61-63, 73-76.

tract. As noted earlier,¹⁴⁰ the definition of the term *BOCB* in the Code does not offer any guidance with regard to this issue, and the courts have endorsed all four of these possible approaches.

As I have argued earlier,¹⁴¹ if one assumes that, on the basis of ex ante efficiency considerations and considerations of retributive justice, it is the policy of the Code to allocate losses resulting from entrustment conflicts to entrusters, one should enable purchasers of entrusted goods to enjoy priority upon the identification of the goods to their contracts. But, at least in cases of commercial entrustment, one should reach the same conclusion even if one approaches the conflict from the perspective of ex post efficiency considerations and need considerations of justice. From the perspective of these considerations, the requirements of possession and acquisition of title might be viewed as equalizers of personal loss elements that might be suffered by first-in-time competing parties whose goods have been taken from them against their will. Given the fungible nature of the goods involved in commercial entrustments, this owner-entruster will never suffer a personal element of loss. It would be superfluous, therefore, to insist that BOCBs involved in such conflicts take possession of the goods or acquire title in them. Rather, these BOCBs should prevail upon the identification of the goods to their contract with the intermediate entrustee.¹⁴²

V. CONFLICTING TRANSACTIONS

B undertakes to sell goods or land, or rights therein, to *A*. Before the transaction is completed, *B* undertakes to sell a conflicting right in the same goods or land to *C*. Completion of both transactions is legally impossible. A priority rule is needed to determine which of the two competing parties is entitled to a right in the goods or land.

140. See *supra* text accompanying notes 72-76.

141. See *supra* text accompanying notes 95-97.

142. For a similar position, though on the basis of other arguments, see Dolan, *supra* note 8, at 1155-56, 1187-89. In many cases there will be a convergence between the identification stage and the contractmaking stage: U.C.C. § 2-501(1)(a) (1990) provides that in the absence of explicit agreement between the parties, identification occurs "when the contract is made if it is for the sale of goods already existing and identified." If the contract is for the sale of future goods, the Code's general rule is that identification occurs "when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers." U.C.C. § 2-501(1)(b) (1990); see also U.C.C. § 2-501(1)(c) (1990) (regarding identification of farm goods).

In contrast to the commercial case of entrustment, in the noncommercial and semi-commercial cases, the owner-entruster expects to retake the goods from the entrustee and, in case he loses them to the second-in-time competing party, the owner-entruster may suffer a personal loss (in addition to a loss of the market value of the goods). In those cases, therefore, if one intends to resolve the conflict on the basis of ex post efficiency considerations and need considerations of justice, it would make sense to require that the BOCB take possession of the goods or acquire title in them as a condition to his priority.

A. Goods: Seller-in-Possession Conflicts

The UCC treats the seller-in-possession case as a subcategory of the entrustment case. Section 2-403(3) of the Code defines the term *entrustment* to include "any acquiescence in retention of possession." Therefore, under the priority rule of section 2-403(2) of the Code, in cases in which the seller is a merchant, a BOCB would be able to defeat the claim of the previous purchaser.¹⁴³ A similar approach was adopted by the Code's predecessor, the Uniform Sales Act (USA).¹⁴⁴

B. Land

1. The Common Law

The priority rules of the common law for resolving conflicting transactions in land consist of a general rule with two qualifying exceptions.

a. The general rule: priority in time is priority in right. The general rule of the common law for resolving conflicting transactions for the sale of legal interests in land connects priority of rights with rank in time: *qui prior est tempore potior est jure* (he who is first in time is first in right).¹⁴⁵

b. First exception: good faith purchase for value. Under the first exception to the foregoing general rule, where the first-in-time purchaser has not yet acquired legal title and the party to the second transaction is a GFPV, that party prevails, *i.e.*, his right will be deemed free from the claim of the previous purchaser.¹⁴⁶

c. Second exception: estoppel and negligence. Under the second exception to the above-mentioned general priority rule, the party first in time may lose her initial priority because of the general doctrine of estoppel: where a false representation of rights with respect to the

143. On conflicting lease transactions, see U.C.C. §§ 2A-304(1), 2A-304(2) (1990).

144. Section 25 of the USA provided:

Where a person having sold goods continues in possession of the goods . . . the delivery or transfer by that person . . . of the goods . . . under any sale, pledge, or other disposition thereof, to any person receiving and paying value for the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

UNIF. SALES ACT § 23 (1950).

145. 4 AMERICAN LAW OF PROPERTY, *supra* note 48, § 17.1; CUNNINGHAM ET AL., *supra* note 46, § 11.9, at 775, 778; PALMER, *supra* note 3, § 16.5; Ames, *supra* note 92, at 8-9; Lawrence Berger, *An Analysis of the Doctrine that "First in Time is First in Right,"* 64 NEB. L. REV. 349, 365 (1985); Durfee, *supra* note 2, at 466-67; Note, *Purchase for Value and Without Notice of Equitable Interests*, 24 HARV. L. REV. 490, 490-92 (1911).

146. 4 AMERICAN LAW OF PROPERTY, *supra* note 48, §§ 17.1, 17.9-17.17; PALMER, *supra* note 3, § 16.5; TIFFANY, *supra* note 46, §§ 574, 585; Berger, *supra* note 145, at 365; Durfee, *supra* note 2, at 469-71; Note, *supra* note 145, at 491.

land is made by the first-in-time party (e.g., by making a statement as to the rights in the land without mentioning that party's claim) and the second-in-time party relies on that representation, the first-in-time party would be estopped from asserting her priority, and the second-in-time party would be entitled to her right even if that party had received notice of the existence of the prior claim before completion of the transaction.¹⁴⁷

Likewise, where the first-in-time party negligently fails to make use of some available means for informing potential subsequent purchasers of his claim, and a second-in-time party enters into his contract for the land without knowledge of the earlier transaction, the second-in-time party would be entitled to his right even if he had received notice of the prior claim before completion of his transaction.¹⁴⁸

2. Recording Statutes

In terms of their treatment of the issue of conflicting transactions, the recording statutes of the various states of the United States can be divided into three general groups:

a. *Notice statutes.* In about half of the states, if *A* fails to record her deed, *C* prevails if she is a GFPV, whether or not she records her right.¹⁴⁹

b. *Notice-race statutes.* In roughly the other half of the states, if *A* fails to record her deed, *C* prevails if she is a GFPV who recorded her conveyance before *A* recorded hers.¹⁵⁰

c. *Pure race statutes.* Under a third approach (adopted in Louisiana and North Carolina), *C* may defeat *A* merely by recording first, even without qualifying as GFPV.¹⁵¹

C. Conflicting Assignments

D undertakes a certain contractual obligation toward *B*. *B* assigns his right against *D* to *A*. Subsequently, *B* assigns the same right to *C*. A priority rule is needed to determine which of the two competing parties is entitled to *B*'s right against *D*. "In few common law areas

147. Ames, *supra* note 92, at 9; Durfee, *supra* note 2, at 485-87; Durfee, *supra* note 3, at 699; 66 AM. JUR. 2D *Records and Recording Laws*, § 160 (1973).

148. RESTATEMENT (SECOND) OF TRUSTS § 314 (1959); 4 AMERICAN LAW OF PROPERTY, *supra* note 48, § 17.2; SCOTT, *supra* note 46, §§ 314, 477; PALMER, *supra* note 3, § 16.5.

149. CUNNINGHAM ET AL., *supra* note 46, § 11.9 at 776; JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 807 (1981).

150. CUNNINGHAM ET AL., *supra* note 46, § 11.9, at 776; DUKEMINIER & KRIER, *supra* note 149, at 808.

151. CUNNINGHAM ET AL., *supra* note 46, § 11.9, at 776; DUKEMINIER & KRIER, *supra* note 149, at 806-07.

did so many diverse rules establish themselves for so long and so inconclusively contend among themselves for supremacy,"¹⁵² but we can discern three major common law approaches.

1. *The New York Rule: First in Time Is First in Right*

In some states — most notably New York — the rule has been that, between two successive assignees of the same right, the first in time is first in right, *i.e.*, the assignee first in time is preferred even if — to take the strongest case — the second assignee had given value for the right without notice of the earlier assignment and had actually received performance from the obligor.¹⁵³

2. *The Restatement Rule*

Under the *Restatement (Second) of Contracts* as under the New York rule, the basic rule is that "the right of an assignee is superior to that of a subsequent assignee of the same right from the same assignor."¹⁵⁴ Unlike the New York rule, however, the initial priority of the first assignee is not absolute; it may be overruled: in circumstances in which "the subsequent assignee in good faith and without knowledge or reason to know of the prior assignment gives value and obtains payment or satisfaction of the obligation," the right of the subsequent assignee will be preferred.¹⁵⁵

3. *The English Rule*

Under the so-called English rule, customarily traced to the case of *Dearle v. Hall*,¹⁵⁶ priority between competing assignees is determined by the order of notification of their assignments to the obligor *D*: a later assignee prevails if he was the first to notify the obligor, provided he took his assignment without notice of the earlier assignment and for value.¹⁵⁷

4. *The Code's Approach*

To a certain extent, these approaches have been superseded by the

152. GILMORE, *supra* note 7, § 25.6, at 670.

153. *Id.*; ARTHUR CORBIN, CORBIN ON CONTRACTS § 902 (1952).

154. RESTATEMENT (SECOND) OF CONTRACTS § 342 (1981).

155. RESTATEMENT (SECOND) OF CONTRACTS § 342(b)(i) (1981).

156. 3 Russ. 1, 58-59, 38 Eng. Rep. 475, 494-95 (Ch. 1828).

157. CORBIN, *supra* note 153, § 902; 2 GILMORE, *supra* note 7, § 25.6; HAROLD G. HANBURY, MODERN EQUITY 584-87 (9th ed., Ronald H. Maudsley ed., 1969); PALMER, *supra* note 3, § 16.5; SNELL'S PRINCIPLES OF EQUITY 71-77 (26th ed., R. Megaruy & P. Baker eds., 1966); E. TYLER & N. PALMER, CROSSLEY VAINE'S PERSONAL PROPERTY 274-78 (5th ed. 1973).

applicable provisions of article 9 of the UCC. Following the pre-Code accounts receivable statutes, the Code subordinates assignment of "accounts" (*i.e.*, rights to payment not evidenced by instruments or chattel papers)¹⁵⁸ to the general system of filing established under article 9. Thus, the general rule under article 9 protects an assignee against the subsequent assignment of his right, as long as a financing statement evidencing the assignment has been filed.¹⁵⁹ Accordingly, the general pure race priority rule of article 9, which determines priority between conflicting claims according to "priority in time of filing or perfection,"¹⁶⁰ applies also to the conflict between two assignees of the same right.¹⁶¹

D. *Rationalizing Conflicting Transactions Priority Rules: General Considerations*

As we have seen, most rules that govern the various cases of conflicting transactions in our law share a common structure: initial priority is accorded to the first-in-time competing party *A*, yet the second-in-time party *C* may defeat that priority by qualifying as GFPV.¹⁶² These rules, therefore, are premised on the assumption that conflicting transactions cases should be settled by *ex post* efficiency considerations and need considerations and not by *ex ante* efficiency and retributive justice considerations.¹⁶³

158. U.C.C. § 9-106 (1990).

159. U.C.C. §§ 9-102(1)(b), 9-302(1)(e) (1990).

160. U.C.C. § 9-312(5)(a) (1990).

161. It should be noted, however, that certain transactions for the assignment of accounts are excluded from these rules of article 9 and are supposed to be governed, therefore, by the common law rules of the states (as embodied in the three above-mentioned approaches, *see supra* text accompanying notes 153-57). *See* U.C.C. § 9-104(f) (1990). Additionally, the filing requirement does not apply to cases in which the assignment "does not alone or in conjunction with other assignments to the same assignee transfer a significant part of the outstanding accounts of the assignor." U.C.C. § 9-302(1)(e) (1990). It should be noted, however, that article 9 applies only to assignments of rights for the *payment of money*. Therefore, the above-mentioned common law rules of the states also apply to all assignments of rights whose content is other than the payment of money.

162. Thus, in cases of conflicting transactions in land, this structure of priority rules is embodied in the priority rules of the common law as well as in notice recording statutes and, to a certain extent, also in notice-race recording statutes. Likewise, in cases of conflicting assignments, this structure of priority rules is embodied in the *Restatement* rule and, to a certain extent, also in the English rule. This same pattern is also embodied in the seller-in-possession priority rules of the USA and the UCC.

163. Again, if we were to apply a case-by-case procedure for resolving conflicting transactions cases on *ex post* efficiency and need considerations, we would be able to identify the greater loss bearer in any particular case of conflict. Cost considerations, however, mandate adoption of the alternative, typical situations procedure of conflict resolution. *See also supra* text accompanying notes 37-38.

1. *The "First in Time First in Right" Rule and
Ex Post/Need Considerations*

When *B* undertakes to sell an asset or a certain right in it to *A* and then to sell a conflicting right to *C*, there is one obvious difference between *A*'s transaction and *C*'s transaction with *B*: *A*'s transaction precedes *C*'s transaction in time. The question is whether this difference is relevant in determining whether *A* or *C* prevails in this competition.¹⁶⁴

A possible response is that ex post, when the conflict between the two parties arises, preferring the earlier promisee *A* would minimize the losses suffered by the parties as a result of *B*'s dishonesty, because *A*, being the first-in-time party, is more likely to suffer the greater loss if *C* prevails than vice versa.

In this context, expectation losses are immaterial: it is impossible to set forth a general a priori assumption that whenever two promisees compete over the same right, the expectation interest of either of them is greater than that of the other, or that the expectation losses likely to be suffered by either one of them, in case her contractual expectation is frustrated, are greater than those of the other.

This is not true, however, in the case of reliance and restitution losses. There may indeed exist a positive correlation between the *length of the time* during which promisees rely on contractual promises given them and the *magnitude of their reliance* on these promises: the longer the period of reliance, the larger is the magnitude of the reliance. Therefore, a rule that grants preference to the promisee who is first in time may be viewed as minimizing the reliance and restitution losses of promisees by protecting that competing party likely to suffer greater reliance and restitution losses if his expectation of the promise's fulfillment is frustrated.

For example, assume *B* is the owner of a store in a shopping center. On January 1, *B* undertakes to lease the store to *A*, starting on July 1. On March 1, *B* enters a similar contract with *C*. Assume that the conflict between *A* and *C* becomes conspicuous to the parties on May 1. Following the creation of their contracts, and in reliance on their expectation to take possession of the store on July 1, both *A* and *C* will take certain actions and abstain from taking other actions. Each will pay the lessor one or several down payments (thus creating a restitution interest in relation to the lessor); each will avoid looking for

164. "Every one knows and follows the rule of ordinary life that applies to such prosaic matters as waiting in line for theater tickets or in a cafeteria: 'first come, first served.'" Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L.Q. 667, 669 (1986).

other stores that would have fit his purposes; and each will enter contracts with third parties (e.g., contracts with architects, carpenters, employees, suppliers, and advertisers) to establish, promote, and operate the business intended to be run by him in the store. With each action, the parties will create a reliance interest in relation to the lessor.¹⁶⁵

The rule granting priority to the party first in time, therefore, treats antedecence in time as a proxy¹⁶⁶ for greater reliance and restitution losses. It addresses not only the ex post efficiency consideration and the need consideration of minimizing the losses suffered by competing promisees, but also the additional above-mentioned ex post concern, namely that of minimizing the administrative costs involved in resolving the conflicts between competing promisees:¹⁶⁷ the simple, technical factor of rank in time serves as a determinant of the complex issue of magnitude of reliance and restitution losses.¹⁶⁸

165. This example envisions conflicting transactions in land, but we could easily adapt it to cases of conflicting transactions in goods and in rights.

166. A legal proxy is an easily identifiable factor whose existence can serve as a reliable indication for the existence of another state of the world whose verification is much more difficult. Proxies are commonly used in the natural sciences — fever as a proxy for the existence of a virus in the body of a patient is the most obvious example — and in our social life: the way one dresses and the car she drives are the most obvious and trivial examples in this context. Proxies are abundant in the law as well. Obvious examples here are the age of legal majority as a proxy for a person's ability to reasonably take care of her interests; the hypothetical damages formula of contract law as a proxy for the losses actually suffered by the injured party in case of breach of contract; the liquidity test for insolvency under bankruptcy law as a proxy for a debtor's ratio of unencumbered assets and outstanding liabilities; and consideration as a proxy for assent in contract law.

167. See *supra* text accompanying notes 37-38.

168. Cf. Epstein, *supra* note 164, at 670 ("The first possession rule represents an ingenious, if intuitive, recognition that time provides the best one dimensional ruler for making the needed mapping. Time offers a unique measuring rod, sufficient in principle to resolve two or two thousand competing claims for priority. Whoever got there first, wins. . . . [A]n enormous decision-making capability is contained in a single variable.")

The "first in time first in right" rule applies no matter what the type and magnitude of the two conflicting rights. See 4 AMERICAN LAW OF PROPERTY, *supra* note 48, § 17.10; Ames, *supra* note 92, at 5, 8-10. One could have argued that the foregoing reasoning is cogent only with respect to cases in which the two parties compete over a right of the same kind (for example, both have been promised ownership or a lease of the same asset) or only in cases in which the earlier right is of larger magnitude than the later competing right. But what about cases in which the later conflicting right is of larger magnitude than the earlier right (e.g., lease versus ownership, easement versus lease)? Would the above reasoning hold for such cases as well?

In terms of the *restitution* interest, it might be argued that a positive relation exists between the magnitude of a right and the magnitude of the restitution losses suffered by its promisee in case his expectation to acquire it is frustrated: the greater the magnitude of the right the greater its worth and, therefore, other things being equal, the greater the restitution losses of the promisee of that right at a given period of time. If this is true, a first-in-time promisee should, indeed, prevail over a later promisee only if the magnitude of the right promised to the earlier promisee is at least of the magnitude of the right promised to the later promisee.

The assumption lying at the root of the foregoing reasoning is that there exists a positive relation between the magnitude of a right in an asset and its worth. But will the assumption be compelling in all cases? How would you rank a lease versus an easement or a mortgage versus a

2. *The Good Faith Purchaser as the Greater Loss Bearer*

The ex post/need rationale of minimizing the reliance and restitution losses of promisees can also explain why, in cases of conflicting transactions, the party first in time (*A*) may lose her initial priority to a party second in time (*C*) who qualifies as good faith purchaser for value.

Based on the foregoing analysis, when both competing promisees are still in the contractual stage of their transactions, it would be reasonable to assume that the reliance and restitution interests of the party first in time are greater than those of the party second in time. But there is one clear and unequivocal case in which the assumption must be the inverse. This occurs when the transaction of the party first in time is still in the contractual stage while the transaction of the party second in time has been completed and has entered its proprietary stage, making him a GFPV in the traditional sense (*i.e.*, a party who has rendered value and has acquired legal title in the asset). In such a case, in terms of the restitution interest, it would be reasonable to assume that, whereas the party first in time has paid only part of the price due, the party second in time has parted with all or at least most of the price due for the asset. Likewise, the reliance of a party claiming title in an asset is surely much greater than that of a party who bases his claim to the asset only upon a contractual undertaking of its owner.

E. *Evaluating Conflicting Transactions Priority Rules: Particular Cases*

1. *Goods: Seller-in-Possession Conflicts*

Under the UCC, a second-in-time party involved in a seller-in-possession conflict, should prevail if he is a BOCB. Yet value in this context is not actual value, as it is under the traditional GFPV concept, but consideration in the contractual sense.¹⁶⁹ This means, that the Code allocates losses resulting from seller-in-possession conflicts to

lease? In such cases it seems difficult to support any a priori assumption as to the relation between the magnitude of the right and its worth. Therefore, the argument that, in terms of the restitution losses likely to be suffered by the parties, the magnitude of competing rights should be taken into account in determining their priority, becomes less compelling.

Things become even less clear when one focuses on *reliance* losses. Here the relation between the magnitude of the promised right and the magnitude of the reliance losses suffered by the promisee if his expectation to purchase it is frustrated is even more obscure: a promisee may incur relatively large reliance expenses even in reliance on a right of a relatively small magnitude (such as a right-of-way easement). Therefore, it seems that, in terms of the potential reliance losses of the parties, the above reasoning that connects length of reliance and magnitude of reliance may hold true in cases in which the later right is of greater magnitude than the earlier right.

169. See *supra* text accompanying notes 46-47, 66-67.

first-in-time competing parties rather than to second-in-time parties.¹⁷⁰ In giving priority to the claim of the second-in-time party where that party has conveyed only minimal value, the Code apparently relies on ex ante efficiency and retributive justice considerations. Although it is hard to presume that, as a general rule, first-in-time competing parties enjoy a clear advantage over second-in-time parties in terms of their ability to prevent the occurrence of seller-in-possession conflicts, we nonetheless can justify the position of the Code on grounds of estoppel: buyers who purchase goods from merchant sellers expect their sellers to have valid title to the goods possessed by them.¹⁷¹

2. Land

The basic distinction that should govern conflicting transactions in land is one between cases in which land transactions are supposed to be recorded and cases in which they are not.

In the former case, the law establishes a means to enable purchasers of interests in land to publicize their *contractual* claims and to make any potential future purchaser of a conflicting right aware of the existence of the previous claim's existence.¹⁷² In such cases, ex ante

170. Cf. *supra* text accompanying note 137.

171. Cf. *supra* text accompanying notes 134-36. The concept of estoppel differs from the ex ante efficiency/retributive justice concept. The doctrine of estoppel applies whenever a person creates a false representation of a certain factual or legal state of the world on which another person justifiably relies. In such a case, for the purpose of resolving the representee's claim against the representor, the misrepresented state of the world would be presumed. The concept of ex ante efficiency/retributive justice is concerned with the ability of two parties who compete over an entitlement to have avoided their competition in the first place. A certain overlap between the two concepts exists, however, because the ability of the representor to avoid the misrepresentation is taken into account in determining whether she should be bound by it, and the ability of the representee to discover the true state of the world is taken into account in determining whether her reliance has been justified.

Under ex post efficiency considerations and need considerations of justice, however, a losing first-in-time party involved in a seller-in-possession conflict should be able to trace his claim to the goods into the right of his seller to the unpaid balance owed him by the second-in-time party. Cf. *supra* text accompanying notes 137-38. It should be noted that unlike the UCC, § 25 of the USA applied the same priority rule to seller-in-possession conflicts involving merchant and nonmerchant sellers.

172. Douglas G. Baird, *Notice Filing and the Problem of Ostensible Ownership*, 12 J. LEGAL STUD. 53, 62-64 (1983); Baird & Jackson, *supra* note 5, at 183, 185; Epstein, *supra* note 5, at 18; Saul Levmore, *Variety and Uniformity in the Treatment of the Good Faith Purchaser*, 16 J. LEGAL STUD. 43, 15-16, 27-35 (1987).

"[I]n the majority of American jurisdictions, the recording statutes have been liberally construed to effect their purpose, so as to include any instrument by which the ownership of or title to land is affected." 66 AM. JUR. 2D *Records and Recording Laws* § 54, at 374 (1973).

Following the rule that recording statutes are generally liberally construed so as to include any instrument by which the ownership or title of land is affected, it is held in many jurisdictions that a recording statute which, in general terms, provides for the recording of conveyances of land, or of instruments affecting title, authorizes the record of an executory contract for the sale of real property.

Id., § 57, at 376. For example, § 294(1) of the New York Real Property Law provides that "[a]n executory contract . . . may be recorded in the office of the recording officer of any county

efficiency considerations and considerations of retributive justice dictate that a first-in-time party *A* who enters a contract for the purchase of a right in land and fails to record his claim (by entering a caution in the record to reflect his contractual claim before the conveyance of a property interest in the land) should lose that right to any subsequent competing promisee *C* (who, presumably, entered his transaction with respect to the land following inspection of the records).¹⁷³ Indeed, we may say that any first-in-time promisee who fails to record his contract fails to make use of a simple means available for preventing the conflict and, therefore, does not deserve to have his interest protected.¹⁷⁴

In contrast, in cases in which no recordation system governs transactions in land, it seems that no competing party should be deemed better able to prevent the conflict. Therefore, in such cases, the conflict between the two competing parties should be governed by *ex post* efficiency considerations and by need considerations of justice.

a. Pure race recording statutes. In every American state, statutes provide for maintenance of land title records.¹⁷⁵ This means that in the United States conflicting transactions in land may be governed by *ex ante* efficiency and retributive justice considerations. These considerations dictate that in cases of conflicting transactions in land the first promisee who records her contract should prevail, provided she has acted in good faith in entering her contract.¹⁷⁶ No state, however, has structured its priority rules in such a manner. The closest manifestation of this reasoning can be found in the pure race recording statutes adopted by only two states. Yet these statutes grant priority not to the party who is first to record her *contractual* claim with respect to the land, but rather to the party who is first to record her *property* interest

in which any of the real property to which it relates is situated.' " N.Y. REAL PROP. LAW § 294(1) (McKinney 1989). "But other authorities, limiting the recording acts to instruments that transfer the legal title, do not require the recording of a contract for the sale of real property . . ." 66 AM. JUR. 2D *Records and Recording Laws*, § 57, at 377 (1973).

173. "The main purpose of recording instruments is to give notice to subsequent purchasers and encumbrancers." 66 AM. JUR. 2D *Records and Recording Laws*, § 98, at 400 (1973). "A person, in dealing with another in respect to real estate, may rely on the record title to the property, in the absence of actual knowledge of the title in fact, or of facts sufficient to put him on inquiry in respect thereto." *Id.*, § 99, at 401. "Persons protected ordinarily against a failure to record include purchasers and encumbrancers . . ." *Id.*, § 157, at 439.

174. See also Douglas Baird & Thomas Jackson, *Information, Uncertainty, and the Transfer of Property*, 13 J. LEGAL STUD. 299 (1984).

175. JOHN E. CRIBBET, *PRINCIPLES OF THE LAW OF PROPERTY* 279-332 (2d ed. 1975); CUNNINGHAM ET AL., *supra* note 46, § 11.9; Joseph T. Janczyk, *An Economic Analysis of Land Title Systems for Transferring Real Property*, 6 J. LEGAL STUD. 213 (1977); Joseph T. Janczyk, *Land Title Systems, Scale of Operations, and Operating and Conversion Costs*, 8 J. LEGAL STUD. 569, 570-72 (1979).

176. See *supra* text accompanying notes 172-74.

in the land. From the perspective of ex ante efficiency and retributive justice considerations, only the former recordation should matter.

Moreover, even though the pure race recording statutes grant priority to a second-in-time promisee who records his interest first, this priority is supposed to be granted even if the second-in-time promisee acts with full knowledge of the prior conflicting claim. In other words, pure race recording statutes apply ex ante efficiency and retributive justice considerations against first-in-time promisees, while they ignore the relevance of such considerations to the conduct of second-in-time promisees.

The only way to rationalize this difference in treatment of first-in-time and second-in-time promisees under pure race statutes is by viewing such statutes as extreme manifestations of the typical situations approach to the structure of priority rules.¹⁷⁷ Pure race recording statutes resolve conflicting transaction cases on the basis of a technical, objective factor (time of recordation), making it unnecessary to probe into the unique facts of particular cases. This approach seems particularly justified the more certain one is in assuming that only rarely would a second-in-time party become aware of the existence of a prior *unrecorded* interest. Indeed, it is for these reasons that article 9 of the UCC has adopted a pure race priority rule under which "priority between conflicting security interests in the same collateral" is determined "in the order of filing."¹⁷⁸

b. Notice recording statutes. About half of the states have adopted notice statutes that follow the two traditional common law rules of "first in time first in right" and GFPV. Yet as I have argued earlier,¹⁷⁹ these two rules fit well into a title system in which rights in land are not supposed to be recorded; they seem misplaced, though, in a system in which records are maintained.¹⁸⁰

c. Notice-race recording statutes. About another half of the states have adopted notice-race recording statutes. These, in turn, grant priority to the second-in-time promisee only if he has both attained the status of GFPV and recorded his conveyance. These statutes are based on a strange mixture of ex ante efficiency considerations and retributive justice considerations, on one hand, and ex post efficiency

177. See *supra* text accompanying notes 37-42.

178. U.C.C. § 9-312(5)(a) (1990). See David G. Carlson, *Rationality, Accident, and Priority Under Article 9 of the Uniform Commercial Code*, 71 MINN. L. REV. 207 (1986); see also RICHARD LEMPERT & JOSEPH SANDERS, AN INVITATION TO LAW AND SOCIAL SCIENCE 27-30, 89-132 (1986) (discussing the movement in the law from negligence rule logics to strict liability rule logics).

179. See *supra* text accompanying notes 172-74.

180. See also DUKEMINIER & KRIER, *supra* note 149, at 807.

and need considerations, on the other. For the second-in-time promisee to prevail, he should be a GFPV in the traditional sense, *i.e.*, the greater loss bearer.¹⁸¹ But under notice-race statutes, if the second-in-time party, even though a GFPV, fails to record his interest, he will lose out to the superior interest of the first-in-time promisee. Yet no equivalent requirement of recording as a precondition to priority is imposed on the first-in-time promisee: he is supposed to prevail in spite of his failure to record his claim in the first place (which failure has generated the conflict), and, needless to say, even if he is not a GFPV.

3. *Conflicting Assignments*

a. The Code's approach. Article 9's approach to the problem of conflicting assignments¹⁸² assumes that the first-in-time assignee enjoys an ability to prevent the occurrence of the conflict by filing a financing statement, alerting potential future assignees of the prior assignment. In adopting a pure race priority rule,¹⁸³ article 9's approach manifests *ex ante* efficiency considerations and considerations of retributive justice against first-in-time assignees who fail to record their assignments.

b. The Restatement rule. In contrast, the *Restatement* rule¹⁸⁴ assumes that *ex ante* efficiency considerations and considerations of retributive justice are irrelevant for resolving cases of conflicting assignments. Under the *Restatement*, the traditional pair of "first in time first in right" and GFPV rules govern the conflict. This *ex post* efficiency/need approach is justified given that, unlike article 9 of the UCC, the *Restatement* does not envisage the existence of a filing system in which assignees are able to record their rights. Rather, the *Restatement* assumes that the first-in-time assignee is unable to alert subsequent potential assignees of his right.¹⁸⁵

c. The English rule. The English rule¹⁸⁶ represents a mixture of *ex ante* efficiency and retributive justice considerations, on one hand, and *ex post* efficiency and need considerations, on the other: in conditioning the priority of an assignee on her notifying the obligor of the assignment, it represents the former perspective;¹⁸⁷ in conditioning the

181. See also *supra* text accompanying notes 77-91.

182. See *supra* text accompanying notes 158-61.

183. U.C.C. § 9-312(5)(a) (1990).

184. See *supra* text accompanying notes 154-55.

185. The *Restatement* rule is the equivalent of notice recording statutes of land transactions.

186. See *supra* text accompanying notes 156-57.

187. A person who is buying or lending money on the security of a debt . . . is well advised

priority of an assignee on her qualification as a GFPV, it represents the latter. The mixture of both perspectives seems unjustifiable. Moreover, while the notification requirement is appropriate for sporadic, small-scale assignment transactions, it obviously is unsuitable for large-scale financial transactions for the assignment of accounts.¹⁸⁸

d. The New York rule. Finally, the New York rule¹⁸⁹ is a strict doctrinal application of the *nemo dat* rule. From a doctrinal perspective, title in an assigned right may be transferred from the assignor to the assignee upon the formation of the assignment contract. All the above approaches, however, assume that, even though the assignor *B* has been divested as a result of the first assignment of any title in the assigned right, the assignor is left with the *power* to transfer such title to a subsequent assignee *C* who meets certain requirements. Under the New York rule, however, after the first assignment the assignor is deemed to be left neither with title in the assigned right, nor with any power with respect to it. Therefore, the New York rule cannot be rationalized under either *ex ante*/retributivist considerations, or *ex post*/need considerations. Rather, it is an extreme manifestation of the *nemo dat* rule.

VI. SELLER-TRANSFeree CONFLICTS

A. *The Seller's Right To Specific Restitution and the Claims of Third Party Transferees*

A sells and delivers an asset to *B*. *B* materially breaches the contract by failing to pay the price due to *A*. *A* cancels her contract with *B* and demands restitution of the asset. Prior to *A*'s cancellation, or afterwards, *B* sells the asset, or a right in the asset, to *C*. A priority rule is needed to determine which of the two competing parties is entitled to her rights in the asset.

An injured seller is sometimes entitled to the remedy of specific restitution in case of material breach by the buyer.¹⁹⁰ In those cases, the buyer *B* is deemed to have acquired voidable title in the asset sold under the contract and if the buyer transfers the asset to a subsequent

to apply first to the debtor . . . to see if it has already been assigned . . . at the same time warning [the debtor] of the forthcoming assignment to him. Thus [under the English rule] the debtor . . . keep[s], as it were, a private register of assignments.

F.H. LAWSON, *THE LAW OF PROPERTY* 56 (1958).

188. GILMORE, *supra* note 7, § 25.6. The English rule is the equivalent of notice-race statutes of land transactions.

189. See *supra* text accompanying note 153.

190. E. ALLAN FARNSWORTH, *CONTRACTS* § 12.19, at 948 (2d ed. 1990) ("Although specific restitution is often available to a party that has a claim to restitution as a remedy for breach, courts do not grant it routinely, as they would in cases of avoidance.").

buyer *C*, that buyer would need to qualify as a GFPV in order to prevail over the claim of the original seller *A*.¹⁹¹ In some cases, however, the courts would not furnish the seller with the remedy of specific restitution. Rather, *A* would be limited to a claim for the price and *B*'s title would be classified as valid title.¹⁹² This is particularly true in the case of contracts for the sale of fungible goods.

Under pre-Code law, a distinction evolved between cash sale transactions for the sale of goods and credit sale transactions. In the case of cash sale transactions, title in the goods was deemed to be continuously held by *A* until actual payment by *B*, and *B*'s title was classified as void title.¹⁹³ In the case of credit sale transactions, *B* was deemed to have acquired voidable title in the goods.¹⁹⁴ Therefore, under the *nemo dat* rule, after a cash sale transaction, following a default by *B*, no subsequent buyer *C* could acquire rights in the goods.¹⁹⁵ In contrast, in the case of a credit sale transaction, *C* could acquire valid title in the goods by qualifying as a GFPV.¹⁹⁶

The UCC preserves the distinction between cash sale and credit sale transactions yet it accords it a new content. In the case of cash sale transactions, *B* does not have any right in the goods *as against his seller* until payment of the price.¹⁹⁷ Yet for the purpose of transactions between *B* and *C*, *B* is deemed to have voidable title in the goods so that he can transfer valid title to a GFPV transferee.¹⁹⁸

In the case of credit sale transactions,¹⁹⁹ the Code's general rule is that *B* acquires valid title in the goods, regardless of whether he pays or does not pay the price, so that *A* is not entitled to any remedy with respect to the goods. Rather, *A* may recover the price from his debtor, *B*. Therefore, under the shelter rule, *C* may acquire valid title in the goods even without qualifying as GFPV. Yet if *B* has received the goods while insolvent, *A* may reclaim the goods from the buyer, *i.e.*, *A*

191. DOBBS, *supra* note 103, § 4.4, at 257-58, § 4.7, at 281-83, 285; Ames, *supra* note 92, at 11; Henry W. Ballantine, *Purchase for Value and Estoppel*, 6 MINN. L. REV. 87, 90-91 (1922).

192. DOBBS, *supra* note 103, § 4.4, at 257.

193. Gilmore, *supra* note 124, at 1060-62; Smith, *supra* note 75, at 43-44; Weinberg, *supra* note 92, at 15-32; Note, *The "Cash Sale" Presumption in Bad Check Cases: Doctrinal and Policy Anomaly*, 62 YALE L.J. 101, 101-02 (1952); Note, *supra* note 124, at 527-28.

194. Gilmore, *supra* note 124, at 1060-62; Smith, *supra* note 75, at 44-45; Weinberg, *supra* note 92, at 15-32; Note, *supra* note 124, at 533.

195. See sources cited *supra* note 193.

196. See sources cited *supra* note 194.

197. U.C.C. § 2-507(2) (1990).

198. U.C.C. § 2-403(1)(c) (1990); see also U.C.C. §§ 2A-304(1)(c), 2A-305(1)(b) (1990).

199. "Where the instrument offered by the buyer is not a payment but a credit instrument such as a note or a check post-dated by even one day, the seller's acceptance of the instrument insofar as third parties are concerned, amounts to a delivery on credit . . ." U.C.C. § 2-511 cmt. 6 (1990).

may have a remedy directed not only against his buyer but also against the goods.²⁰⁰ If *B* transfers the goods to a GFPV, however, that transferee may cut off the seller's power of reclamation.²⁰¹

B. *Ex Ante Efficiency Considerations and Considerations of Retributive Justice*

Any credit transaction involves certain risks that are avoidable in cash transactions. Sellers who extend credit to their buyers usually resort to some procedure for determining the creditworthiness of their buyers (from the making of a casual and superficial assessment up to obtaining a report from a credit rating agency such as Dun and Bradstreet). In some cases, following this determination, these sellers will take specific measures to protect their interests (such as structuring the transaction as a cash transaction or insisting upon a security interest, a guarantee, or a letter of credit). In most cases, if the credit buyer has defaulted, the seller could have done better. The buyer's default is usually the seller's failure as much as it is the buyer's. We may say, therefore, that in the case of triangle conflicts that result from material breach, considerations of ex ante efficiency and retributive justice militate against the original seller. In most cases, some fault of the original seller has enabled the intermediate wrongdoer to take possession of the asset while subsequently failing to pay its price. This means that, as between a subsequent buyer of the disputed asset and the original seller, any loss resulting from the conflict should be assigned to the seller.

From the perspective of the foregoing analysis, it seems that it would be unjustified to apply the traditional GFPV concept to triangle conflicts resulting from breach of contract. The traditional concept, with its stringent requirements of actual value and title, allocates losses to second-in-time parties and is appropriate for conflicts governed by ex post efficiency and need considerations.²⁰² The Code's GFPV concept, premised on ex ante efficiency considerations and retributive justice considerations,²⁰³ is more appropriate to triangle conflicts resulting from material breach.

We have seen that with regard to conflicts over goods, the Code, following the common law, maintains a distinction between cash sale and credit sale transactions. Apparently, this distinction is based on

200. U.C.C. § 2-702(2) (1990).

201. U.C.C. § 2-702(3) (1990); see also U.C.C. §§ 2A-304(1)(b), 2A-305(1)(b) (1990).

202. See *supra* text accompanying notes 46-49, 89-91.

203. See *supra* text accompanying notes 93-108.

the presumed intentions of the original seller and her buyer as to the allocation of rights and risks between them. In cash sale transactions, the seller does not intend to pass title to the buyer prior to actual payment, while in credit sale transactions the seller agrees to relinquish any claim to the goods following their delivery to the buyer. (As we have seen, the common law interprets the intentions of parties to such transactions somewhat differently.) Yet the focus of this distinction on title simply underlines the flaws of the doctrinal-derivational approach set forth earlier.²⁰⁴ While in the context of the transaction of the original seller and her buyer the distinction may make sense, it is totally meritless within the context of a conflict between the original seller and a subsequent buyer. From the perspective of the efficiency and justice considerations relevant to such conflicts, it is immaterial whether *A* and *B* have meant to enter a cash or credit sale transaction, and the same allocation of entitlements and losses should take place between the two competing parties, *A* and *C*, in both cases.

C. *Ex Post Efficiency Considerations and Need Considerations*

In triangle conflicts resulting from material breach the original seller is likely to suffer a loss amounting to the full contract price which, presumably, approximates the market value of the disputed asset. (Otherwise, there would arise no conflict. Only in cases in which the seller is likely to suffer a loss to the extent of at least a substantial amount of the price of the asset will he be entitled to cancel his contract and reclaim the asset.) The original seller is not likely, however, to suffer a personal value loss. Whether the asset had been used by the seller as fungible property or as personal property, the asset's price would presumably approximate its market value, and the seller's agreement to part with it implies that her loss would not exceed that value. Because the requirements of possession and title serve as equalizers for personal value losses,²⁰⁵ even if one prefers to approach conflicts resulting from material breach by applying ex post efficiency and need considerations, it would still be superfluous to condition the priority of the subsequent buyer on his taking possession of the asset or on his acquiring title in it.

VII. THEFT

A. *The Nemo Dat Rule and the Market Overt Rule*

A is the owner of certain goods. *B* steals *A*'s goods and sells them

204. See *supra* text accompanying notes 9-11.

205. See *supra* text accompanying notes 87-91.

to C. A demands reclamation of the goods from C. A priority rule must determine which of the two competing parties is entitled to title in the goods.²⁰⁶

Clearly, in theft-related conflicts, under the *nemo dat* rule, as B receives no title from A, B can transfer none to C, so that A should prevail. In England, however, an exception to this rule is recognized: C may cut off A's title in goods purchased by C in good faith in a market overt.²⁰⁷ The market overt rule was discussed in several states of the United States in the first half of the nineteenth century, but it was rejected.²⁰⁸ Thus, under American law, if an owner loses possession of goods through theft, the owner may follow the goods and reclaim them from any subsequent transferee.

The English rule puts the risk of theft on the party who has purchased the goods from the thief, except for cases in which the other competing party is a market overt purchaser, in which case the English rule puts the risk on the original owner of the goods.²⁰⁹ American law always puts the risk of theft on the party who has transacted with the thief: any subsequent transferee would lose to the owner but would be able to sue his immediate seller.²¹⁰ Apparently, the only party who would not be able to sue his immediate seller is the purchaser from the thief. Thus, in evaluating the American approach to theft conflicts we have to focus on the conduct and interests of the original owner, on one hand, and the party who purchased the goods from the thief, on the other.

206. Marcel Mauss cites a story of the Indian Mahabharata under which Nrga, the king of the Yadus, was changed into a lizard, through the sin of his own people, for having given a cow to a Brahmin that belonged to another Brahmin. He who had accepted it in good faith did not want to give it back, not even in exchange for a 100,000 others. . . . Nor will the one from whom the cow has been removed accept another. It is irrevocably the property of both Brahmins. Faced with the two refusals, the unfortunate king remains under a spell for thousands of years because of the curse that the property carried with it.

MAUSS, *supra* note 97, at 57-58.

207. LAW REFORM COMM., TWELFTH REPORT, TRANSFER OF TITLE TO CHATTELS, §§ 30-35, reprinted in HONNOLD, *supra* note 9, at 412, 416-18; LAWSON, *supra* note 187, at 37; TYLER & PALMER, *supra* note 157, at 174-75, 202-07; Durfee, *supra* note 3, at 693; Weinberg, *supra* note 92, at 3-15.

208. Merrill v. Dietz (*In re Universal Clearing House Co.*), 62 B.R. 118 (Bankr. D. Utah 1986), modified sub nom., Merrill v. Abbott (*In re Independent Clearing House Co.*), 77 B.R. 843 (Bankr. D. Utah 1987); Bay Springs Forest Prods., Inc. v. Wade, 435 So. 2d 690 (Miss. 1978); Pate v. Elliott, 400 N.E.2d 910 (Ohio Ct. App. 1978); Durfee, *supra* note 3, at 693; Warren, *supra* note 75, at 470; Weinberg, *supra* note 15, at 569-70; Weinberg, *supra* note 92, at 3-15. For a review of the attitudes of various legal systems, see Levmore, *supra* note 172.

209. Weinberg, *supra* note 15, at 583-85.

210. *Id.* at 569, 574 n.25.

B. *Ex Ante Efficiency Considerations and Retributive Justice Considerations*

At first sight, it seems difficult to tell whether owners or purchasers of goods who transact with thieves have the greater ability to prevent theft conflicts. The difficulty arises not because members of these two categories of competing parties cannot be presumed to have a meaningful ability to prevent the conflict but, on the contrary, because members of both categories of competing parties can prevent it.

The case for viewing the owner as a party able to prevent the theft of his goods is clear: the owner physically controls his goods.²¹¹ The owner is aware of the value of his goods; the owner is also presumed to be aware of the frequency of theft in his neighborhood, office, plant, and so on. Thus, the owner may be expected to be able to take cost-effective measures for preventing theft of his goods.²¹²

On the other hand, it is reasonable to assume that transactions for the sale of goods by thieves are usually conducted in circumstances that should excite suspicion in the mind of the purchaser. Therefore, one can assume that, generally, purchasers from thieves are in a position enabling them to prevent the conflict. Indeed, in cases in which the purchaser acts with actual knowledge or presumed suspicion of the theft, ex ante efficiency considerations and considerations of retributive justice dictate that she be denied priority.²¹³ Assuming, however, that the purchaser does *not* act with actual knowledge or presumed suspicion of the theft, can she take any meaningful precautionary measures for detecting the theft? I think the answer should clearly be in the negative.²¹⁴ This implies, therefore, that from the perspective of ex ante efficiency and retributive justice considerations, owners of stolen goods should lose their interest in the goods to purchasers of these goods who have directly transacted with the thief in good faith and to any subsequent purchaser of the goods who derives her title from such a person. From this perspective, it is hard to justify the American priority rule that governs theft conflicts.

C. *Ex Post Efficiency Considerations and Need Considerations*

It is also hard to justify the American rule from the perspectives of ex post efficiency and need considerations. Clearly, at first sight, it

211. Cf. the risk of loss doctrine, U.C.C. §§ 2-509, 2-510 (1990).

212. Weinberg, *supra* note 15, at 583, 585-86; Jillison, *supra* note 124, at 515-19; see also SCHWARTZ & SCOTT, *supra* note 5, at 508-12; cf. U.C.C. §§ 3-405, 3-406 (1990).

213. See *supra* text accompanying notes 77-80.

214. Weinberg, *supra* note 15, at 584-85; Jillison, *supra* note 124, at 515-19; see also Jackson, *supra* note 5, at 47-50.

would be plausible to view original owners of stolen goods as the "greater loss bearers": because the disputed goods have been taken from their owners against their will, these owners may suffer a loss to the extent of the market value of the goods, if they regarded them as fungible property goods, and, additionally, a personal element of loss, if they regarded the goods as personal property.

In one case, however, we would be justified in assuming that the losses likely to be suffered by the purchaser if the original owner prevails would be equal to or even greater than the losses likely to be suffered by the owner if the purchaser prevails: this is the case in which the purchaser has fully paid the price for the goods and, even more so, in cases in which the purchaser has himself used the goods for some time as personal property. Clearly, in those cases, we would not minimize the losses suffered by parties involved in triangle conflicts if we were to take the stolen goods away from their current owners and return them to their previous owners. Yet even in these circumstances, American law grants priority to the original owner. Thus, the American priority rule for conflicts of theft can be rationalized neither through *ex ante* efficiency and retributive justice considerations nor through *ex post* efficiency considerations and need considerations of justice. Rather, much like the New York rule that governs cases of conflicting assignments,²¹⁵ the American theft rule can be rationalized only within the framework of purely doctrinal considerations: it is an extreme manifestation of the *nemo dat* rule.²¹⁶

CONCLUSION

In this article I offered a normative framework for the resolution of triangle conflicts premised on both the concept of efficiency (the minimization of the costs of preventing conflicts, the losses due to conflicts, and the costs of determining priorities in conflicts) and the concept of justice (justice as retribution and justice as the allocation of scarce resources to those who need them most). I argued that there is a convergence between these efficiency and justice imperatives and that both dictate that in all cases of triangle conflict in which one of the two competing parties clearly could have prevented the occurrence of the conflict, priority should be granted to the other party and that in all other cases, priority should be granted to the competing party likely to

215. See *supra* text accompanying notes 153, 189.

216. The difference in the approaches of the law to entrustment conflicts, see *supra* Part IV, and to theft conflicts is another manifestation of the fundamental distinction in the common law between cases of misfeasance and cases of nonfeasance. See 3 HARPER ET AL., *supra* note 20, § 18.6; Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247 (1980).

suffer the greater loss if he is denied priority and the other party prevails.

Attempting to rationalize the GFPV doctrine in light of the foregoing normative premises, I argued that the element of good faith in the traditional GFPV doctrine represents both the *ex ante* efficiency policy of allocating entitlements against parties who can prevent the occurrence of conflicts and the imperatives of the retributive justice concept. I also argued that the elements of value and acquisition of title that are part of the traditional GFPV doctrine represent both the *ex post* efficiency policy of allocating entitlements to parties likely to suffer the greater loss and the imperatives of the need criterion of the distributive justice concept.

Discussing the UCC concepts of GFPV and BOCB, I argued that they are appropriate for resolving triangle conflicts with regard to which *ex ante* efficiency considerations and retributive justice considerations dictate that losses be borne by the first-in-time parties involved in the conflicts. Analyzing some of the conflicts governed by the Code (entrustment, seller in possession, seller-transferee), I showed that, indeed, it is justified to allocate the losses resulting from them to the first-in-time parties. I also showed that it would be superfluous to apply the requirements of possession and acquisition of title as part of the Code's concepts of GFPV and BOCB.

In *Private Property and the Constitution*²¹⁷ Bruce Ackerman defined two modes of discourse about the law: the intuitionist method of the Ordinary Observer, traditionally employed by judges in resolving legal issues, and the method of the Scientific Policymaker (most commonly consisting of Utilitarianism and Kantianism), which has arisen in American law in recent decades. Ackerman argued that, at least within the specific context of the "taking problem," these two methods would often resolve legal issues differently. In this article I argued that in resolving triangle conflicts judges have been motivated by their intuitions of justice and that as there is a convergence between these intuitions and the imperatives of the efficiency concept, our priority law may be rationalized to a substantial extent in terms of the efficiency concept. This, in turn, led to the more general argument that the above convergence lies at the root of the considerable explanatory

217. ACKERMAN, *supra* note 36, at 1-22; see also BRUCE A. ACKERMAN, RECONSTRUCTING AMERICAN LAW (1983); Soper, *supra* note 36. In *Moral Thinking*, R.M. Hare makes a distinction similar to the one made by Ackerman. Hare suggests that there are two methods for resolving moral issues: "critical thinking" and "intuitive thinking." HARE, *supra* note 36. In *Utility and Rights*, Hare argues that many conclusions that would be intuitively reached by most people would also be justifiable by adopting the critical method of thinking. R.M. HARE, *Rights, Utility, and Universalization: Reply to J.L. Mackie*, in *UTILITY AND RIGHTS*, *supra* note 36, at 118-19.

power of the efficiency criterion when applied to a substantial amount of common law doctrine.

"[A]ll law is universal," said Aristotle, "but about some things it is not possible to make a universal statement which shall be correct." This article touches on a fundamental jurisprudential problem: the gap between legal rules, on one hand, and the richness of the reality governed by these rules, on the other. Many triangle conflicts, each presenting *its own unique equities*, arise in numerous legal contexts. Our law, however, regulates many of these diverse situations by employing a *single* legal doctrine, the traditional GFPV doctrine (or one of its variants, such as the holder in due course doctrine and the Code's GFPV and BOCB doctrines). Moreover, these doctrines attempt to resolve conflicts not by weighing the equities of the particular competing parties involved, but by setting forth a limited number of typical factual situations and inquiring whether a particular case of conflict falls into one of them.

This article has offered a normative framework comprised of considerations of efficiency and justice for resolving triangle conflicts. While I believe that these considerations are relevant for resolving the many conflicts not discussed in this article (for example, conflicts arising within the context of article 9 of the UCC, or conflicts over negotiable instruments), it remains for future studies to explore the extent to which the rules governing these conflicts may be rationalized in terms of the considerations of efficiency and justice offered in this article.